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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1896, IN

151, 152, 153, 154 U. S.

BOOK 38,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STAT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. STEPHEN JOHNSON FIELD,
HON. JOHN MARSHALL HARLAN,
HON. HORACE GRAY,
HON. DAVID JOSIAH BREWER,
HON. HENRY BILLINGS BROWN
HON. GEORGE SHIRAS, JR.,
HON. HOWELL EDMONDS JACKS
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REPORTER,

HON. J. C. BANCROFT DAVIS.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

---

[1] Commission dated February 19, 1894; sworn March 12, 1894.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

Allotments, March 13, 1893, and Apr. 2, 1894. See Appendix VI. of Book 37 and Appendix I. herein.

Names of Justices, and whence appointed.	By whom Appointed.	Circuits, 1891–1894.	Commissioned.	Sworn in.
Associate Justice HORACE GRAY, Massachusetts.	President Arthur.	First. Me., N. H., Mass., Rhode Island.	1881. (Dec. 20.)	1882. (Jan. 9.)
Associate Justice HENRY B. BROWN, Michigan.	President Harrison.	Second. Vermont, Conn., New York.	1890. (Dec. 29.)	1891. (Jan. 6.)
Associate Justice. HORACE GRAY,[1] Massachusetts.				
Associate Justice GEORGE SHIRAS, Jr., Pennsylvania.	President Harrison.	Third. New Jersey, Penn., Del.	1892. (July 26.)	1892. (Oct. 10.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
HOWELL E. JACKSON,[1] Tennessee.				
Associate Justice HOWELL E. JACKSON, Tennessee.	President Harrison.	Sixth. Ky., Tenn., Ohio, Mich.	1893. (Feb. 18.)	1893. (Mar. 4.)
HENRY B. BROWN,[1] Michigan.				
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Seventh. Ind., Ill., Wis.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. Dak., S. Dak., Wyo.	1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justice STEPHEN J. FIELD, California.	President Lincoln.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho.	1863. (Mar. 10.)	1863. (Dec. 7.)

[1] Until April 2, 1894. See Appendix I.

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OF THE

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IN

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1893.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

SARAH R. ANGLE, Administratrix of the Estate of Horatio G. Angle, deceased, *Appt.*,

v.

THE CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

(See S. C. Rep. ed. 1-27.)

Wrongful use of the powers and processes of the court—malicious interference in a contract—causing breach of contract—stockholder, when liable for company's debt—inducements to legislation—power of legislature to destroy property—action of legislature will not bar redress of private wrong—excuse of wrongdoer—property obtained wrongfully—when liable for debts of former owner—trustee ex maleficio—constructive trust, when impressed on property.

1. A wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition.
2. If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer.
3. Where one railroad company by its wrongful conduct induced another railroad company to break its contract with a contractor for its construction, it is liable to him for the damages sustained thereby; *a fortiori* when it not only induces a breach of the contract by the latter company, but also disables it from performance.
4. A sole stockholder cannot wrongfully cause the transfer of all the property of the corporation to be made to himself, so as to deprive a creditor of the corporation of the payment of his debt, and if he does so, the creditor may hold the sole stockholder responsible for that payment.
5. Whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act.

NOTE.—*As to delivery and acceptance necessary under the statute of frauds*, see note to Mahan v. United States, 21: 307.

As to contracts; their interpretation and validity, see note to Bell v. Bruen, 11: 89.

As to covenants in contract; when dependent and when independent, see note to Goldsborough v. Orr, 5: 600.

As to stated sum in contract; whether penalty or liquidated damages, see note to Tayloe v. Sandiford, 5: 384.

As to how far fraud or illegal consideration will avoid contract, see note to Armstrong v. Toler, 6: 468.

As to inadequacy of price to impeach or set aside sale, see note to Erwin v. Parham, 13: 952.

As to construction of written contracts; how far a question for the court, see note to Ward v. United States, 20: 792.

As to contracts by letter or telegram; offer and acceptance; when valid, see note to Eliason v. Henshaw, 4: 556.

Trustees ex maleficio; when the relation arises.

Those who have or assume the management of property without authority may generally be placed under this head. If such one makes a sale which is invalid, the vendor becomes a trustee of the proceeds for the one who should hold the property. Brown v. Black, L. R. 15 Eq. 367; Morris v. Joseph, 1 W. Va. 256, 91 Am. Dec. 386.

Or, if a defective title to land is given, the grantor becomes a trustee for the benefit of his grantee of any rights afterwards acquired by him, though this result may not arise where the guarantee of the title immediately vests such after acquired interest in the grantee. Walsey v. Foreman, 38 Cal. 90; Dolhequy v. Tabor, 22 Cal. 279; Doyle v. Peerless Petroleum Co. 44 Barb. 239; Clark v. Martin, 49 Pa. 299; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; White v. Patten, 24 Pick. 324; Nash v. Spofford, 10 Met. 192, 43 Am. Dec. 425.

The grantor, conveying a title encumbered by an unregistered mortgage, to one having no notice of the mortgage, may become a trustee for the mortgagee of the consideration received; likewise one may become a trustee if he gives or receives a deed in fraud of the rights of others. Mosbier v. Knox College, 32 Ill. 155; Troy Bank v. Wilcox, 24 Wis. 671; Wolford v. Herrington, 74 Pa. 311, 15 Am. Rep. 548; Boynton v. Housler, 74 Pa. 453; Overton v. Tracey, 14 Serg. & R. 326; Thomson v. White, 1 U. S. 1 Dall. 424 (1: 206).

6. A right of action to recover damages for an injury is property, and the legislature has no power to destroy such property.
7. The action of the legislature in subserviency to the public interest will bar no redress of a private wrong unless such bar be absolutely necessary to the accomplishment of the public interest.
8. A wrongdoer, the party whose wrongs created that condition which induced the legislative forfeiture, cannot excuse his wrongs on the grounds that the legislature had the power to forfeit, and might have done it anyway.
9. It is contrary to equity that a defendant should be permitted to enjoy unmolested that particular property, the possession of which he sought to secure, and did in fact secure, by its wrongful acts.
10. Where public lands were given to a railroad company to aid in the construction of its road, and a part of the work of construction had been done, there is an equity in securing the application of these lands in payment thereof, and where another company, by its wrongdoings has secured title to those lands, equity will hold that one who has been deprived of payment for such work of construction, from the former company, by reason of their having been taken away from it, may pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for such wrongdoings would have been paid by the former company, out of their proceeds.
11. A party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.
12. Whenever the legal title to property has been obtained through actual fraud, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein.
13. Where property was in a railroad company for the purpose of aiding in the construction of its road, and in such construction work was done by the plaintiff, equity recognizes a right that that property should be applied in the payment for that work; and if the wrongdoing of the defendant has wrested the title to such property, from the company and transferred it to himself, he becomes, therefore, a trustee *ex maleficio* in respect to the property.

[No. 73.]

Argued Nov. 8, 9, 1893. Decided Jan. 3, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Wisconsin, dismissing a suit in equity brought by Sarah R. Angle, administratrix, against The Chicago, St. Paul, Minneapolis & Omaha Railway Company, to reach a land grant in the hands of said company. Reversed, and case remanded for further proceedings and to apply it to the payment of a judgment against the Chicago, Portage & Superior Railway Company for work done by

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An agent, though generally answerable only to his principal, may through his own fraud become a trustee for the injured party. Hardy v. Caley, 33 Beav. 365; Bridgman v. Gill, 24 Beav. 302; Alleyne v. Darcy, 4 Ir. Ch. Rep. 199.

An administrator attempting to manage the real estate, other than to sell it for the payment of debts, has done what he has no power to do, and is a trustee *ex maleficio*. People v. Houghtaling, 7 Cal. 348; McCoy v. Scott, 2 Rawle, 222, 19 Am. Dec. 640; Le Forte v. Delafield, 3 Edw. Ch. 32.

So is any one taking personal property under analogous circumstances; as, if one should come into possession of property as administrator of a deceased trustee, he becomes a trustee with the same duties and liabilities as any other. Bennett v. Austin, 81 N. Y. 308; Goodhue v. Barnwell, Rice, Eq. 198; Blomfield v. Eyre, 8 Beav. 250; White Schoolhouse Proprs. v. Post, 31 Conn. 248; Hope v. Liddell, 21 Beav. 183; Wilson v. Moore, 1 Myl. & K. 337.

Any one wrongfully dealing with an estate becomes a trustee *ex maleficio*, answerable to the party interested as *cestui que trust*. Rackham v. Siddall, 16 Sim. 297; Hennessey v. Bray, 33 Beav. 96.

If one obtains the title to land by artifice or concealment, equity will impress upon the land in his hands a trust in favor of the party justly entitled thereto, and will order the trust executed by a conveyance. Felix v. Patrick, 145 U. S. 317 (36: 719).

The fraud which will create a trust *ex maleficio* in land conveyed must exist at the time of sale; subsequent bad faith or repudiation being insufficient. Shaffner v. Shaffner, 145 Pa. 168.

A fraudulent purchaser of the property of an insolvent who has sold it at a public sale, will be treated as a trustee for the creditors, holding the money realized from the sale for the benefit of whoever is adjudged entitled thereto. Herman v. McKinney, 47 Fed. Rep. 758.

One who, while professing to act for another, purchases or takes title for himself, is a trustee, if the party for whom he pretends to purchase has an interest in the property. Conant v. Riseborough, 139 Ill. 383, affirming 30 Ill. App. 498.

The mere fact that a purchaser of land at a judicial sale repudiates his agreement to reconvey it to another than the debtor, upon reimbursement, is not sufficient to charge him as trustee *ex maleficio*, although he purchased it at less than its value, unless those seeking to assert the trust could have purchased or made better arrangements, or others were prevented from bidding. Shaffner v. Shaffner, 145 Pa. 168.

A parol agreement whereby a mortgagee to secure future advances, who has made no advances, is to foreclose the mortgage, bid in the property, and convey it to the mortgagor and such persons as he may designate, for the purpose of clearing up the title, will be specificially enforced against such mortgagee as a trustee *ex maleficio*, where the agreement has been partly performed by the mortgagors allowing the property to be sold and purchased by the mortgagee, and the latter has conveyed part of the property to persons designated by the mortgagor, but refuses to convey the remainder to the latter who has remained in possession. Cutler v. Babcock, 81 Wis. 195.

Land purchased in his own name by a son upon a judicial sale of his father's lands, under an agreement with the latter to make the purchase as his agent, and that the tract shall belong to all the children upon payment of the purchase money, except a portion reserved for the support of the father and his wife for life, the land being paid for with moneys of the father and the proceeds of the reserved portion, is held by the son in trust for the father. Beverly v. Beverly, 88 Va. 915.

A woman who purchases land with money fraudulently obtained from a man by a promise to marry him and to hold such land in lieu of her right to dower under the marriage, may be held to be a trustee on her refusal to marry him, and the land charged with a lien for such money. Edwards v. Culbertson, 18 L. R. A. 204, 111 N. C. 342.

Where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title. Monroe Cattle Co. v. Becker, 147 U. S. 47 (37:72).

When the existence of fraud is shown in the ac-

plaintiff's intestate in constructing the railroad of the latter company.

See same below, 39 Fed. Rep. 143, 912.

Statement by *Mr. Justice* **Brewer**:

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Wisconsin dismissing plaintiff's bill.

The bill was filed on the 23d of May, 1888, against the Chicago, Portage & Superior Railway Company, the Chicago, St. Paul, Minneapolis & Omaha Railway Company and the Farmers' Loan & Trust Company. The Chicago, St. Paul, Minneapolis & Omaha Railway Company was the only defendant served with process. It appeared, and, on the 28th of July, filed a demurrer to the bill which, after argument, was sustained, and on September 2, 1889, the decree of dismissal was entered. *Farmers Loan & T. Co.* v. *Chicago, P. & S. R. Co.* 39 Fed. Rep. 143; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 39 Fed. Rep. 912.

The facts as stated in the bill are as follows: By two acts, of date June 3, 1856, and May 5, 1864, respectively (11 Stat. at L. 20, and 13 Stat. at L. 66) Congress granted lands to the state of Wisconsin to aid in the construction of certain railroads, among others one "from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield." These land grants were accepted by an act of the legislature, approved October 8, 1856 (Wis. Laws 1856, p. 137) and by a joint resolution of the legislature of the state, of date March 20, 1865 (Wis. Gen. Laws, 1865, p. 689) and a map of definite location was duly filed and accepted by the Secretary of the Interior.

By an act of March 4, 1874 (Wis. Laws 1874, p. 186) the state granted to the North Wisconsin Railway Company, whose name was subsequently changed to Chicago, *St. Paul, Min- [4 neapolis & Omaha Railway Company, and who is the defendant herein (to be hereafter called the Omaha Company) that portion of the land grant applicable to the construction of the road from a point on St. Croix river to Bayfield, and to the Chicago & Northern Pacific Air Line Railway Company, whose name was subsequently, and before 1878, changed to that of the Chicago, Portage & Superior Railway Company (hereafter called the Portage Company) so much of said grant as was applicable to the construction of the road from the west end of Lake Superior to a junction with the

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quisition of the title to land by the party holding it, and who orally agreed to reduce to writing a verbal agreement declaring a trust in the land, equity will declare such party a trustee *ex maleficio*, upon the terms of the dishonored verbal agreement, or other equitable terms. Van Trotha v. Bamberger, 15 Colo. 1.

One to whom another furnishes money to purchase land for him, and who, upon purchasing the land, without the latter's knowledge, takes the title in his own name, is agent of and holds the land in trust for the latter. Martin v. Fix, 44 Kan. 540.

If a person who is not, in fact, a trustee, acts as such, either by mistake or intention, he thereby becomes a trustee *de son tort*. Easterly v. Barber, 65 N. Y. 252.

Where money or property acquired by felony has been converted into other property, the law will raise a trust *in invitum* for the purpose of subjecting the substituted property to the purposes of indemnity and recompense. Story, Eq. Jur. §§ 1255, 1258; Hill, Trustees, 222; Wright v. Methodist Episcopal Church Trustees, 4 Edw. Ch. 215; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152.

The obtaining of an absolute deed by means of a parol promise made without intention of performance is fraud, constituting the grantee merely a trustee. Brison v. Brison, 75 Cal. 525.

Where one having any interest in land is induced to confide in the verbal promise of another that he will purchase it for the benefit of the former at a sheriff's sale, and in pursuance of this allows him to become the holder of the legal title, a subsequent denial by the latter of the confidence is such a fraud as will convert the purchaser into a trustee *ex maleficio*. Gruhn v. Richardson, 128 Ill. 178.

An oral promise to make a will giving to another certain property, in consideration of a deed from the latter, considered simply as a contract, is within the statute of frauds; but if made with a fraudulent intent to obtain the deed without consideration, the statute of frauds becoming immaterial, and the grantee is a trustee *ex maleficio*. Manning v. Pippen, 86 Ala. 357.

Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired, in favor of the one who is truly and equitably entitled to the same. Moore v. Crawford, 130 U. S. 122 (32: 878.)

If an agent purchases lands with money of his principal and takes title in his own name without the latter's consent, the land, or the proceeds thereof, will be impressed with a trust in favor of the principal. Kraemer v. Deustermann, 37 Minn. 469.

One who by fraudulent misrepresentation obtains a conveyance from the owner of any interest in property, real or personal, is in equity a trustee *ex maleficio* for the person defrauded; and any one taking the property from such trustee with notice of the fraud and of the consequent trust is affected by the trust. Jones v. VanDoren, 130 U. S. 684, (32: 1077).

Where a man who purchased land at a tax sale induced other bidders to refrain from bidding, saying that he wanted the land for the owner, who was his neighbor, he will be charged as trustee for the latter or the sale set aside. Merrett v. Poulter, 96 Mo. 237.

Where a husband had a contract with a railroad company for the purchase of land, but he had paid the interest on the contract merely, and, by arrangement with his wife, procured money of her to purchase the same and deed it in her name but instead took the deed to himself, such conveyance is held in trust for her benefit. Mosteller v. Mosteller, 40 Kan. 658.

One acting as agent of an execution defendant to purchase real estate under levy for defendant, purchasing in his own name for himself, is a trustee *ex maleficio*; and such defendant can recover the property in ejectment. Shallcross v. Mawhinny (Pa.) Jan. 31, 1887.

Where money of one is wrongfully used by another, the owner may pursue it and establish a resulting trust in land bought with it. Moore v. Stinson, 144 Mass. 594; McClung v. Steen, 32 Fed. Rep. 372.

line running from St. Croix river to Bayfield.

The eighth section of this act, which is the granting section to the latter company, is as follows:

"There is hereby granted to the Chicago & Northern Pacific Air Line Railway Company all the right, title, and interest which the state of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said state by said two acts of Congress as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the Land Office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year."

The value of the lands thus granted was, at the time of the wrongs hereinafter described, $4,000,000.

By section 12 the company was required within sixty days to file with the secretary of state an acceptance of the grant upon the terms and conditions named therein, and also such security for the construction of the road as should be required by the governor. Both of these conditions were complied with.

5] *Genoa, named in section 8, was the town on the southern boundary of the state of Wisconsin, at which the line of the Chicago & Northern Pacific Air Line Railway entered the state, and Hudson was the place on the St. Croix river, described in the acts of Congress as the initial point of the road to be aided.

On March 16, 1878, an act was passed by the legislature of Wisconsin (Wis. Laws, 1878, p. 442) extending the time for the construction of the Portage Company's road three years.

In the panic of 1873, '74, the Portage Company had broken down under a load of debts and embarrassments, and remained inactive until 1880. At that time it secured the services of Willis Gaylord to assist in extricating it from its embarrassments, and in continuing the construction of its road. William H. Schofield, an experienced railway projector and financier, was induced to accept the office of president, and the co-operation and assistance of the New York, New England & Western Investment Company (hereafter called the Investment Company) was secured.

A new mortgage for $25,000 a mile, and a new issue of stock, was provided for. Seven hundred thousand dollars of the new bonds and one million of the new stock were to be issued in full satisfaction of all outstanding stock, bonds, and other demands. In pursuance of these arrangements, it issued certificates of stock for one million dollars, in the name of A. A. Jackson, general solicitor of the Portage Company, which, indorsed by him in blank, were deposited with the Trust Company, and it also executed its orders to the number of ninety, calling for the delivery to John C. Barnes or bearer of a designated amount of said million dollars of stock in ten per cent installments. These orders were in the following form:

"To the Farmers' Loan & Trust Company:

"This is to certify that, for value received, Mr. John C. Barnes or bearer is entitled to have and receive — shares of the capital stock of the Chicago, Portage & Superior *Railway [6 Company, which stock has been fully paid for and placed in your keeping as a special trust for delivery upon this order, and you are hereby authorized and directed to accept or certify in the usual manner this order for the delivery of said stock, and to deliver to the bearer hereof — shares of the said stock whenever and as often as any two hundred and fifty thousand dollars of the first mortgage bonds of the said railway company are sold or disposed of by said railway company or by its fiscal agent, or whenever and as often as any ten miles of the railroad of said railway company shall be built, as will be certified to by the president of said railway company, and in any event you are hereby directed to deliver to the bearer, on the first day of January, A. D. 1883, any of the said — shares of capital stock then remaining undelivered upon a surrender of this order therefor.

"Chicago, Portage & Superior
"Railway Company.
"[seal.] By ——— ———, President.

[On the margin:] "This order for the delivery of the bonds and stock of this company held in special trust is hereby approved and accepted.

"The Farmers' Loan & Trust Company.
[seal.]"

These orders were all delivered to John C. Barnes in exchange for and redemption of all the theretofore outstanding stock of the Portage Company, which stock was at once canceled, with the exception of two certificates for $25,000, which, by oversight or design on the part of Charles J. Barnes, vice president of the Portage Company, remained in his custody uncanceled.

The situation after these arrangements were made was such that the entire outstanding stock was in the possession and control of C. J. Barnes, J. C. Barnes, and A. A. Jackson, yet held by them in trust for the company. The further stock provided for was to be issued from time to time to assist in the sale of the bonds until enough of the latter had been disposed of to construct the road. These arrangements having been perfected, *the Portage [7 Company, through its president, sought the alliance and support of the Grand Trunk Railway Company of Canada, which had recently completed an extension of its road to Chicago.

Three contracts were entered into, of dates June 16, 1881, July 10, 1881, and September 30, 1881, by which the bonds of the company were to be disposed of and money enough advanced for the construction of the road. The bill sets out fully the nature and scope of these contracts, and copies of them are attached as exhibits. It is unnecessary here to say more than that, by them, taken in connection with the prior arrangements of the Portage Company, the latter obtained satisfactory assurances of

abundant funds, and was placed in a position to fully perform its agreement with the state and construct the railroad by at least May 5, 1882,—all this, of course, upon the condition of no outside or wrongful interference.

Relying upon the sufficiency of its arrangements for money, it, on August 18, 1881, entered into a contract with Horatio G. Angle, for the construction of about sixty-five miles of its railway, being that portion covered by the land grant heretofore referred to. By the terms of that contract Angle was to receive $8500 per mile in cash and $5000 per mile in the full paid stock of the company, on condition that he completed the road on or before May 5, 1882. It also contracted for steel rails and fastenings to be delivered as the work of construction proceeded.

Angle commenced work, and had made such progress that, on the 20th of January, 1882, he had 1600 men employed along the line, and it was an assured fact that, unless interfered with, he would complete the railway, according to the terms of the contract, on or before May 5, 1882.

The bill further charges that about this time the Omaha Company conspired with other parties to wrest from the Portage Company its land grant, and to that end to prevent the completion of the contract by Angle and the construction of the road.

In the carrying out of this conspiracy the con- [8] spirators* bribed Charles J. Barnes and A. A. Jackson, officers of the Portage Company, and who, either personally or as attorneys in fact for John C. Barnes, had the control of all the outstanding stock of the Portage Company, though holding it in trust for the benefit of the company, to betray their trust and transfer the stock to one L. J. Gage, for the benefit of the Omaha Company.

Having thus secured the control of the stock, they caused notice thereof to be given to the officers of the Grand Trunk Railway Company. These gentlemen, finding that the control of the Portage Company was passing into the hands of hostile interests, surrendered the collateral which had been already transferred to them, and declined to proceed further in the contracts which had been entered into.

Continuing the execution of this conspiracy, the Omaha Company notified the general manager of the Portage Company of the purchase of the outstanding stock, and advised and induced him to telegraph officially to the engineer-in-chief in charge of the work of construction, who had engaged in that work seven engineering corps, to forthwith call in these engineers, suspend their work, and pay them off. They also caused the general manager to notify the contractor, Angle, that the control of the company had been changed, and the English capitalists forced out, and also to telegraph to the merchants at Duluth and Superior City (who were furnishing supplies to the 1600 men at work) that the company had been sold out, advising them to protect themselves, because the company could not pay or protect them.

In consequence of these notices, the several engineering corps were broken up, the engineers left the work, all the tools, material, and other personal property belonging to the contractor and the company were attached at the suit of these merchant creditors, and the 1600 laborers dispersed and went elsewhere for work.

In further execution of this conspiracy it endeavored to bribe the president and directors of the Portage Company and the Investment Company to turn over the organization of the Portage Company at once to them. Failing in this, it caused* a bill to be filed in the circuit [9 court for Cook county, Illinois, falsely charging the president and board of directors with incurring imprudent obligations and otherwise thus impairing the value of the million and twenty-five thousand of stock, purchased as heretofore set forth, and praying for a temporary injunction which, on February 11, 1882, was granted without hearing or notice, and restrained the president and other officers of the Portage Company from doing any act or thing whatsoever in the name or behalf of the company during the continuance of the injunction.

In still further execution of the conspiracy, the Omaha Company caused the fact of the abandonment of the work and the dispersion of the laborers engaged thereon to be promptly and widely published throughout Wisconsin, and especially among the members of the legislature, then in session at Mad son—concealing at the same time the means by which this had been accomplished.

Further, through its own agents, and especially through Jackson and Barnes, the corrupted officers of the Portage Company, it falsely represented to the legislature that no special progress had been made in the matter of constructing this road; that no considerable number of men had ever been at work, and that the Portage Company had finally abandoned it, and was wholly without means or credit to prosecute it.

On the strength of these representations the legislature, without inquiry or hearing, on February 16, 1882 (Wis. Laws 1882, p. 11) hurriedly passed an act forfeiting and revoking the grant to the Portage Company and bestowing it upon the Omaha Company, which forfeiture and regranting were confirmed by an act passed March 5, 1883.

The contract with Angle having been thus broken by the Portage Company, he commenced an action at law against that company. While this action was pending Angle died, but a revivor was had in the name of the present plaintiff, and on January 31, 1887, she recovered a judgment in the Circuit Court of the United States for the Western District of Wisconsin for $205,803.19.

*Upon that judgment execution was is- [10 sued and returned *nulla bona*, and thereupon this bill was filed to reach the land grant in the hands of the Omaha Company.

Messrs. **J. R. Doolittle, Thomas Ewing** and *Milton I. Southard*, for appellant:

While the Portage Company was the nominal defendant in the suit at law, the Omaha Company was the real defendant in interest; and is therefore, in equity bound to pay the judgment, whether it acquired the land grant or not.

Summer v. *Sleeth*, 87 Ill. 500.

The Omaha Company made the breach of the contract for which this suit was brought, and the judgment recovered. Therefore the Omaha Company is in equity bound to pay the judgment which it caused against the Portage Company.

Chippewa Valley & S. R. Co. v. *Chicago, St. P. M. & O. R. Co.* 6 L. R. A. 601, 75 Wis. 224.

The Portage Company could have recovered upon the facts alleged in the bill in an action at law on the case against the Omaha Company, which, with a view to its own pecuniary advantage, had, by fraud, prevented the Portage Company from earning the land grant.

It could have waived the tort and brought assumpsit for the value of its interest.

2 Greenl. Ev. 108, note 3; *Putnam* v. *Wise*, 1 Hill. 234, 37 Am. Dec. 309; *Lightly* v. *Clouston*, 1 Taunt. 112.

There was "fraud and damage coupled together," in the act of the Omaha Company against Angle, as well as against the Portage Company.

Equity has always had jurisdiction of a fraud like this.

Story, Eq. Jur. § 203; *Chesterfield* v. *Janssen*, 2 Ves. Sr. 125-155.

Courts of equity will if acts have, by fraud, been prevented from being done, interfere and treat the case exactly as if the acts had been done; and, this they will do by converting the party who has committed the fraud, and profited by it, into a trustee for the party in whose favor the act would otherwise have been done.

Perry, Tr. § 181.

If a person by his fraudulent conduct, with a view to his own profit, prevents a deed or will being made in favor of a third person, and the property intended for such third person afterward comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him.

Perry, Tr. § 181; *Carey* v. *Brown*, 92 U. S. 171, 174 (23: 469, 470).

The legislative power cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts.

Cooley, Const. Lim. (4th ed.) 111; *Newland* v. *Marsh*, 19 Ill. 376, 382.

The legislature has no power to set aside a fraud committed by one party against another, or to set aside the rights, trusts and equities out of that fraud.

White Mountains R. Co. v. *White Mountains (N. H.) R. Co.* 50 N. H. 50; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162).

In a suit between individuals, neither party in a court of justice can be heard to question the purity of the motives of the members of a legislative body.

Chippewa Valley R. Co. v. *Chicago, St. P. M. & O. R. Co.* 6 L. R. A. 601, 75 Wis. 224; *Jones* v. *Jones*, 12 Pa. 350, 51 Am. Dec. 611; *Wright* v. *Defrees*, 8 Ind. 298; *Johnson* v. *Higgins*, 3 Met. (Ky.) 567; *Ex parte McCardle*, 74 U. S. 7 Wall. 506 (19: 264); *Doyle* v. *Continental Ins. Co.* 94 U. S. 535 (24: 148); *Soon Hing* v. *Crowley*, 113 U. S. 703 (28: 1145); *Aldridge* v. *Williams*, 44 U. S. 3 How. 24 (11: 475); *Maynard* v. *Hill*, 125 U. S. 190 (31: 654); *Sunbury & E. R. Co.* v. *Cooper*, 33 Pa. 278.

One obtaining a patent to land from the United States by fraud towards another, or who affects himself with a trust, holds the title thus acquired for the benefit of those who have been injured by his conduct.

Groves v. *Fulsome*, 16 Mo. 543, 57 Am. Dec. 247; *Lewis* v. *Lewis*, 9 Mo. 182; *Bird* v. *Ward*, 1 Mo. 398, 13 Am. Dec. 506; *Lindsey* v. *Hawes*, 67 U. S. 2 Black, 554 (16: 265); *Garland* v. *Wynn*, 61 U. S. 20 How. 6 (15: 801); *Stark* v. *Starr*, 73 U. S. 6 Wall. 402, 419 (18: 925, 930); *White* v. *Cannon*, 73 U. S. 6 Wall. 443 (18: 923); *Rogers* v. *Brent*, 10 Ill. 573, 50 Am. Dec. 422.

The Omaha Company by fraud and bribery prevented the Portage Company from completing the land grant division of its railway within the time prescribed by the grant, and itself constructed a branch of its rival railroad on a parallel and contiguous line and acquired the lands for itself, whereby it became trustee of such lands *ex maleficio*, for the contractor Angle whose judgment for $205,883.19, against the Portage Company, was for a balance due him for work done in building that land grant division which work was done solely on the credit given to the Portage Company by the land grant.

Pom. Eq. Jur. §§ 155, 171, 1053, 1057, 1413, 1415, *note 5;* Perry, Tr. § 166; 1 Spence, Eq. Jur. 511, 512; *Carey* v. *Brown*, 92 U. S. 171 (23: 469); *Monger* v. *Shirley*, reported only in U. S. Sup. Ct. Rep. 22 L. ed. 449.

By the acts of the legislature of Wisconsin, of February 16, 1882, and March 5, 1883, the state prevented the Portage Company from complying with the condition of the grant and thereby lost the right to forfeit the grant for failure to perform the condition.

Davis v. *Gray*, 83 U. S. 16 Wall. 232 (21: 457); Co. Litt. 206*a*, 206*b;* 4 Kent, Com. 130.

The act of the legislature of Wisconsin of February 16, 1882, revoking the land grant to the Portage Company and conferring it on the Omaha Company, and also the act of March 5, 1883, re-enacting the said act of February 16, 1882, are unconstitutional and void because impairing the obligation of the contract.

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 137 (3: 178); *New Jersey* v. *Wilson*, 11 U. S. 7 Cranch, 164 (3: 303); *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629); *Piqua Branch of State Bank of Ohio* v. *Knoop*, 57 U. S. 16 How. 369 (14: 977).

The company acquired an equitable right to earn the lands by building the railway, on accepting the grant and filing the bond; subject of course, to defeasance on failure to perform the condition subsequent.

Tucker v. *Ferguson*, 89 U. S. 22 Wall. 527 (22: 805); *Van Wyck* v. *Knevals*, 106 U. S. 365 (27: 202); *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 (21: 447).

The same rules apply in equity to equitable estates as apply at law to legal estates. They are alike descendible, devisable, alienable and barrable.

Davis v. *Gray*, *supra;* *Den* v. *Sherrerd*, 72 U. S. 5 Wall. 281 (18: 577); *Walton* v. *Walton*, 7

Johns. Ch. 272; *Cholmondeley* v. *Clinton*, 2 Jac. & W. 147; *Burgess* v. *Wheate*, 1 Eden, 223; *Philips* v. *Brydges*, 3 Ves. Jr. 126.

Messrs. **Thomas Wilson** and *John F. Dillon*, for appellee:

Inasmuch as the Portage Company never constructed any road, it never earned the lands, and never had any right to or title in them. Such right and title could only be acquired by the performance of the condition precedent, which was never performed.

Tiedeman, Real Prop. §§ 271, 273, and notes; 4 Kent, Com. (13th ed.) 124, 125; *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 59 (22: 554); *Farnsworth* v. *Minnesota & P. R. Co.* 92 U. S. 49-65 (23: 530, 535); *Davis* v. *Gray*, 83 U. S. 16 Wall. 203, 229, 230 (21: 447, 456); *Wells* v. *Smith*, 2 Edw. Ch. 78.

Both of the conditions upon which the land grant in question was conferred by the state act approved March 4, 1874, chap. 126, upon the Portage Company having been broken by that company prior to the forfeiture act of February 16, 1882, the power of the state to pass that act was clear and unquestionable.

Dubuque & P. R. Co. v. *Litchfield*, 64 U. S. 23 How. 66 (16: 500); *Slidell* v. *Grandjean*, 111 U. S. 412 (28: 321).

Where a condition is a continuing one the waiver of an existing default or a default for any previous year is not a waiver of any subsequent breach.

Bleecker v. *Smith*, 13 Wend. 533; *Jackson* v. *Allen*, 3 Cow. 220; *Doe* v. *Woodbridge*, 9 Barn. & C. 376; *Doe* v. *Peck*, 1 Barn. & Ad. 428; *Doe* v. *Gladwin*, 6 Q. B. 953; *Farwell* v. *Easton*, 63 Mo. 446; *Alexander* v. *Hodges*, 41 Mich. 691.

As the state had the power to refuse absolutely to make the grant to the Portage Company, *a fortiori* it had the power to make the grant with conditions.

Troy v. *Troy & L. R. Co.* 49 N. Y. 657; *People* v. *Barnard*, 110 N. Y. 548; *Indianapolis & C. R. Co.* v. *Lawrenceburgh*, 34 Ind. 304.

That forfeitures are to be strictly construed does not apply to public grants of this character.

Farnsworth v. *Minnesota & P. R. Co.* 92 U. S. 68 (23: 536).

The confirmatory act of March 5, 1883, is valid, and had the effect to extinguish any existing title, interest or right of the Portage Company of whatsoever nature, in or to the lands in question.

Strother v. *Lucas*, 37 U. S. 12 Pet. 453 (9: 1154); *Field* v. *Seabury*, 60 U. S. 19 How. 323 (15: 650); *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521, 530 (22: 606, 609); *Slidell* v. *Grandjean*, 111 U. S. 412, 439 (28: 321, 330); *Whitney* v. *Morrow*, 112 U. S. 693, 695 (28: 871, 872).

Re-entry by the state for condition broken, avoids not only all estate in the grantee, but also all intermediate charges, encumbrances and conveyances.

McKelway v. *Seymour*, 29 N. J. L. 329; *Barker* v. *Cobb*, 36 N. H. 344; *Scott* v. *Stipe*, 12 Ind. 74; *Thomas* v. *Record*, 47 Me. 500, 74 Am. Dec. 500; *Bartlett* v. *Jones*, 60 Me. 246; *Dolan* v. *Baltimore*, 4 Gill, 394; *Rowell* v. *Jewett*, 71 Me. 408; *Nicoll* v. *New York & E. R. Co.* 12 N. Y. 121.

If the Portage Company, prior to the forfeiture act of 1882, had committed a breach of either of the conditions upon which it held the land grant, then such forfeiture act extinguished any interest in or lien upon the said lands on the part of the Portage Company.

1 Dan. Ch. Pl. & Pr. (5th ed.) 378; *Hayward* v. *Eliot Nat. Bank*, 96 U. S. 611, 614 (34: 855, 856).

Statements of specific facts and nothing else is admitted by a demurrer.

Fogg v. *Blair*, 139 U. S. 119 (35: 105); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 544 (35: 1099, 1109).

If the complainant has any right of action against this defendant, a remedy at law is adequate, and therefore the only remedy.

Scott v. *Neely*, 140 U. S. 106 (35: 358); *Smith* v. *Ft. Scott, H. & W. R. Co.* 99 U. S. 398, 401 (25: 437, 438); *Angell* v. *Draper*, 1 Vern. 398, 399; *Shirley* v. *Watts*, 3 Atk. 200; *Wiggins* v. *Armstrong*, 2 Johns. Ch. 144; *McElwain* v. *Willis*, 9 Wend. 548, 556; *Crippen* v. *Hudson*, 13 N. Y. 161; *Jones* v. *Green*, 68 U. S. 1 Wall. 330 (17: 553); *Lumley* v. *Gye*, 2 El. & Bl. 216; *Bowen* v. *Hall*, L. R. 6 Q. B. Div. 333; *Green* v. *Button*, 2 Cromp. M. & R. 707; *Cattle* v. *Stockton Waterworks Co.* L. R. 10 Q. B. 458; *Buzard* v. *Houston*, 119 U. S. 347 (30: 451); *United States* v. *Ingate*, 48 Fed. Rep. 251; *New York Guaranty & I. Co.* v. *Memphis Water Co.* 107 U. S. 205 (27: 484); *Smith* v. *Bourbon County Comrs.* 127 U. S. 105 (32: 73).

Mr. Justice **Brewer** delivered the opinion of the court:

That which attracts notice or even casual reading of the bill—the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer—is the fact that, while Angle was actively engaged in executing a contract which he had with the Portage Company—a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work—through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant from the Portage Company was wrested from it.

Surely it would seem that the recital of these facts would carry with it an assurance that there was some remedy which the law would give to Angle and the Portage Company for the losses they had sustained, and that such remedy would reach to the party, the Omaha Company, by whose acts these losses were caused.

That there were both wrong and loss is beyond doubt. And as said by Croke, *J.*, in *Bailey* v. *Merrill*, 3 Bulst. 94, 95, "damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth." *The Portage Com- [11 pany held a land grant worth four millions of dollars. It had contracted for the construction of its road, such construction to be completed in time to perfect its title to the land. The contract had been so far executed that its full

completion within the time prescribed was assured. The contractor had sixteen hundred men employed. The rails had been purchased. The company had lifted itself out of the embarrassments which years before had surrounded it. It had taken up all its old stock but $25,000, which was ignorantly or wrongfully withheld by one of its officers. It had issued one million of new stock, had authorized a new issue of bonds, and had arranged for the canceling of all its obligations with seven hundred thousand of these bonds and one million of stock. It had consummated arrangements with a wealthy company for the advancement of moneys sufficient for its work, and had gone so far as to place in the hands of that company one hundred thousand of its bonds, upon which $50,000 in cash was to be advanced. Except through some wrongful interference, it was reasonably certain that everything would be carried out as thus planned and arranged.

At this time the Omaha Company, which was a rival in some respects, and which had located a line parallel and contiguous to the line of the Portage Company, interferes, and interferes in a wrongful way. It bribes the trusted officers of the Portage Company to transfer the entire outstanding stock into its hands, or at least place it under its control. Being thus the only stockholder, it induces the general manager to withdraw the several engineering corps, whose presence was necessary for the successful carrying on of the work of constructing the road; to give such notice as to result in the seizure of all the tools and supplies of the contractor and the company, and the dispersion of all laborers employed. To prevent any action by the faithful officers of the Portage Company, it wrongfully obtains an injunction tieing their hands. In the face of this changed condition of affairs the company, which had negotiated with the Portage Company and was ready to advance it money, surrendered the one hundred thousand of the 12] bonds, and abandoned the *arrangement. By false representations to the legislature as to the facts of the case, it persuaded that body to revoke the grant to the Portage Company and bestow the lands upon itself.

That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defense were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability.

Neither can it be said that the Omaha Company had a right to contend for these lands; that it simply made an effort, which any one might make, to obtain the benefit of this land grant. No rights of this kind, whatever may be their extent, justify such wrongs as were perpetrated by the Omaha Company. Here, bribery was resorted to to induce the trusted officers of the Portage Company to betray their trust, and to place at least the apparent ownership of the stock in the hands of the rival company.

Without notice, without hearing, and by false allegations, it secured an injunction to stay the hands of the honest officers of the Portage Company. Such wrongful use of the powers and processes of the court cannot be recognized as among the legitimate means of contest and competition. It burdens the whole conduct of the Omaha Company with the curse of wrongdoing, and makes its interference with the affairs of the Portgage Company a wrongful interference.

*Further, by false representations as to [13 what the Portage Company has done and intends to do, it induced the legislature of the state to revoke the grant to the Portage Company and bestow it upon itself. The result, and the natural result, of these wrongful actions on the part of the Omaha Company was the breaking down of the Portage Company, the disabling it from securing the means of carrying on this work, the dispersion of the laborers, and the prevention of the contractor from completing his contract. It will not do to say that the contractor was not bound to quit the work, but might have gone on and completed his contract, and thus earned the lands for the Portage Company; nor that the wrongful act of the trusted officers of the Portage Company in betraying their trust could have been corrected by the Portage Company by appropriate suit in the courts; that the law in one shape or another would have offered redress to the Portage Company for all the wrongs that were attempted and done by the Omaha Company. Granting all of this, yet the fact remains that the natural, the intended, result of these wrongful acts was the breaking down of the Portage Company, the unwillingness of the foreign company to furnish it with money, and the prevention of the contractor from completing his contract.

It is not enough to say that other remedies might have existed and been resorted to by the Portage Company, and that notwithstanding the hands of its officers were tied by this wrongful injunction. It is enough that the Portage Company did break down; that it broke down in consequence of these wrongful acts of the Omaha Company, and that they were resorted to by the latter with the intention of breaking it down.

It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. *Green* v. *Button*, 2 Cromp. M. & R. 707, in which the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff,

14] the other party to the contract, and *was held responsible for the loss occasioned thereby. *Lumley* v. *Gye*, 2 El. & Bl. 216, in which a singer had entered into a contract to sing only at the theater of the plaintiff, and the defendant maliciously induced her to break that contract, and was held liable to the damages sustained by the plaintiff in consequence thereof. *Bowen* v. *Hall*, L. R. 6 Q. B. Div. 333, in which it was held that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, which thereby would naturally cause, and did in fact cause, an injury to such employer. In the opinion of Brett, *L. J.*, it was said "that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby* v. *White*, 1 Ld. Raym. 938. If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him." *Walker* v. *Cronin*, 107 Mass. 555, in which a manufacturer was held entitled to maintain an action against a third party who, with the unlawful purpose of preventing him from carrying on his business, willfully induced many of his employés to leave his employment, whereby the manufacturer lost their services, and the profits and advantages which he would have derived therefrom. *Benton* v. *Pratt*, 2 Wend. 385, 20 Am. Dec. 623. *Rice* v. *Manley*, 66 N. Y. 82, 23 Am. Rep. 30, in which a party had contracted to sell and deliver to plaintiffs a quantity of cheese, but having been made to believe through the fraud of the defendant that the plaintiffs did not want the cheese, sold and delivered it to him, and it was held that an action could be maintained against the defendant for the damages which the plaintiffs sustained from failing to get the cheese. *Jones* v. *Stanly*, 76 N. C. 355, in which the court said: "It was decided in *Haskins* v. *Royster*, 70 N. C. 601, 16 Am. Rep. 780, that if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The same reasons cover 15] every case where one person *maliciously persuades another to break *any* contract with a third person. It is not confined to contracts for service."

Under these authorities, if the Omaha Company had by its wrongful conduct simply induced the Portage Company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. *A fortiori*, when it not only induces a breach of the contract by the Portage Company, but also disables it from performance.

But there is still another aspect in which these transactions may be regarded. The Omaha Company became by its wrongful acts the sole stockholder in the Portage Company. It matters not that it might have been disposessed of this position by appropriate action in the courts. It was, for the time at least, the sole stockholder. As such sole stockholder, it took advantage of its position and its powers to strip the Portage Company of its property and secure its transfer to itself.

Now, what rights, if any, a corporation may have against a sole stockholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, need not be inquired into. It is clear that this stockholder cannot secure this transfer from the corporation to itself of the property of the latter so as to deprive a creditor of the corporation of the payment of his debt.

To put it in another way: The Portage Company, a corporation, owed Angle $200,000. It had property with which that debt could be paid. The Omaha Company became the sole stockholder in the Portage Company. As such sole stockholder, it used its powers to transfer the property of the Portage Company to itself, and its conduct all the way through was marked by wrongdoing.

Whatever the Portage Company might do, Angle may rightfully hold the sole stockholder responsible for that payment, which the corporat on would have made but for the wrongful acts of such stockholder.

*But the stress of the defendant's conten- [16 tion is not that the bill fails to state a case of wrong for which, generally speaking, the law would give a remedy, but that the action of the legislature of the state in revoking the land grant to the Portage Company and donating it to the Omaha Company is conclusive upon the courts, and prevents any recovery; and, secondly, that although actionable wrong on the part of the defendant may be disclosed by the bill, the only remedy which the plaintiff has therefor is an action at law for damages, and no grounds are shown for the interposition of a court of equity.

With respect to the first of these matters, it is insisted that the Portage Company was in default at the very time that these wrongs, on the part of the Omaha Company, were charged to have been committed and the act of forfeiture was passed. By section 8 (the granting section) of the act of March 4, 1874, it was provided: "This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned, as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year." The act of March 16, 1878, reads that "the time limited for the construction of the railway . . . is hereby extended three years." It is said that this act in effect merely struck out the word "five" in the clause quoted, and substituted therefor the word "eight," leaving the other conditions of the grant unchanged. It is not claimed in the bill that the Portage Company had ever constructed any part of its road from Genoa northward, or that a railway had not been constructed and put in operation from the city of Hudson to the point of intersection,

and, therefore, it is urged that it is not shown that the Portage Company was not in default or that the legislature had not the absolute right to forfeit, as it did, by the act of February 16, 1882. It is contended, on the other hand, 17] by the plaintiff that the *extension was an absolute extension of three years from May 5, 1879, irrespective of the other two conditions in the original grant, and gave to the Portage Company an interest in the land grant which the legislature had no power to take away before May 5, 1882. It is further insisted by the defendant that, even if this claim of the plaintiff be sustained, the act of March 5, 1883, confirming the revocation and resumption of the land grant to the Portage Company, and the regranting of the same to the Omaha Company, was after the expiration of the full limit of extended time as thus claimed by the plaintiff, and that then the Portage Company had unquestionably failed to earn the grant and had lost all right to the land. Hence, it is said that there was, in whatever aspect the matter may be looked at, a valid resumption by the state of the grant which it had made conditionally to the Portage Company and a regrant of the lands to the Omaha Company; that the act of the legislature cannot be questioned; that full knowledge of all the situation must be presumed, and that no inquiry is permissible as to the motives which actuated the legislature, it being presumed that everything which it did it did rightly.

In this respect, the case of *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 [3: 162], is relied upon. In that case a purchase of a large body of lands was made by James Gunn and others in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature. The title to some of these lands thus acquired passed by conveyances to Peck, who conveyed them to Fletcher. An action was brought on certain covenants in that deed. The third covenant was that all the title which the state of Georgia ever had in the premises had been legally conveyed to Peck, the guarantor. The second count assigned "as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in all the virtue of such law. And that divers of the said 18] lands purchased from the said *state by members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, etc., and so the title of the state of Georgia did not pass to the said Peck." In respect to this matter the court, by *Chief Justice* Marshall, observed, among other things, as follows:

"This is not a bill brought by the state of Georgia to annul the contract, nor does it appear to the court by this count that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

"This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deducted from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law."

The rule upon which this decision rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. *This principle rests upon the [19] independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly. Upon that rule it is insisted that these two acts of the state of Wisconsin cannot be impeached; that whatever wrongs may in fact have been done by the Omaha to the Portage Company, the legislature of Wisconsin, in the exercise of its undoubted power, has taken away the lands from the Portage and given them to the Omaha Company, and, as its power is undoubted, no court can interfere or inquire as to why or under the influence of what motives or information those acts were passed; nor can any court decree, either directly or indirectly, that those lands which were taken away from one company and given to the other, either legally or equitably, still remain the property of the first company, and subject to the payment of its debts.

But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? Did the resumption of the land grant and the regrant to the Omaha Company make lawful its acts in bribing the officers of the Portage Company? Did it relieve the Omaha Company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially and in effect decree that the wrongs done by the one company to the other created no cause of action? A right of action to re-

cover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the state or in the act of the legislature in taking away the land grant, but [20] in such proceedings *on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature. There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a criminal proceeding by an action against the prosecutor for malicious prosecution. It may be, as counsel claim, that the legislature is presumed to act with full knowledge of the situation; that it knew of the wrongs done by the Omaha to the Portage Company; knew that those wrongs had disabled the Portage Company from proceeding with the work, knew that thereby a cause of action had arisen to the contractor, Angle, against the Portage Company, and also against the Omaha Company; and with all that knowledge in possession deliberately passed the statutes referred to, and yet it does not follow that its legislation was intended or was potent to relieve the Omaha Company from liability. There is in this suggestion no impunging the motives, the wisdom, or the power of the legislature. It acts as the guardian of the public interests, to which all private interests must yield, and it may well have thought that, notwithstanding the wrong that had been done by the Omaha Company, the fact was obvious that the Portage Company had become disabled, and could not go on with the work; and that in subserviency to such public interest it was necessary that the grant be taken away from the former and given to the latter company, in order thus to expedite the construction. As the courts will not interfere with the action of the legislature, so it may rightfully be presumed that the legislature never intend to interfere with the action of the courts, or to assume judicial functions to itself. It may be presumed to have left to the courts the redress of the private wrongs done by the Omaha Company. In other words, it may have acted upon considerations like these: Public interest requires the speedy building of this road; the Portage Company cannot build it, the Omaha Company can if aided by this grant; therefore, the public interests demand a taking away of the grant from the one compa- [21] ny and giving it to the other.* If the disabled condition of the Portage Company has been brought about by the wrongs of the Omaha Company, the courts are open, and the accepted maxim in those tribunals is, that where there is a wrong there is a remedy. It thus subserves the interests of the public and leaves the redress of the wrong to that department which has not only the requisite jurisdiction, but also the appropriate machinery for ascertaining the amount of the injury, and enforcing the due compensation.

Look at this from the opposite standpoint: When this matter was brought to the attention of the legislature, and its action invoked, was it confronted with only these alternatives? Must it, even if it could, as a condition of subserving the public interests, condone the private wrong done by the one company to the other, or must it let the public interests be neglected until such time as the question of private wrong has been determined, or must it, without the possession of the suitable machinery for investigation, arbitrarily determine—as a condition of this transfer in subservience to public interests—the measure of injury done by the one company to the other, and the amount and character of the compensation to be rendered? Large and unnecessary stress would be laid upon the legislature if the question of public interest was always to be thus hampered by suggestions of injury and compensation between private individuals. While if there be no such stress, abundant freedom of action is open to the legislature, the distinction between the separate functions of the coordinate departments of the government is preserved, and at the same time public interest and private justice may be secured. The legislature may proceed with sole regard in all its actions to the public interests, with the assurance that all questions of wrong and loss between individuals will be settled in the judicial department, and that its own action in subserviency to the public interest will bar no redress of a private wrong unless such bar be absolutely necessary to the accomplishment of the public interest.

But it is said that to permit this suit to be maintained, and to subject these lands in the possession of the Omaha Company *to the [22] satisfaction of the judgment against the Portage Company, is, *pro tanto*, to nullify the action of the legislature; that in taking the lands away from the one company and giving them to the other, it intended that the transfer should be absolute, without limitation, and subject to no contingencies or burdens. But it affirmatively expressed no such intention; it simply made the transfer, leaving the property subject to all the burdens and contingencies which might arise in the ordinary course of law. Suppose at the time of this transfer from the one company to the state, and from the state to the other company, there was an existing judgment in favor of the Portage against the Omaha Company, would it be for a moment contended that there was anything in the transfer which prevented the Portage Company from satisfying its judgment by a seizure and sale of the lands thus transferred to the Omaha Company? Unless there were in the words of the grant to the Omaha Company something which expressly tied up that land, it passed to the company, subject to seizure and sale in satisfaction of any of its past or future obligations.

Even if it be conceded that, under a true construction of the grant, taken in connection with the act extending the time for three years, the Portage Company was in default on February 16, 1882, and the legislature had then the absolute right to forfeit the grant, such concession would be no answer to the cause of action set out in the bill. For who can say that the legislature would have exercised that

right of forfeiture? The mere fact that the Portage Company could not enforce at the time a legal right to the lands as against the state does not absolve the Omaha Company from liability for those wrongs which resulted in putting the Portage Company in a condition naturally calling for legislative action in furtherance of the public interest. If nothing of the kind had been done by the Omaha Company, and the Portage Company was, as it is stated, proceeding diligently in the work, with reasonable assurance that it would be completed within three or four months, it is fair to presume that the legislature would not have disturbed the grant, but would have permitted the Portage Company to fully earn that which it had 23] already partially *earned. The selection of the Portage Company in the first instance was, of course, made by the legislature in good faith, and the time was extended with the intent that the Portage Company should do the work and have the grant, and if the legislature saw that the company was doing the work and would have it promptly completed, respect for the good faith of the legislature compels the conclusion that but for the untoward circumstances precipitated upon the Portage Company by the wrongful acts of the Omaha Company the act of February 16, 1882, would never have been passed. Assuredly it does not lie in the power of the wrongdoer, the party whose wrongs created that condition which induced the legislative forfeiture, to excuse its wrongs on the grounds that the legislature had the power to forfeit, and might have done it any way. The cases of *Benton* v. *Pratt*, 2 Wend. 385, 20 Am. Dec. 623, and *Rice* v. *Manley*, 66 N. Y. 82, 23 Am. Rep. 30, are suggestive upon this question. In the former of these cases it appeared that certain parties had contracted with the plaintiff to purchase of him twenty hogs, to be delivered at a future day, nothing having been done to make the contract binding under the statute of frauds. While the plaintiff was driving his hogs and preparing to fulfill his contract, the defendants, knowing the facts, fraudulently represented that he did not intend to deliver them, and thus induced those third parties to buy their hogs, and when the plaintiff arrived with his they refused to take them simply because they had already a full supply. The point was made that the plaintiff could not recover because there was no binding contract between him and the third parties, but the point was overruled, the court saying: "It was not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not, the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants." And in the latter case the plaintiffs had made an agreement with one Stebbins to purchase from him a quantity of cheese, to be delivered at a future day, and that contract, too, was not binding by reason of the statute of frauds. The defendant knowing of this, fraudulently, by 24] means of a fictitious *telegram, persuaded Stebbins that the plaintiffs did not want the cheese and would not take it, and thus himself secured a purchase of it. Here, too, it was objected, in defense to an action against him for the damages caused by a failure on the part of the plaintiffs to obtain the cheese from Stebbins, that there was no contract which could be enforced against Stebbins for the sale and delivery of the cheese, but the court overruled the objection, saying: "Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B, depending upon the facts of the case. Kerr, Fraud & Mistake, 274, and cases cited; Bac. Abr. *Fraud*, b. Suppose A made a parol contract with B for the purchase of land, and B is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C as to A, by which B is deceived and induced to convey to C; in such case, although A could not have compelled B to give him the conveyance, it would be a reproach to the law to hold that C would not be liable to A for the damage caused by the fraud." The same line of thought applies to the case before us. While it cannot be affirmed with certainty that the legislature would not have passed the act of forfeiture, yet it is reasonable to presume that it would not, and that its act was induced by the situation of the Portage Company, which situation was brought about by the wrongful acts of the Omaha Company.

Our conclusions in respect to this matter may be summed up thus: The Portage Company would have completed the work but for the wrongful acts of the Omaha Company. In consequence of the disability thus caused, and also moved by the false representations of the Omaha Company, the legislature resumed its grant and made a regrant to the *Omaha [25 Company. The validity of that act is conceded. It is to be presumed the legislature acted with proper regard to the public interests, and without any improper motives, or inducements. Conceding all this, it is equally to be presumed that it left the redress of private wrongs to the judicial department. It attached no conditions to the grant to the Omaha Company which would prevent the appropriation of those lands to the satisfaction of any claims against that company. And hence to hold the Omaha Company as trustee for the creditors of the Portage Company, in respect to these lands, neither impeaches the validity of the action of the legislature nor casts any imputation upon its knowledge or motives. It may also be noticed that the purpose of this grant, from Congress in the first place and from the state to the companies in the second place, was to aid in the construction of the railroad. That purpose having already been accomplished, there is no thwarting public policy, or the purposes of the grant, if the lands granted shall now be appropriated, through the processes of the courts to the satisfaction of any claims against the Omaha Company.

Passing now to the other of the two objections, it may be conceded that an action at law

would lie for the damages sustained by the Portage Company, through the wrongful acts of the Omaha Company. Indeed, that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. Waiving the question as to the solvency of the Omaha Company, and assuming that any judgment against it for damages could be fully satisfied by legal process, there remains the proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property, the possession of which it sought to secure, and did in fact secure, by its wrongful acts. Ought the Portgage Company to be compelled to experiment with the solvency of the Omaha Company before coming into a court of equity? While no express trust attached to the title to these lands, either in the Portage or in the Omaha Company—while it may be conceded 26] that when the legislature resumed *the grant it took the title discharged of any express trust or liability in favor of the creditors of the Portage Company, and might have transferred an absolute title to any third party beyond the reach or pursuit of the Portage Company, or its creditors—yet it is still true that the lands were given to the Portage Company, as they had been given by Congress to the state in the first instance for the purpose of aiding in the construction of this road; that a part of the work necessary for such construction had been done, and there is, therefore, an equity in securing, to the extent to which the work had been done, the application of these lands in payment thereof. And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially, at least, out of their proceeds. While no express trust is affirmed as to the lands, yet it is familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.

In Pomeroy's Eq. Jur. § 155, the author says, citing many cases: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." And again, in section 1053: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under 27] *any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

These authorities are ample to sustain this suit. The property was in the Portage Company for the purpose of aiding in the construction of this road; work was done by the plaintiff in that direction. Equity recognizes a right that that property should be applied in the payment for that work. The wrongdoing of the defendant, the Omaha Company, has wrested the title to this property from the Portage Company and transferred it to itself. It has become, therefore, a trustee *ex maleficio* in respect to the property. It follows from these considerations that the court erred in sustaining the demurrer to this bill, and the decree of dismissal must be reversed, and the case remanded with instructions to overrule the demurrer, and for further proceedings in conformity to law.

Mr. **Justice Harlan** dissents from the opinion and judgment for the reasons stated by him, at the circuit in *Angle* v. *Chicago, St. P. M. & O. R. Co.* 39 Fed. Rep. 912, and *Farmers Loan & T. Co.* v. *Chicago P. & S. R. Co.* 39 Fed. Rep. 143.

See in this connection the appellee's brief herein; *ante*, p. 61.—ED.

FAMOUS SMITH, *Plff. in Err.*,
v.
THE UNITED STATES.

(See S. C. Reporter's ed. 50-56.)

When an Indian cannot be convicted of murder of an Indian—evidence—acquittal—jurisdiction of circuit court.

1. An Indian cannot, in a U. S. circuit court, be convicted of the murder of another Indian in the Indian territory.

NOTE.—*For what purposes evidence of intoxication may be given by one accused of crime*, see note to Hopt v. Utah, 26: 873.

As to when confessions of accused are evidence against him, see note to Hopt v. Utah, 28: 262.

As to homicide by officers in making an arrest; when justifiable, see note to Tennessee v. Davis, 25: 648.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit, see note to Roberts v. Lewis, 36: 579.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to McDonald v. Smalley, 7: 287.

2. Upon the trial before the circuit court, for murder, committed in the Indian country, by an Indian, the government must establish the fact that the person murdered was not an Indian, in order to a conviction.

3. Upon the trial before the circuit court of an indictment for murder committed by an Indian in the Indian country, if no other reasonable inference can be drawn from the evidence than that the person murdered was an Indian, defendant is entitled, as matter of law, to an acquittal.

4. On the trial for murder committed in the Cherokee Nation by an Indian, where several witnesses swore that the murdered person was a Cherokee Indian, of Indian blood, and recognized as an Indian, and was enrolled and participated in the payment of "bread money" to the Cherokees, and there was no legitimate testimony to the contrary, the U. S. circuit court before whom the trial was, had no jurisdiction.

[No. 1003.]

Submitted Nov. 15, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment of conviction of Famous Smith for the murder of James Gentry, alleged to have been a white man, and not an Indian, on August 1, 1893, in the Cherokee Nation, Indian territory. *Reversed.*

Statement by *Mr. Justice* **Brown:**

This was a writ of error to review the conviction of the plaintiff in error for the murder of one James Gentry, alleged to have been "a white man and not an Indian," on August 1, 1883, in the Cherokee Nation, Indian territory. The case was tried before the Circuit Court of the United States for the 51]*Western District of Arkansas at the May term of 1893, and the prisoner convicted and sentenced to death. Thirty-four assignments of error were contained in the record, none of which were considered except the first and last, which raised the question of the jurisdiction of the court, arising from the fact that both the accused and the deceased were Indians.

Mr. **A. H. Garland,** for plaintiff in error:

It devolved upon the government to prove the averment in the indictment that James Gentry was a white man and not an Indian.

The policy of Congress is to vest in the courts of the Indian Nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party.

Ex parte Mayfield, 141 U. S. 107–116 (35: 635–638); *Elk* v. *Wilkins*, 112 U. S. 94–123 (28: 643, 653); *Scott* v. *Sandford*, 60 U. S. 19 How. 393–404 (15: 691–700).

Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes are not citizens.

United States v. *Osborne*, 6 Sawy. 406–409.

There is no evidence upon which to predicate the verdict of the jury finding that James Gentry was a white man and not an Indian.

Marion County Comrs. v. *Clark*, 94 U. S. 278–288 (24: 59–63); *Marshall* v. *Hubbard*, 117 U. S. 415–419 (29: 919, 920).

Instructions given a jury upon a purely hypothetical case, or involving abstract propositions, unsupported by any evidence cannot be sustained.

Bryan v. *United States*, 66 U. S. 1 Black, 140 (17: 135); *Beaver* v. *Taylor*, 68 U. S. 1 Wall. 637 (17: 601); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 (17: 298).

Evidence of communicated threats is admissible to shed light upon the mental attitude of the prisoner toward the deceased when the homicide occurred.

Wood v. *State*, 92 Ind. 269; *State* v. *Evans*, 33 W. Va. 417; *Wiggins* v. *Utah*, 93 U. S. 465 (23: 941).

Where an attack is made with murderous intent, the person attacked is under no obligation to fly. He may stand his ground, and if need be, kill his adversary.

Erwin v. *State*, 29 Ohio St. 186, 23 Am. Rep. 733; *State* v. *Tweedy*, 5 Iowa, 433; *Runyan* v. *State*, 57 Ind. 80; *Burgess* v. *Territory*, 1 L. R. A. 808, 8 Mont. 57; *May* v. *State*, 23 Tex. App. 146; *Marcum* v. *Com.* (Ky.) June 2, 1887; *McDonald* v. *State*, 89 Tenn. 161; Bishop, Crim. Law, § 850.

The instructions of the court on the question of flight were calculated to give the jury an exaggerated opinion of the importance of the evidence tending to show it, and of the weight they should give it in passing upon the guilt of the accused.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error:

This court exercises no wider jurisdiction than is given by the ancient practice with relation to writs of error.

Alexander v. *United States*, 138 U. S. 353, 355 (34: 954, 956); *Moore* v. *United States*, 150 U. S. 57 (37: 996).

The jurisdictional question, cannot be now raised, not having been raised at the trial.

Williams v. *Nottawa*, 104 U. S. 209, 211 (26: 719, 720); *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 (12: 666); *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280 (18: 825).

Except as to jurisdictional objections the court upon a writ of error can look into the bill of exceptions only to decide questions which are raised by a specific exception.

Slacum v. *Pomery*, 10 U. S. 6 Cranch, 225 (3: 206); *Garland* v. *Davis*, 45 U. S. 4 How. 131 (11: 907); *Bennett* v. *Butterworth*, 52 U. S. 11 How. 669 (13: 859); *Suydam* v. *Williamson*, 61 U. S. 20 How. 427, 433 (15: 978, 980); *Rogers* v. *Burlington*, 70 U. S. 3 Wall. 654, 661 (18: 79, 82); *New Orleans, O. & G. W. R. Co.* v. *Morgan*, 77 U. S. 10 Wall. 256, 260 (19: 892); *New Orleans Ins. Asso.* v. *Piaggio*, 83 U. S. 16 Wall. 378, 386 (21: 358, 359); *Clinton* v. *Missouri Pac. R. Co.* 122 U. S. 469, 474 (30: 1214); *Moline Plow Co.* v. *Webb*, 141 U. S. 616, 623 (35: 879, 881); *Pomeroy* v. *State Bank of Indiana*, 68 U. S. 1 Wall. 592 (17: 638); *Hanna* v. *Maas*, 122 U. S. 24 (30: 1117); *Ex parte Mayfield*, 141 U. S. 107 (35: 635); *United States* v. *Rogers*, 45 U. S. 4 How. 567 (11: 1105).

Section 2146 of the Revised Statutes refers to Indian citizens, not merely to all people having Indian blood; and its general language as to Indians is subject to exception by special treaty provisions such as Article VII. of the Cherokee treaty of 1866.

Ex parte Crow Dog, 109 U. S. 556, 570 (27: 1030, 1035).

To decide whether Gentry was an Indian, at all, it would be necessary first to ascertain the presumption in the absence of evidence.

No convincing unanimity of evidence appears on the subject of his citizenship. Some thought he was a Cherokee; some thought not. His own statements that he was a Cherokee were uniform. These, however, would not have bound the jury, even had he gone on the stand himself to affirm their truth.

Quock Ting v. *United States*, 140 U. S. 417, 422 (35: 501, 503); *Kavanagh* v. *Wilson*, 70 N. Y. 177, 179; *Volkmar* v. *Manhattan R. Co.* 134 N. Y. 418; *McNulty* v. *Hurd*, 86 N. Y. 517; *Dean* v. *Metropolitan Elev. R. Co.* 119 N. Y. 540; *Sipple* v. *State*, 99 N. Y. 284, 289; *Robinson* v. *New York Cent. & H. R. R. Co.* 20 Blatchf. 338.

If the defendant belongs to a class of persons not subject to the jurisdiction of the court, that fact is not to be negatived by the indictment or declaration, but one to be set up affirmatively by a plea or answer.

1 Bishop, Crim. Proc. § 513; *McLish* v. *Roff*, 141 U. S. 661 (35: 893).

Fabrication of testimony affords foundation for a presumption against the fabricant.

1 Bishop, Crim. Proc. § 1252.

The exception to the comments on the law in reference to flight and the law as given by the court on that subject and in reference to the law on that subject of threats, is too general.

Holder v. *United States*, 150 U. S. 91 (37: 1010); *Hicks* v. *United States*, 150 U. S. 442 (37: 1152); *Allen* v. *United States*, 150 U. S. 551 (37: 1179); *Carver* v. *Astor*, 29 U. S. 4 Pet. 1 (7: 761), *Harvey* v. *Tyler*, 69 U. S. 2 Wall. 328, 339 (17: 871, 872).

It is proper to charge that flight is evidence of guilt.

Ryan v. *People*, 79 N. Y. 593; *Com.* v. *McMahon*, 145 Pa. 413; *State* v. *Fitzgerald*, 63 Iowa, 268; *Foster's Case*, 11 Coke, 60b; *People* v. *Stanley*, 47 Cal. 113, 118, 17 Am. Rep. 401; 2 Thomp. Trials, § 2543; Lawson, Presumptive Ev. 573; Whart. Crim. Ev. § 750.

Mr. Justice **Brown** delivered the opinion of the court:

This case, so far as we have found it necessary to consider it, raises but a single question, namely, whether, Smith being admitted to be a Cherokee Indian, born and raised in the Cherokee Nation, and a citizen of that nation, the undisputed testimony did not also show Gentry to have been an Indian.

If this were the case, then it is clear the court had no jurisdiction of the offense. By Rev. Stat. § 2145 (chap. 4, title 28) relating to the "government of Indian country," it is provided "that except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." But by § 2146, as amended by the Act of February 18, 1875 (18 Stat. at L. 318) "the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, nor to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." As we held in *Re Mayfield*, 141 U. S. 107 [35: 635], there is nothing in the treaty of July 19, 1866, between the United States and the Cherokee Nation (14 Stat. at L. 799) which renders this statute inapplicable or indicates that the circuit courts of the United States have jurisdiction of crimes committed by one Indian against the person or property of another.

*Upon this point a number of witnesses [54 were sworn, who all stated that Gentry claimed to be a Cherokee Indian, and looked like one, having the dark hair, eyes, and complexion of an Indian, and that he was generally recognized as one. Kajo Gentry, his reputed father, appears to have been either of Cherokee blood or mixed Creek and Cherokee. He also was recognized as an Indian, and appears to have been enrolled and participated in the payment of "bread money" to the Cherokees.

The only testimony to the contrary tended to show that, in 1883, Gentry was not permitted to vote at an election held in the Cherokee Nation, but it also appeared that it was because he had not been in the district long enough. To entitle him to vote at an election he must not only have been a citizen of the Cherokee Nation, but must have resided in the particular district where he offered to vote six months prior thereto. There was also some testimony tending to show that Gentry had lived for some time, but it does not appear how long, in southern Arkansas, and came to the Cherokee Nation by the way of the Choctaw Nation.

In this connection the court charged the jury in substance that, to give the court jurisdiction, it was necessary to charge in the indictment that Gentry was a white man and not an Indian. "The meaning of that is, that he was a citizen of the United States; or, more correctly speaking, a jurisdictional citizen of the United States." That if he were, notwithstanding the defendant was an Indian, the court still had jurisdiction. That in this connection it was important "to ascertain whether he has been recognized legally by the authorities of that country as a citizen thereof." That "if a man is an Indian by blood, and if he goes out and lives among the white people, abandons his country, lives among white people who are citizens of the United States, and performs the duty belonging to citizenship, or exercises the rights that pertain thereto, that that is evidence on his part of a purpose to abandon the relation he may have to that country and to its people, and he may abandon it in that way so as to cause him to become a jurisdictional citizen of the United States." That *the jury also had a right to consider that, if he were related there, his relatives took no interest in him when killed, etc. [55 Exceptions were duly taken to this portion of the charge.

That Gentry was a white man, and not an

Indian, was a fact which the government was bound to establish, and if it failed to introduce any evidence upon that point, defendant was entitled to an instruction to that effect. Without expressing an opinion as to the correctness of the legal propositions embodied in this charge, we think there was no testimony which authorized the court to submit to the jury the question whether Gentry was a white man and not an Indian. The objection went to the jurisdiction of the court, and if no other reasonable inference could have been drawn from the evidence than that Gentry was an Indian, defendant was entitled, as matter of law, to an acquittal. *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 116 [22: 780]; *Marion County Comrs.* v. *Clark*, 94 U. S. 278 [24: 59]; *Marshall* v. *Hubbard*, 117 U. S. 415 [29: 919].

The testimony offered by the government had no legitimate tendency to prove that he was not an Indian. The evidence that he was not permitted to vote in the Canadian district, where the murder was committed, was explained by the fact that he had not resided in the district the six months required by law, to entitle him to vote, and by the fact that one of the judges of election told him that he had no doubt that he was an Indian. Nor did the fact that Gentry said he lived in southern Arkansas, without any evidence showing how he came to live there, under what circumstances, or how long he lived there, constitute any evidence of his being a white man, or that, being an Indian, he had severed his tribal relations and become a citizen of the United States.

It was held by this court in *Elk* v. *Wilkins*, 112 U. S. 94 [28: 643], that an Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the government of the United States, who has voluntarily severed himself from his tribe, and taken up his residence among the white citizens of a state, but who has not been naturalized, taxed, or recognized as a citizen, either by the state or by the United States, is not a 56] citizen of the *United States within the 14th Amendment of the Constitution. Much more is that the case where it appears that the Indian was but temporarily a resident of a state, the length of his residence not being shown, and that he had done nothing to indicate his intention to sever his tribal relations.

Upon the testimony in this case, we think the defendant was entitled to an instruction that the court had no jurisdiction, and its judgment must, therefore, be reversed, and the case remanded with directions to set aside the verdict, and for further proceedings in conformity with this opinion.

ALEXANDER D. WILSON, *Appt.*, v. OSWEGO TOWNSHIP and C. MONTAGUE, Trustee.

(See S. C. Reporter's ed. 56-67.)

Act of 1875—removal of cause—diversity of citizenship—when one of several parties cannot remove a cause—formal parties—trustee of bonds—necessary party—separable controversy—one defendant not answering—single cause of action—practice.

1. Under the first clause of section 2 of the Act of 1875, all of the plaintiffs, if there are more than one, or all the defendants, if there are more than one, must, in order to remove the suit, unite in the petition therefor.
2. To enable a suit to be removed under this first clause of section 2 of the Act of 1875, when the ground for removal is diversity of citizenship, the party to the suit on the one side, whether consisting of one or more persons, must have a state citizenship different from that of the party on the other side, whether consisting of one or more persons.
3. For the purpose of removing a suit under the first clause of section 2, of the Act of 1875, the parties may be placed "on different sides of the matter in dispute according to the facts," so that all those on one side will be "citizens of different states from those on the other," and this being done, those on either side may remove the suit, provided that all unite in the petition therefor.
4. The jurisdiction of the Federal courts will not be defeated by the mere joinder or non-joinder of formal parties.
5. Where the object of the suit is to recover the possession of bonds, the bailee or trustee of the bonds is a necessary and indispensable party, and if he is a defendant, and is a citizen of the same state with the plaintiff, there is no right of removal on the part of another defendant, on the ground that still another defendant is a formal, unnecessary, or nominal party.
6. In an action to recover possession of bonds from a bailee, defendant, a railroad company to whom they had been issued and which had contracted to pay the plaintiff's assignor the

NOTE.—*As to removal of causes, under Act of 1875; citizenship*, see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies, see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524, and to Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, Act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to removal of causes; right to remove; grounds of removal; citizenship; prejudice or local influence; Federal question; parties, see note to Butler v. National Home for Disabled Volunteer Soldiers, 36: 346.

As to jurisdiction of United States circuit court depending on parties and residence, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

bonds for work by him in the construction of its road, is a proper, if not a necessary party.

7. The question whether there is a separable controversy warranting a removal to the U. S. circuit court must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the circuit court.

8. The fact that one of the defendants did not answer, but made default, is unimportant, and placed the parties in no different position with reference to a removal of the cause than they would have occupied if that defendant had answered.

9. Where the complaint in the state court embraced but a single cause of action and a single ground of relief, a removal of the cause cannot be had by the non-resident defendants on the ground of a separable controversy.

10. Where the cause was wrongfully removed from the state court to the U. S. circuit court, the decree of the latter court will be reversed with costs, and the cause remanded to that court, with directions to remand the suit to the state court.

[No. 175.]

Argued and Submitted Dec. 20, 1893. Decided Jan. 3, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Missouri, in an action brought by Alexander D. Wilson, plaintiff, against the Union Savings Association *et al.*, defendants, and the Oswego Township, intervening defendant, decreeing that certain bonds of said Oswego Township be delivered by said Union Savings Association to said township for cancellation, and for the value of a missing bond, etc. Reversed and cause remanded to the circuit court with directions to remand the suit to the state court.

The facts are stated in the opinion.

Mr. **Frederick H. Bacon,** for appellant:

The motion to remand to the state court should have been sustained, because some of the defendants, as well as complainant, were residents of the state of Missouri and the suit could not have been finally disposed of without the presence of such defendants who were citizens of the same state as the complainant.

Torrence v. *Shedd*, 144 U. S. 527 (36: 528); *Fraser* v. *Jennison*, 106 U. S. 191, 194 (27: 131, 132).

There is no equity in the cross-bill because it seeks to enforce a forfeiture.

Marshall v. *Vicksburg*, 82 U. S. 15 Wall. 146 (21: 121); *Horsburg* v. *Baker*, 26 U. S. 1 Pet. 232 (7: 125).

There is a defect of parties because under the allegations of the answer the controversy cannot be determined unless the subcontractors and supply men are made parties to this suit, they being the beneficiaries entitled to the bonds under the allegations of the cross-bill.

Traders Nat. Bank v. *Campbell*, 81 U. S. 14 Wall. 87 (20: 832); *Shields* v. *Barrow*, 58 U. S. 17 How. 130 (15: 158).

The township has a complete and perfect remedy at law.

Phœnix Mut. L. Ins. Co. v. *Bailey*, 80 U. S. 13 Wall. 616 (20: 501); *Grand Chute* v. *Winegar*, 82 U. S. 15 Wall. 355 (21: 170).

The township is guilty of such laches as will prevent its recovery.

Lansdale v. *Smith*, 106 U. S. 391 (27: 219); *Mackall* v. *Casilear*, 137 U. S. 556 (34: 776); *Brown* v. *Buena Vista County*, 95 U. S. 157 (24: 422); *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 33 Fed. Rep. 447; *Wagner* v. *Baird*, 48 U. S. 7 How. 234 (12: 681); *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 836).

At the time of the deposit the bonds belonged to Burgess. The alleged trust was invalid.

Story, Eq. Jur. § 979*a*; Pom. Eq. Jur. § 418; *Wheeler* v. *Smith*, 50 U. S. 9 How. 55 (13: 44).

As to those who have not answered, the bill may be taken as confessed. Their default is an admission that on their part they have no claim to the fund.

2 Dan. Ch. Pl. & Pr. 1674; *Stevenson* v. *Anderson*, 2 Ves. & B. 407.

The plea laches, is a personal one and can only be set up by the bank, the custodian of the bonds, or the parties for whose benefit the bonds were deposited and the trust created.

Lord v. *Morris*, 18 Cal. 482; *Ferguson* v. *Broome*, 1 Bradf. 10; *Skidmore* v. *Romaine*, 2 Bradf. 122; *Larthet* v. *Hogan*, 1 La. Ann. 330; *Dawson* v. *Callaway*, 18 Ga. 573.

Burgess was a purchaser of these bonds for value without notice.

Douglas County Comrs. v. *Bolles*, 94 U. S. 105 (24: 46).

If Burgess was an innocent purchaser, complainant is also.

Roberts v. *Lane*, 64 Me. 108, 18 Am. Rep. 242; *Scotland County* v. *Hill*, 132 U. S. 107 (33: 261).

The presumption is that the state treasurer, being a public officer, did his duty.

Rice v. *Harrell*, 24 Ark. 402.

The effect of the auditor's certificate was to make the bonds negotiable. The township is estopped by the recitals in the bonds.

Wilson v. *Salamanca Twp.* 99 U. S. 499 (25: 330); *New Providence Twp.* v. *Halsey*, 117 U. S. 336 (29: 904); *Dallas County* v. *McKenzie*, 110 U. S. 686 (28: 285); *Humboldt Twp.* v. *Long*, 92 U. S. 642 (23: 752); *Coloma* v. *Eaves*, 92 U. S. 484 (23: 579); *Rock Creek Twp.* v. *Strong*, 96 U. S. 271 (24: 815.)

In this case the township commissioners did adjudicate that the bonds were not in excess of the amount authorized, and their determination is final after the bonds were negotiated.

Marcy v. *Oswego Twp.* 92 U. S. 637 (23: 748); *Dixon County* v. *Field*, 111 U. S. 83 (28: 360).

The auditor's certificate goes far beyond the recitals of the bonds—it is an adjudication of the court having jurisdiction.

Lewis v. *Barbour County Comrs.* 105 U. S. 739 (26: 993); *Rock Creek Twp.* v. *Strong*, 96 U. S. 271 (24: 815); *Lake County Comrs.* v. *Graham*, 130 U. S. 674 (32: 1065); *New Providence Twp.* v. *Halsey*, 117 U. S. 336 (29: 904).

Mr. **John O'Day,** for appellees:

The bonds in controversy are void. They were issued without any authority of law whatever.

Wells v. *Pontotoc County Suprs.* 102 U. S. 628 (26: 123); *McClure* v. *Oxford Twp.* 94 U. S. 429 (24: 129); *Merchants Exch. Nat. Bank* v. *Bergen County Freeholders*, 115 U. S. 384

(29: 430); *Dixon County* v. *Field*, 111 U. S. 93 (28: 363); *Davies County* v. *Dickinson*, 117 U. S. 664 (29: 1029).

The question of power is not one which the township is estopped from setting up in defense.

Ottawa v. *Carey*, 108 U. S. 123 (27: 675); *Marsh* v. *Fulton County Suprs.* 77 U. S. 10 Wall. 676 (19: 1040); *McClure* v. *Oxford* and *Wells* v. *Pontotoc County Suprs. supra; Buchanan* v. *Litchfield*, 102 U. S. 278 (26: 138).

None of the rules protecting negotiable paper in the hands of an innocent holder apply to Wilson in this case. Burgess could not deliver the bonds, hence Wilson could take no title to them.

Chipman v. *Tucker*, 38 Wis. 43, 20 Am. Rep. 1; *Marvin* v. *McCullum*, 20 Johns. 288; *Richards* v. *Durst*, 51 Ill. 141; *Scott* v. *State Bank*, 9 Ark. 36; *Devries* v. *Shumate*, 53 Md. 216; *Couch* v. *Meeker*, 2 Conn. 302, 7 Am. Dec. 274; *Stringer* v. *Adams*, 98 Ind. 541.

Equity will bar claims because stale from lapse of time even though a trust be involved.

Creath v. *Sims*, 46 U. S. 5 How. 192 (12: 110).

The court rightfully overruled complainant's (appellant's) motion to remand the cause to the state court.

The law in relation to the removal of causes has no application to nominal or formal parties.

Wormley v. *Wormley*, 21 U. S. 8 Wheat. 421 (5: 651); *Wood* v. *Davis*, 59 U. S. 18 How. 467 (15: 460); *Browne* v. *Strode*, 9 U. S. 5 Cranch, 303 (3: 108); *McNutt* v. *Bland*, 43 U. S. 2 How. 9 (11: 159); *Bates* v. *New Orleans, B. R. & V. R. Co.* 16 Fed. Rep. 132; *Hazard* v. *Robinson*, 21 Fed. Rep. 193.

This case presents a controversy between Wilson, a citizen of the state of Missouri, and Oswego township, a citizen of the state of Kansas, and these questions can be fully determined between Wilson and Oswego township without the presence of either or any of the other parties to the suit, as originally brought.

Fraser v. *Jennison*, 106 U. S. 194 (27: 132); *Barney* v. *Latham*, 103 U. S. 205 (26: 514); *Harter* v. *Kernochan*, 103 U. S. 562, 566 (26: 411, 412).

Mr. Justice **Jackson** delivered the opinion of the court:

The appellant, as the assignee of Edward Burgess, on August 10, 1886 filed his petition in the circuit court of the city of St. Louis, Missouri, against the Union Savings Association of that city, the Memphis, Carthage & Northwestern Railroad Company, a corporation organized under the laws of the state of Missouri; C. Montague, a non resident of the state of Missouri, and certain unknown persons, to recover possession of twenty-two bonds of Oswego township, state of Kansas, of the value of $500 each, held by the Union Savings Association as bailee or trustee.

The petition alleged that the Memphis, Carthage & Northwestern Railroad Company was empowered to construct, maintain, and operate a railroad in the states of Missouri and Kansas, through the township of Oswego, a political subdivision of the county of Labette, in the state of Kansas; that said township was authorized and empowered to vote, grant, and issue to the railroad company its bonds to aid in the construction of the railroad through the county of Labette; that after due proceedings had been had the township of Oswego voted, issued, executed and delivered to the railroad company twenty-two of its bonds of the value of $500 each, with interest coupons attached, bearing date September 2, 1872, numbered from 27 to 48 both inclusive; that the railroad corporation had previously entered into a contract with *Edward Burgess to construct a por- [58 tion of its road, and that Burgess under this contract engaged in the execution of a large amount of such construction work on the railroad; that the railroad company, under its contract with Burgess, was to pay for the work and labor performed and to be performed with the bonds of the township, including the bonds in question; that on September 17, 1873, the company was indebted to Burgess in a large sum of money for work and labor performed on the railroad under his contract, which Burgess was still engaged in carrying out; that the railroad company, at the request of Burgess, and in consideration of the work performed and to be performed by him, delivered to him, and to the defendant, C. Montague, trustee, jointly, said twenty-two bonds upon the agreement and understanding between the railroad company, Burgess, and Montague that on the completion of the work then in progress on the railroad, up to the amount of the value of the twenty-two bonds, Montague would relinquish for himself, and for all others, these bonds to Burgess, which would then become the absolute property of the latter; and that to carry out this agreement the bonds, with all the coupons thereto attached, were placed by Burgess and Montague, jointly, in the custody of the defendant, the Union Savings Association, as trustee or bailee, where they were to remain until the completion of the work on the railroad by Burgess, when they were to be delivered by the Union Savings Association to him or his assigns on the demand of himself and Montague.

It was further set out in the petition that Burgess duly performed his work upon the railroad, under and in accordance with his contract, and became thereby entitled to the bonds, and that Montague ceased to have any right, interest, or claim thereto, either for himself or for any other person, and that the bonds became the absolute property of Burgess, who thereafter, for a valuable consideration, sold and assigned the bonds in controversy, with all his right, title, and interest therein and claim thereto to the plaintiff.

The plaintiff also stated that after the sale and assignment of the bonds to himself he notified the defendant, the Union *Savings [59 Association, of his ownership thereof, and demanded them, which the defendant refused to deliver without the assent of Montague.

The petitioner further alleged that he was informed and believed that certain persons, to him unknown, claimed an interest in these bonds and coupons, but that he could not state the nature of their interest nor the residence of the claimants.

The prayer of the petition was that the de-

fendant, the Union Savings Association, be ordered to deliver the bonds and coupons in controversy to the plaintiff; that said unknown persons claiming an interest therein be duly notified by publication of the pendency of the suit, and be required to answer the same, and that the plaintiff have all such further relief as might be proper.

Upon the filing of this petition a summons was issued to the sheriff of the city of St. Louis, whose return thereon shows that the same was duly served upon the Union Savings Association in August, 1886, and upon the Memphis, Carthage & Northwestern Railroad Company on October 1, 1886. It further appears that publication was duly made for the defendant, C. Montague, and the unknown parties having an interest in the bonds in controversy.

On October 11, 1886, the Oswego township, on its own motion, intervened in the cause, and was made a party defendant thereto.

At the October term, 1886, the Union Savings Association filed its answer to the petition, in which, after stating its want of knowledge or information as to the incorporation of the Memphis, Carthage & Northwestern Railroad Company, and the delivery to that company of the bonds in question, and other general allegations of the petition, denied that the bonds described, or any bonds, were placed by Burgess and Montague, jointly, in its custody, there to remain until Burgess had completed the work on the railroad, when they were to be delivered to him or his assigns on demand; but admitted that on December 17, 1873, Edward Burgess and C. Montague, trustee, deposited with it bonds which it believed to be the [60] *same referred to in the plaintiff's petition, and that it issued and delivered a receipt therefor to Burgess and Montague at their request, which was in words and figures as follows:

"Received, St. Louis, Dec'r 17th, 1873, of Edward Burgess and C. Montague, trustees, ten thousand five hundred dollars of Oswego township, Labette Co., Kansas bonds, issued to the Memphis, Carthage & Northwestern Railroad Company, the numbers being twenty-eight to forty-eight, inclusive (also bond No. 27, of which ($300 worth) is to be held for same parties under same terms, in all $10,800 bonds) each bond for $500, due 20 years after date, dated Sept. 2nd, 1872, annual interest at ten per cent, represented by the nineteen coupons attached to each bond, all of such ten thousand eight hundred dollars of bonds subject to the joint order of said C. Montague, trustee, or his successors or successor in office, and the said Edward Burgess, upon the return of this receipt duly indorsed.

"(Signed) James B. Love, *Cashier.*"

The defendant further answered that it had no knowledge that Burgess had completed the work on the railroad, nor of his having become the owner of the bonds, nor of his assignment to the plaintiff; and further, that before the commencement of the suit, Montague, trustee, acting in the premises on behalf of the Oswego township, had notified the defendant that Burgess was not entitled to the bonds.

The defendant also stated that it was ready and willing to surrender the bonds to the party or parties legally entitled thereto whenever it was settled in such manner as to protect defendant from further responsibility, and prayed that all claimants and the parties in interest might be brought into court and interpleaded for the bonds; and that it might be allowed a reasonable compensation for the custody thereof since the year 1873, and also a reasonable allowance for attorney's fees.

Montague and the Oswego township filed separate answers, in which they denied that the bonds in question had ever been delivered to the Memphis, Carthage & Northwestern Railroad *Company under any legal authority; [61 alleged that the bonds were void because they were never lawfully issued under any authorized election and vote of the people of the township to the railroad company; that they were never, in fact, delivered to that railroad company, but that they were delivered to the Union Savings Association to secure the payment by Burgess of all debts, liabilities, and obligations which might be contracted by him in the prosecution of the work upon the railroad through the township and county; that he had never performed this work, according to his contract with the railroad company, and if the bonds had ever been regularly issued he had never acquired a title thereto. The Oswego township, therefore, claimed that the bonds should be surrendered to it for cancellation.

The Memphis, Carthage & Northwestern Railroad Company failed to answer the petition, and made default thereto.

On December 4, 1886, Montague and the Oswego township filed their petition to have the cause removed to the circuit court of the United States on the ground that at the commencement of the suit, and at the time of the motion, they were citizens of the state of Kansas, while the plaintiff was a citizen of the state of Missouri; that the Union Savings Association, though a citizen of the state of Missouri, was only trustee of the bonds, and had no interest in the result of the controversy, and that the Memphis, Carthage & Northwestern Railroad Company, named as a party defendant, had never been served with process or entered its appearance in the suit.

On this petition, and proper bond tendered therewith, the suit was removed into the United States Circuit Court for the Eastern District of Missouri. After such removal was effected the plaintiff moved the court to remand the cause to the circuit court of the city of St. Louis on the grounds, first, that the application was not made under the second paragraph of section 639 of the Revised Statutes; second, that the cause was not one in which there could be any final determination of the controversy as to the parties applying for the removal without the presence of the other defendants; third, that the *suit was not one between citi- [62 zens of different states, but was one in which the plaintiff and the defendant, the Union Savings Association, and the Memphis, Carthage & Northwestern Railroad Company, were citizens of Missouri, while Montague and Oswego township were citizens of the state of Kansas; fourth, that the suit was not one in which there was a separable controversy between citizens of different states, and that the sheriff's return, as set out in the record, showed that

the defendant, the Memphis, Carthage & Northwestern Railroad Company, had been duly served and brought before the court prior to the filing of the petition for the removal of the cause.

The motion to remand was, however, overruled, and thereafter various amended pleadings were filed in the circuit court, including a cross-bill on the part of the Oswego township to have the bonds in controversy declared void and returned to it for cancellation.

Upon the hearing of the cause the court entered a final decree holding that the bonds in question were issued without authority of law, and that the same should be delivered by the Union Savings Association to the Oswego township for cancellation; and, it further appearing that bond No. 27, referred to in the pleadings, had been appropriated by the Union Savings Association, and was no longer in its possession, a decree was entered against it for the value of the missing bond, subject to a deduction for the amount of compensation allowed it as custodian of the bonds. From the final decree the present appeal is prosecuted.

The question first presented for our consideration by the appellant is that the cause was improperly removed from the state court to the United States circuit court, and that his motion to remand the same to the state court should have been sustained for the reason that the defendants, the Union Savings Association and the Memphis, Carthage & Northwestern Railroad Company, were citizens of the same state as the plaintiff, and that the suit could not be finally disposed of without the presence of these defendants, both of whom were proper, if not necessary parties.

Against this position it is urged, on behalf of [63] the appellees *that the real controversy in the case was wholly between the plaintiff and the Oswego township, and C. Montague, and could be fully determined between them without reference to the other defendants; that the railroad company and the Union Savings Association were, at the most, only nominal or formal parties.

The removal in this case was had under the second section of the Act of 1875, but under which clause of that section does not distinctly appear. The first clause of the section relates to removals of controversies that are not separable, and in which all the parties on one side of the suit are citizens of different states from those on the other side, which is a necessary condition to enable the circuit court to take jurisdiction of the entire suit. Under this clause, all of the plaintiffs, if there are more than one, or all the defendants, there being more than one, must, in order to remove the suit, unite in the petition therefor; and it is settled by the authorities that to enable a suit to be removed under this first clause of the section, when the ground for removal is diversity of citizenship, the party to the suit on the one side, whether consisting of one or more persons, must have a state citizenship different from that of the party on the other side, whether consisting of one or more persons; and that, for the purpose of removing the suit, these parties may be placed "on different sides of the matter in dispute according to the facts," so that all those on one side will be "citizens of different states from those on the other," and that this being done, those on either side may remove the suit, provided that all unite in the petition therefor.

The situation of the parties in this case, in connection with the relief sought by the petition, does not admit of placing the parties on different sides of the matter in dispute, so that those on one side will be citizens of different states from those on the other, for the purpose of removing the suit, unless it can be held that both the Memphis, Carthage & Northwestern Railroad Company, which was made a party defendant, and duly served, and the Union Savings Association, were merely nominal, formal and unnecessary parties, *as [64 these corporations were citizens of the same state as the plaintiff.

It is settled that the jurisdiction of the Federal courts will not be defeated by the mere joinder or non-joinder of formal parties. *Wormley* v. *Wormley*, 21 U. S. 8 Wheat. 421, 451 [5: 651, 659].

In *Wood* v. *Davis*, 59 U. S. 18 How. 467 [15: 460], where formal or nominal parties were united with the real parties to the litigation, it was held that such joinder would not oust the jurisdiction of the Federal court, if the citizenship of the real parties was such as to confer it, but, in speaking for the court, *Mr. Justice* Nelson said, in that case: "This is not a case of a stakeholder, or the holder of a deed as an escrow, where a trust has been created by the parties, which is sought to be enforced by one of them. In all such cases the trustee may be a proper party, as he has a duty to perform, and which the court may enforce, if improperly neglected or refused."

In *Bacon* v. *Rives*, 106 U. S. 99 [27:69], where the complainants were citizens of the state in which the suit was originally brought, and the defendant, the real party to the controversy, against whom relief was sought, was a citizen of another state, his right to remove the suit to the circuit court of the United States was held not to be defeated upon the ground that the citizenship of another defendant, who was a stranger to that controversy, and who occupied substantially the position of a mere garnishee, was the same as that of the complainant. In that case, however, the relief sought was against a non-resident defendant, as the real party to the controversy. In the present case no relief is sought against the removing parties.

These authorities do not control in this case, for the reason that the relief sought by the plaintiff in his bill, or petition, was the recovery of the possession of the bonds held by the Union Savings Association. He sought no active or affirmative relief against any other defendant to the suit. He did not even make the Oswego township a party defendant. By his petition he raised no question whatever as to the validity of the bonds or the regularity of their issue. He alleged that they were regularly issued by the township of Oswego to the Memphis, *Carthage & Northwestern Railroad [65 Company, and that by an arrangement between the railroad company and C. Montague, trustee, and Edward Burgess, they were placed in the possession of the Union Savings Association until Burgess should complete his contract

with the railroad company, when the bonds were to be delivered to Burgess, or his assignee. The plaintiff, as his assignee, claimed that Burgess had complied with and completed his contract, thereby becoming the owner of the bonds, and entitled to their possession; and that thereafter he assigned his right, title, and interest in the same to the plaintiff, who by his petition only sought to recover possession of the bonds. The Union Savings Association, being the bailee or trustee of the bonds, was a necessary and indispensable party to the relief sought by the petition, and that defendant, being a citizen of the same state with the plaintiff, there was no right of removal on the part of Montague, or of the intervening defendant, the Oswego township, on the ground that the Union Savings Association was a formal, unnecessary, or nominal party.

Furthermore, under the allegations of the petition that the bonds had been issued to the Memphis, Carthage & Northwestern Railroad Company by the Oswego township, by authority of law, and that it had contracted with Burgess to pay him the bonds in question for work and labor performed and to be performed by him in the construction of its line of railroad, the railroad company was a proper, if not a necessary party, as it had an interest in the question whether Burgess had performed his contract and earned the bonds.

Considering the nature of the suit and the relief sought thereby, these defendants cannot be treated and regarded as purely formal and unnecessary parties. The character of the relief sought made the Union Savings Association, which occupied the position of a bailee or trustee, a necessary and indispensable party.

But can the removal be sustained under the second clause of the second section of the Act of 1875, on the ground that the suit presented a separable controversy between the plaintiff and 66] *the parties applying for and securing the removal? We think not. The question whether there is a separable controversy warranting a removal to the circuit court of the United States must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the circuit court. *Barney* v. *Latham*, 103 U. S. 205 [26: 514].

The original petition, in the present case, filed in the state court, and the relief sought thereunder, did not present a controversy which was wholly between citizens of different states, or one that could be finally determined as between the plaintiff and the removing parties, without the presence of the Union Savings Association, and could not, therefore, be removed separately or jointly by either Montague or the township of Oswego.

The fact that the Memphis, Carthage & Northwestern Railroad Company did not answer, but made default, is unimportant, and placed the parties in no different position with reference to a removal of the cause than they would have occupied if that company had answered, and either admitted or denied the rights of the plaintiffs. *Putnam* v. *Ingraham*, 114 U. S. 59 [29: 66].

The petition filed in the state court did not present several causes of action, some of which were against the resident defendants and others against the non-resident defendants, but embraced a single cause of action and a single ground of relief. It did not, therefore, come within the authorities which allow a removal on the ground of a separable controversy such as entitled the non-resident defendants to remove the cause.

Without reviewing the authorities on the subject of removal of causes on the ground of separable controversies, within the meaning of the second clause of the second section of the Act of 1875, we deem it sufficient to cite the following cases as fully sustaining the conclusion to which the court has arrived, that the pleadings in the case under consideration present no ground on which to base the right of removal: **Brooks* v. *Clark*, 119 U. S. [67 502, 511 [30: 482, 485]; *Brown* v. *Trousdale*, 138 U. S. 389, 396 [34: 987, 990]; *Torrence* v. *Shedd*, 144 U. S. 527, 530 [36: 528, 531].

In this last cited case *Mr. Justice* Gray, speaking for the court, sums up the authorities on the subject as follows: "But in order to justify such removal on the ground of a separate controversy between citizens of different states there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them;' and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

Considering the character of the relief sought by the original bill, and the situation of the parties, it cannot be properly said that the whole subject-matter of the suit was capable of being finally determined between the plaintiff, on the one side, and Montague and the Oswego township, on the other, without the presence of the Union Savings Association, so as to warrant the removal as a separable controversy.

The cases of *Thayer* v. *Life Assn. of America*, 112 U. S. 717 [28: 864]; *St. Louis & S. F. R. Co.* v. *Wilson*, 114 U. S. 60 [29: 66]; and *Crump* v. *Thurber*, 115 U. S. 56 [29: 328], are not distinguishable in principle from the present case. In the former case the situation of the parties was substantially the same as in the case under consideration, and it was held that the resident corporation, as the holder of the stock which the complainant sought to have transferred to himself, was such an indispensable party as would prevent the removal of the cause from the state to the circuit court.

We are, therefore, of opinion that the cause was wrongfully removed and that the motion to remand should have been sustained. The decree below is reversed with costs, and the cause remanded to the circuit court of the United States for the Eastern District of Missouri with directions to remand the suit to the state court from which it was originally removed, and it is accordingly so ordered.

68] *JOSEPH INGLEHART ET AL., by WILLIAM K. DUHAMEL, their guardian *ad litem*, *Appts.*,

v.

IDA MAY STANSBURY.

(See S. C. Reporter's ed. 68-73.)

When appeal will be dismissed—necessary appellants—when one defendant cannot appeal alone.

1. Where the appellants have no beneficial or appealable interest in the premises in controversy, and no interest whatever of any kind in the result of the suit, the appeal will be dismissed.
2. Where the principal matter in controversy is the validity of the proceedings in a partition suit, and the real defendants, whose rights are affected by the decree appealed from, are the parties claiming title under those proceedings, they are necessary appellants from the decree setting aside those proceedings and ordering the whole land to be conveyed to the plaintiff.

One defendant affected by a joint decree cannot appeal alone, without joining the other defendants as appellants, or showing a valid excuse for not joining them, which can only be shown by a summons and severance, or by some equivalent proceeding.

[No. 144.]

Argued Dec. 6, 7, 1893. Decided Jan. 3, 1894.

APPEAL from a decree of the Supreme Court of the District of Columbia, in a suit in equity brought by Ida May Stansbury, against Joseph Inglehart and others, defendants, to declare null and void and set aside as clouds upon plaintiff's title to land certain proceedings in partition and deeds, and for the appointment of a trustee in place of one who had died, to convey such land to her. Said decree being in favor of the plaintiff and for the relief prayed for. *On motion to dismiss, dismissed.*

See same case below, 9 Mackey, 134.

Statement by *Mr. Justice* **Gray:**

This was a bill in equity in the Supreme Court of the District of Columbia by Ida May Stansbury to enforce a trust under a deed dated June 10, 1870, by which Gustavus R. Dixon and Ada Georgiana Amanda, his wife, conveyed land of his in the city of Washington to Joseph Inglehart, his heirs and assigns, in trust for the sole and separate use and benefit of the wife during her life or widowhood and no longer, with remainder in fee to the heirs of the body of the husband, and, in default of such heirs, then (as the plaintiff contended and the court below held) to convey the land in fee simple to the plaintiff, then Ida May Campbell, not quite fourteen years old, living with her parents, and no kin of his, but a cousin of his wife, and about seven years younger than she.

Gustavus R. Dixon died December 1, 1871, leaving his wife Ada, but no issue, surviving him.

Upon a bill in equity, filed July 23, 1873, by Ada Dixon against Ida Campbell and Inglehart as trustee, that court, after appointing a guardian *ad litem* for Ida, and with his and *her written consent and that of her par- [69 ents and of Inglehart, ordered part of the land to be sold by a trustee, appointed for the purpose, for the payment of repairs and taxes on the whole, confirmed his sale thereof, appointed commissioners to make a partition of the rest of the land in equal moieties in fee between Ada Dixon and Ida Campbell, and on May 6, 1874, decreed that the return of the commissioners be confirmed, and that said Ada and Ida each hold in severalty the moiety set off to her. The purchaser at the trustee's sale conveyed to Florian Trautman; and a part of the land set off to Ada Dixon was conveyed by her to John G. Thompson, who entered into possession thereof, and received the rents and profits.

Ada Dixon married William H. Davis, November 2, 1874; and died February 26, 1888, leaving an infant son and heir.

Ida Campbell became of age July 10, 1877, and on June 23, 1881, having meanwhile married Charles J. Stansbury, filed the original bill in the present case against Inglehart, as trustee under the deed of Gustavus R. Dixon, to compel him to convey to her in fee all the land included in that deed; and against Thompson to cancel the deed to him, as casting a cloud upon her legal title. To that bill Thompson filed a demurrer, which was sustained, with leave to amend the bill. On April 14, 1882, before the hearing upon Thompson's demurrer, and not having himself pleaded to the bill, Inglehart died, leaving infant heirs only.

Ida afterwards, from time to time, filed other bills, by way of amendment, supplement and revivor, joining her husband as plaintiff; making Inglehart's infant heirs, Ada's second husband, Davis, and her infant son and heir, as well as Thompson and Trautman, defendants; and praying that all the proceedings upon the bill for partition be declared null and void for want of jurisdiction in the court, and that those proceedings, as well as the deeds to Trautman and to Thompson, be set aside as clouds upon Ida's title, and that some proper person be appointed as trustee in Inglehart's stead to convey all the land to her.

Guardians *ad litem* were appointed for the infant heirs of *Inglehart, as well as for [70 the infant Davis, and respectively answered in their behalf, submitting their rights to the protection of the court.

Trautman answered, alleging that he purchased in good faith; and William H. Davis and Thompson answered, denying the plaintiff's title to a conveyance or right to relief. A general replication was filed to the answers of the defendants.

NOTE.—*That only parties to record can be heard on appeal or writ of error*, see note to Harrison v. Nixon, 9: 201.

When parties interested are numerous, part may maintain a bill in equity for benefit of all, see notes to Smith v. Swormstedt, 14: 942, and to Bacon v. Robertson, 15: 499.

As to parties necessary; in equity, want of; when a defense; when objection to be made, see notes to Morgan v. Morgan, 4: 242, and to Marshall v. Beverly, 5: 97.

As to parties in error; who necessary, see note to Owing v. Kincannon, 8: 727.

As to death of parties; effect on suit, see note to Green v. Watkins, 5: 256.

The court, upon a hearing in general term on pleadings and proofs, entered a decree for the plaintiffs, as prayed for. *Stansbury* v. *Inglehart*, 9 Mackey, 134. Inglehart's heirs, by their guardian *ad litem*, alone appealed to this court. Thompson was a surety upon the appeal bond.

The appellee moved this court to dismiss the appeal, on the following grounds:

First, "That the appellants are parties to the suit only as heirs at law of one Joseph Inglehart, who held as trustee only the legal title to certain real estate mentioned in the proceedings, without beneficial interest of any kind therein; and that his trust was and is at an end; and that the appellants have therefore no beneficial or appealable interest in the premises, and no interest whatever of any kind in the result of the suit."

Second, "That the appellants were joint parties in the suit with other persons who had beneficial and substantial interests therein; and said other persons have not been made parties to the appeal; and there has been no summons to them and severance, or any other equivalent action."

In opposition to this motion, affidavits of Trautman, of Thompson, and of the guardian *ad litem* of the infant Davis, who was also one of the attorneys for all the defendants, were filed in this court, stating that the appeal 71 |was taken in behalf *of Inglehart's heirs alone, and no separate appeal by any other defendant, because, although the aggregate value of the whole land in question exceeded $5000, the value of the part claimed by each was less than that amount; and because said guardian and attorney was of opinion, and Trautman and Thompson were advised by counsel, that the appeal in behalf of Inglehart's heirs was for the benefit of all the defendants; and that Trautman and Thompson paid all the costs and expenses of that appeal.

Mr. **S. S. Henkle** for appellants.
Mr. **J. J. Darlington** for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

The state of the case, so far as material for the disposition of the motion to dismiss the appeal, may be summed up thus:

The claim of the plaintiff and appellee, Ida Stansbury, formerly Ida Campbell, was based upon the position that the sole duty of Joseph Inglehart as trustee under the deed of Gustavus R. Dixon and his wife Ada was, after the expiration of an equitable estate for life or widowhood in Ada, to convey the legal title in fee in the whole land to Ida. The defense rested mainly on the decree obtained, with Inglehart's consent, by Ada Dixon in her lifetime, for the sale of part of the land for the payment of taxes and repairs, and for the partition of the rest of the land in equal moieties in fee between Ada and Ida. At the time of the final decree in the case at bar, Inglehart had died, Ada Dixon had married William H. Davis and afterwards died, and the parties to the suit were as follows: The plaintiffs were Ida and her husband. The defendants were Inglehart's infant heirs, by their guardian *ad litem;* Ada's second husband, Davis, and her infant heir, by his guardian *ad litem;* Trautman, claiming under the sale of part of the land by order of the court in the partition suit; and Thompson, claiming under a deed from Ada of part of the moiety set off to her by the decree of partition. Yet the only appellants are the heirs of Inglehart.

Those heirs were made parties defendant, solely because the legal title of Inglehart had descended to them. They had no greater interest in the subject of the suit, than he would have had if living at the time of the decree below. But Inglehart *never had any [72 interest in the land, except as trustee under the deed of Dixon and wife. Under that deed, after the termination of her life estate, he had nothing but the naked legal title, and no duty in regard to the land, unless to convey the whole to Ida. On the other hand, if the proceedings in the suit for partition were valid, they divested his title as trustee, and left no interest in him or his heirs. He never had or claimed any title or interest under those proceedings, and in no way represented the parties claiming under them.

Inglehart, and his heirs after his death, were rightly made parties defendant to the bill, because the plaintiff asserted that, notwithstanding the proceedings in the partition suit, he, and they by descent from him, still held the legal title, and she was entitled to a conveyance thereof; and for the same reason Inglehart's heirs might perhaps join in an appeal from the decree in her favor.

But the principal matter in controversy was the validity of the proceedings in the partition suit. The real defendants, whose rights were affected by the decree appealed from, were the parties claiming title under those proceedings, and they were necessary appellants from the decree setting aside those proceedings and ordering the whole land to be conveyed to the plaintiff.

Whether the interests of Inglehart's heirs and of the other defendants were sufficient in amount or value to sustain a joint appeal by all the defendants need not be considered, because it is quite clear that Inglehart's heirs could not appeal alone, without joining the other defendants as appellants, or showing a valid excuse for not joining them.

This could only be shown by a summons and severance, or by some equivalent proceeding, such as a request to the other defendants and their refusal to join in the appeal, or at least a notice to them to appear and their failure to do so; and this must be evident upon the record of the court appealed from, in order to enable the party prevailing in that court to enforce his decree against those who do not wish to have it reviewed, and to prevent him and the appellate court from being vexed by successive appeals in the same matter. *Owings v. *Kincannon*, 32 [73 U. S. 7 Pet. 399 [8: 727]; *Todd* v. *Daniel*, 41 U. S. 16 Pet. 521, 523 [10: 1054, 1055]; *Masterson* v. *Howard*, 77 U. S. 10 Wall. 416 [19: 953]; *Hardee* v. *Wilson*, 146 U. S. 179 [36: 933].

Appeal dismissed.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, v. ADOLPH VOLK.

(See S. C. Reporter's ed. 73-79.)

Withdrawing question from jury—burden of proving contributory negligence—omission to instruct jury—exception—request for instructions—competent evidence—writ of error sued out for delay.

1. In an action against a railroad company for personal injuries, rulings of the court on the trial as to the allegations and proof upon the subject of exemplary damages become immaterial by the subsequent instruction of the court withdrawing from the jury the claim for such damages, and by the return of a verdict for actual damages only.
2. By the settled law of this court, contributory negligence on the part of the plaintiff need not be negatived or disproved by him, but the burden of proving it is upon the defendant.
3. The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, where the bill of exceptions does not show that the defendant requested any instruction upon that subject.
4. The not giving an instruction upon a point in issue may be excepted to, if one was requested, but not otherwise.
5. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for said party to require an opinion from the court upon that point; if he does not, it is a waiver of it.
6. The testimony as to the circumstances of the continuance of the plaintiff in the employ of iron works, after being injured, which was offered only to show the character of the work performed by the plaintiff, both before and after the accident, was competent evidence upon the question how far his capacity of earning a livelihood had been impaired by his injuries.
7. Where the writ of error appears to this court to have had no plausible ground to support it, and to have been sued out merely for delay, the motion of defendant in error for damages, in addition to interest on the judgment, under U. S. Rev. Stat. § 1010 and Rule 23 of this court, will be granted.

[No. 161.]

Argued and Submitted Dec. 13, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment for plaintiff Adolph Volk, against The Texas & Pacific Railway Company, defendant, for personal injuries caused by the negligence of the Company. *Affirmed with interest and 10 per cent damages.*

Statement by *Mr. Justice* **Gray**:

This was an action against a railroad corporation incorporated by Act of Congress, to recover for personal injuries.

The petition alleged that while the plaintiff, a laborer employed in the Fort Worth Iron Works, a corporation owning and carrying on a shop or foundry, was assisting in unloading an iron boiler from a railroad car disconnected from *any engine and standing [74 upon a side track or switch belonging to or used by that corporation, close by its shop or foundry, and connected with the defendant's line of railway, the defendant, by its agents and servants, willfully and with gross negligence, caused an engine and cars to run against the car upon which the plaintiff was at work, whereby he was knocked down and thrown off the car, severely injured, disabled to work, and put to expense for medicines and physicians' fees, "all to his damage twenty-five thousand one hundred and twenty-five dollars."

The petition further alleged that "said acts of negligence have by the defendant railway company been ratified and adopted in this, that said company has retained said reckless and neligent servants in its employ after having been notified of their said reckless and negligent act and the injury inflicted upon plaintiff thereby, and in failng to in any way prevent or to take any steps to prevent the occurrence of such accidents in future. By reason whereof the plaintiff says he is entitled to the further sum of ten thousand dollars by way of exemplary damages."

The defendant, by way of demurrer, excepted to the petition, because it did not appear therefrom that the plaintiff was without fault or negligence in the premises; and excepted also to the sufficiency of the allegations claiming exemplary damages; and, by way of answer, denied all the allegations of the petition, and pleaded not guilty; and, for special answer, set up that, if the plaintiff was injured as alleged, "said injuries were caused by the plaintiff's own contributory negligence and want of care in failing to get off the car after the danger was apparent, but before said car upon which the plaintiff was at work had been struck."

The jury returned a verdict "for the plaintiff, and assess his actual damages at eight thousand dollars." Judgment was rendered on the verdict, and the defendant tendered a bill of exceptions, so much of which as related to the points argued in this court was as follows:

First. The court overruled the exception to the sufficiency of the allegations in the petition claiming exemplary damages; *" and [75 allowed the plaintiff, over the defendant's objection, to introduce evidence to the effect

NOTE.—*As to when railroad or other corporations are liable for punitive or exemplary damages*, see note to Lake Shore & M. S. R. Co. v. Prentis, 37: 97.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

As to master's duty to furnish suitable and safe machinery and appliances; and liability to servant for their being insufficient or out of repair, see note to Richmond & D. R. Co. v. Elliott, 37: 728.

As to contributory negligence; imputed negligence; negligence of parent, or child, or husband, or driver; intoxication, see note to Union Pac. R. Co. v. Botsford, 35: 734.

As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master, see note to Baltimore & O. R. Co. v. Baugh, 37: 773.

As to freedom of plaintiff from contributory negligence necessary to entitle him to recover, see note to Stokes v. Saltonstall, 10: 115.

that the engineer and fireman in charge of said engine had been retained in the defendant's employment and had never been censured or reprimanded for the accident in question. To all of which the defendant excepted at the time. But the court in its charge to the jury, after hearing the argument upon the question of exemplary damages, withdrew from their consideration the claim of exemplary damages."

Second. The court overruled the exception that the petition did not show that the plaintiff was without fault or negligence. The defendant thereupon, in support of the answer setting up contributory negligence of the plaintiff, "introduced evidence tending to show that at the time of accident the plaintiff was on top of the car from which he was thrown, and walking upright with his face towards the approaching engine; and further evidence tending to show that the car upon which plaintiff was at work was separated from certain other cars on said track by an open space of fifty or sixty feet, and that the engine in motion ran against and struck certain other cars on said side track, pushed them over this intervening space, and ran them against the car upon which plaintiff had been at work. But the court did not charge upon contributory negligence; to which the defendant excepted."

Third. The plaintiff, in proving his case, introduced the deposition of one Bauer, in which he testified that he was one of those unloading the car upon which the plaintiff was at work, and, "in answer to a question by the plaintiff, and over the defendant's objection that the answer was incompetent, was allowed to testify as follows: 'We didn't know what was coming until she struck the car, for we were busy at work and not thinking of the engine coming in, knowing that they had no right to make any flying switch in there, anyhow.'" "To which ruling the defendant excepted."

Fourth. "In further proof of this case, the plaintiff introduced the witness Bauer to show the character of the work performed by the plaintiff, both before and after the accident; and, over the defendant's objection 76] that it was irrelevant, *incompetent and misleading, said witness was allowed to testify that now the iron foundry 'just keep him on, being he got hurt (referring to the plaintiff) so he could make a living for his wife and family.' To which ruling the defendant excepted."

"To the action of the court in its rulings upon the exceptions to the plaintiff's petition and the testimony in the case, as well as the charge to the jury, the defendant excepted at the time;" and, after the allowance of his bill of exceptions, sued out this writ of error.

The defendant in error suggested that the writ of error had been sued out merely for delay and asked for damages, in addition to interest on the judgment below, under section 1010 of the Revised Statutes and Rule 23 of this court.

Messrs. **John F. Dillon,** *Winslow S. Pierce* and *Harry Hubbard*, for plaintiff in error:

The court erred in admitting evidence to the effect that the engineer and fireman in charge of the engine which caused the accident in question had been retained in defendant's employment, and had never been censured or reprimanded for the accident.

Columbia & P. S. R. Co. v. *Hawthorne*, 144 U. S. 202 (36: 405).

The court erred in failing to charge the jury upon contributory negligence.

Rodrian v. *New York, N. H. & H. R. Co.* 125 N. Y. 526; *Jones* v. *East Tennessee, V. & G. R. Co.* 128 U. S. 443 (32: 478); *Dublin, W. & W. R. Co.* v. *Slattery*, L. R. 3 App. Cas. 1166.

A reversal will be directed unless it appears beyond doubt that the error complained of did not and could not prejudice the rights of the party.

Vicksburg & M. R. Co. v. *O'Brien*, 119 U. S. 99, 103 (30: 299, 300).

Mr. **A. H. Garland,** for defendant in error:

Defendant never presented nor insisted on its general demurrer in the court below, but waived the same.

Bailey v. *Dozier*, 47 U. S. 6 How. 23 (12: 328); *Wilson* v. *Fowler*, 3 Ark. 463; *Duncan* v. *Ripley*, 7 Ark. 100; *Carnall* v. *Crawford County*, 11 Ark. 623; 5 Rob. Pr. 6-17, 101-103.

Plaintiff was engaged in this lawful business; and while thus engaged, was injured by the gross negligence of the defendant's servants while they were looking after its business.

1 Thomp. Neg. 461, 462; *New Orleans, J. & G. N. R. Co.* v. *Bailey*, 40 Miss. 395; *San Antonio Street R. Co.* v. *Cailloutte*, 79 Tex. 341; *Galveston City R. Co.* v. *Hewitt*, 67 Tex. 473, 60 Am. Rep. 32.

The retention in its service of the negligent employé after the act, is proof of ratification.

Thomp. Carriers, 393, 394; *Goddard* v. *Grand Trunk R. Co.* 57 Me. 202-223, 2 Am. Rep. 39; *Perkins* v. *Missouri, K. & T. R. Co.* 55 Mo. 201; *Malecek* v. *Tower Grove R. Co.* 57 Mo. 17; *Graham* v. *Pacific R. Co.* 66 Mo. 536.

The particular error complained of in the court below, and the matter excepted to must be stated with special directness.

Patrick v. *Graham*, 132 U. S. 627 (33: 460); *New York & C. M. S. & Co.* v. *Fraser*, 130 U. S. 611 (32: 1031); *Hanna* v. *Maas*, 122 U. S. 24 (30: 1117).

This court will not undertake to pass either upon the weight or the sufficiency of the evidence to sustain the verdict.

Lancaster v. *Collins*, 115 U. S. 222 (29: 373); *St. Paul Plow Works* v. *Starling*, 140 U. S. 184 (35: 404); *Wilson* v. *Everett*, 139 U. S. 616 (35: 286).

Nor will it notice an assignment which merely complains "that the verdict is contrary to law."

Jones v. *Buckell*, 104 U. S. 554 (26: 841); *Greenhood* v. *Randall*, 111 U. S. 775 (28: 596).

An assignment of error will not be considered by the court, which is merely an objection to the finding of the jury upon the weight of evidence.

Supreme Court Rule 21.

A motion for a new trial cannot be reviewed in this court.

Missouri Pac. R. Co. v. *Chicago & A. R. Co.* 132 U. S. 191 (33: 309); *Dahl* v. *Raumheim*, 132 U. S. 260 (33: 324).

This is a delay case under Rule 23 of this court (Rev. Stat. § 1010).

Barrow v. *Hill*, 54 U. S. 13 How. 54 (14: 48); *Sutton* v. *Bancroft*, 64 U. S. 23 How. 320 (16: 454); *Kilbourne* v. *State Sav. Inst. of St. Louis*, 63 U. S. 22 How. 503 (16: 370); *Phelps* v. *Edgerton*, 131 U. S. app. LXXI. (16: 749); *Whitney* v. *Cook*, 131 U. S. app. CXCVII (26: 569).

Mr. Justice **Gray** delivered the opinion of the court:

The rulings as to the allegations and proof upon the subject of exemplary damages became immaterial by the subsequent instruction of the court withdrawing from the consideration of the jury the claim for such damages, and by the return of a verdict for actual damages only. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451 [26: 141]; *New York L. E. & W. R. Co.* v. *Madison*, 123 U. S. 524 [31: 258].

By the settled law of this court, not controverted at the bar, contributory negligence **78]** on the part of the plaintiff need not *be negatived or disproved by him, but the burden of proving it is upon the defendant. *Inland & S. Coasting Co.* v. *Tolson*, 139 U. S. 551, 557 [35: 270, 272]. The omission of the court to instruct the jury upon the subject of the plaintiff's contributory negligence is not open to exception, because the bill of exceptions does not show that the defendant requested any instruction upon that subject. In England, it is misdirection, and not nondirection, which is the subject of a bill of exceptions. *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 499. In this country, the rule is somewhat more liberal; and the not giving an instruction upon a point in issue may be excepted to, if one was requested, but not otherwise. In a very early case, *Chief Justice* Marshall said: "There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception." *Smith* v. *Carrington*, 8 U. S. 4 Cranch, 62, 71 [2: 550, 553]. As afterwards more fully stated by *Mr. Justice* Story, "it is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, when it was not requested by either party at the trial. It is sufficient for us that the court has given no erroneous directions. If either party deems any point presented by the evidence to be omitted in the charge, it is competent for said party to require an opinion from the court upon that point. If he does not, it is a waiver of it." *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1, 15 [7: 327, 332]. See also *United States Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 342, 353, 354 [19: 457, 460, 461]; *Shutte* v. *Thompson*, 82 U. S. 15 Wall. 151, 164 [21: 123, 127]. A request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions. The testimony of one of the men who were working with the plaintiff in unloading the car at the time of the injury, that they were busy at their work and did not think of the approach of the engine until it struck the car, related to facts which might naturally be within his knowledge, and be apparent from the behavior of the workmen; and was competent, though perhaps not important, evidence upon the issue *of contributory negligence pre- **[79** sented by the defendant's answer.

The testimony as to the circumstances of the continuance of the plaintiff in the employ of the iron works, after being injured, was offered only "to show the character of the work performed by the plaintiff, both before and after the accident;" and was competent evidence upon the question how far his capacity of earning a livelihood had been impaired by his injuries. *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545, 554 [30: 257, 258]; *Richmond & D. R. Co.* v. *Elliott*, 149 U. S. 266 [37: 728].

The writ of error appears to this court to have had no plausible ground to support it, and to have been sued out merely for delay. The motion of the defendant in error is therefore granted, and the judgment affirmed, with interest, and ten per cent damages.

THE AZTEC MINING COMPANY, *Plff. in Err.*, *v.* JOHN W. RIPLEY.

(See S. C. Reporter's ed. 79-81.)

Review of territorial judgment—jurisdiction of this court.

1. Only in cases in which the judgments of the circuit court of appeals are made final by the Judiciary Act of March 3, 1891, can that court review the judgments of the supreme court of a territory.
2. An appeal or writ of error lies to this court from or to the decrees or judgments of the supreme court of the territories, except in cases susceptible of being taken to the circuit courts of appeals, and cases where the matter in dispute exclusive of costs does not exceed the sum of five thousand dollars.

[No. 870.]

Submitted Dec. 18, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of Appeals for the Eighth Circuit, to review a judgment of that court, dismissing a writ of error brought to review a judgment of the supreme court of the territory of New Mexico, affirming a judgment of the district court for the third judicial district, within and for the county of Grant, in said territory, in favor of John W. Ripley against the Aztec Mining Com-

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see notes to Hart v Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

pany, for the sum of $1657.51, damages and costs. On motion to dismiss or affirm. *Affirmed.*

See same case in Circuit Court of Appeals, 10 U. S. App. 383.

The facts are stated in the opinion.

Mr. **Rufus H. Thayer** for defendant in error, in favor of motion.

Mr. **Nathan Frank** for plaintiff in error, in opposition to motion.

The Chief Justice: Judgment was recovered in the District Court for the Third Judicial District, within and for the county of Grant, in the territory of New Mexico, on May 26, 1891, by John W. Ripley against the Aztec Mining Company for the sum of $1657.51 damages and costs, and affirmed on error by the supreme court of that territory, August 19, 1891. The mining company thereupon sued out a writ of error from the United States Court of Appeals for the Eighth Circuit, which was dismissed for want of jurisdiction. 10 U. S. App. 383. A writ of error was thereupon allowed from this court and comes before us upon a motion to dismiss or affirm.

By the 15th section of the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, chap. 517) the circuit courts of appeals, in cases in which their judgments were made final by the Act, were empowered to exercise appellate jurisdiction over the judgments, orders, or decrees of the supreme courts of the several territories; but as this case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, nor a case between aliens and citizens of the United States, or between citizens of different states, it did not belong to either of the classes defined by section six of that Act, as cases in which the judgments or decrees of the circuit courts of appeals should be final, and therefore the Circuit Court of Appeals for the Eighth Circuit properly declined to take jurisdiction.

The last paragraph of the section provides that "in all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, when the matter in controvery shall exceed one thousand dollars besides costs;" and as this case was not made final by that section, a writ 81] of error *would lie were it not that under section 15 that court had no jurisdiction to review the judgment.

As, however, in any case made final, the section made it competent for this court to require, by certiorari or otherwise, such case to be certified for its review and determination with the same power and authority in the case as if it had been brought up by appeal or writ of error; and as the paragraph quoted gave the appeal or writ of error as of right in cases not made final, we are of opinion that it may be properly held that it was the intention of Congress that jurisdiction might be entertained by this court to pass upon the jurisdiction of that court when involving the question of the finality of its judgment under section 6. We have already held that an appeal or writ of error lies to this court from or to the decrees or judgments of the supreme court of the territories, except in cases susceptible of being taken to the circuit courts of appeals, and cases where the matter in dispute exclusive of costs does not exceed the sum of five thousand dollars. *Shute* v. *Keyser*, 149 U. S. 649 [37: 884].

Tested by that rule this case could not have been brought to this court, and as we are clear that the Circuit Court of Appeals for the Eighth Circuit rightly decided that it had no jurisdiction, it could not be brought to that.

Judgment affirmed.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* T. R. JOHNSON.

(See S. C. Reporter's ed. 81-105.)

Federal question—Review of state judgment—claim of immunity—question of general law—suit against receiver—equity jurisdiction—right of claimant.

1. Because a suit brought in a state court might have been brought in the circuit court of the United States, or removed thereto from the state court, it does not follow that the state court decided against any title, right, privilege, or immunity in exercising its jurisdiction.
2. To give this court jurisdiction to review a state judgment against a right or immunity claimed under authority exercised under the United States, the right or immunity must be one of the plaintiff in error and not of a third person.
3. Where the defense was that plaintiff was subject to an order of the United States circuit court (requiring claims against a receiver to be prosecuted by intervention within a certain time) and must resort to that court for the collection of his claim and could not recover a judgment *in personam* collectible by ordinary process, and that his claim was thereby barred; the overruling of that defense was a decision against the validity of the order and against a claim of right or immunity thereunder.
4. The contention for the railway company defendant, that a personal judgment could not be rendered against it because it was not liable for acts of negligence committed by the receiver of its property, was a question of general law and for the state court to pass upon.
5. By the Act of March 3, 1887, chap. 373, as corrected

NOTE.—*As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit*, see note to Roberts v. Lewis, 36: 579.

As to jurisdiction of United States circuit court depending on parties and residence, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to jurisdiction of United States courts over common law offenses, see note to United States v. Coolidge, 4: 124.

As to powers and duties of receivers, see note to Davis v. Gray, 21: 447.

As to receiver's appointment and powers; receiver's certificates; contracts of receivers; liability for claims and damages; payment of wages, etc.; lien of receiver's certificates; liability of purchaser at foreclosure sale, suits by receiver; liability of for personal injuries and for taxes, see note to Olcott v. Headrick, 35: 851.

by the Act of August 13, 1888, chap. 866, a receiver appointed by a United States court may be sued in respect of any act or transaction of his connected with the property, without the previous leave of such court; such suit may be brought in any court of competent jurisdiction.

6. The preservation of general equity jurisdiction over suits instituted against receivers without leave does not make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction.

7. Where the court by its order was about to discharge the receiver of a railroad, appointed by it, but reserved the proceedings for the disposition of pending intervention and such as might be filed within a time fixed, one who did not intervene within that time is not precluded from resorting to a suit in another court for the collection of his claim.

[No. 138.]

Argued Dec. 15, 1893. Decided Jan. 3, 1894.

In error to the Supreme Court of the State of Texas, to review a judgment of that court, affirming the judgment of the District Court of Marion County, Texas, in an action brought by T. R. Johnson, plaintiff, against John C. Brown as receiver of the Texas & Pacific Railway Company and said company defendants, to recover damages for an injury to said plaintiff, alleged to have been received by him, through the negligence of the receiver; said judgment being one of dismissal as to defendant Brown, and for the sum of $15,000, against the defendant railway company. *Affirmed.*

See same case below, 76 Tex. 421.

Statement by *Mr. Chief Justice* **Fuller:**

83] *This was an action commenced by T. R. Johnson in the District Court of Marion county, Texas, September 14, 1888, against John C. Brown, and amended, December 17, 1888, by making the Texas & Pacific Railway Company a party defendant. On January 14, 1889, plaintiff filed his first original amended petition against said defendants, wherein it was alleged that the defendant Brown was on December 15, 1885, duly appointed by the Circuit Court of the United States for the Eastern District of Louisiana receiver of the Texas & Pacific Railway Company and all of its property in the states of Texas and Louisiana; that he qualified as such receiver, December 16, 1885, and entered upon and exercised and performed his duties as such from that date until October 31, 1888, inclusive, and that during that time he operated and managed the property of the defendant corporation in all its parts in said states as a common carrier of freight and passengers, and into and through certain enumerated counties of the state of Texas. The petition, after stating the circumstances of the accident and the ground of liability in that respect, further averred that the receiver was discharged by the court appointing him, October 31, 1888, under an order of October 26, 1888, and that he delivered to the railway company all of its property, consisting of the corpus of said railway and all the earnings and income then in his hands as receiver, unexpended, and all the lands belonging thereto and all improvements and betterments which had been added to the property by him.

The provisions of this order requiring that the property should be so delivered subject to the liabilities of the receiver were specifically alleged and their legal effect and that of the acceptance of the property averred; and it was further stated that under the laws of the state plaintiff was entitled to a lien on the property for the satisfaction of his claim. Reference was also made to an order of May 31, 1888, relating to the termination of the receivership, June 1, 1888, and averring that after that date the road was continuously operated by the company.

The plaintiff further alleged that the receiver was originally *appointed at the instigation [84 and by the consent of the railway company and for its benefit, and that the property in his hands from December 16, 1885, to June 1, 1888, inclusive, was operated and managed by him for the benefit of the defendant company and its property as originally intended, and that the property on June 1, 1888, was redelivered to the defendant corporation, greatly improved in value without any sale or foreclosure and without any third parties acquiring any title thereto or interest therein of any kind. It was finally averred that "the said Brown, as receiver, and under orders and direction of said court and by consent of all parties interested, including defendant company, during the time above mentioned applied all the receipts, earnings and income of said railway under said receivership, after the payment of current expenses, to the permanent improvement of said property to the betterment thereof, and to the purchase of large and valuable additional property for the use and operation of said road, amounting in the aggregate to the sum of three million dollars, all of which money and property is now in the possession of the defendant company as its own and under the conditions heretofore set out. Wherefore the plaintiff brings this suit and prays for citation to defendants according to law, and on final trial for judgment against the defendant John C. Brown, simply establishing the claim of plaintiff against the receivership under his management, and against the Texas & Pacific Railway Company for his damages, fifty thousand dollars, and to fix upon the said property of the said defendant company in the state of Texas a lien to satisfy the judgment rendered herein, for costs, and such other relief as plaintiff may be entitled in law or in equity."

The answer of the defendant Brown set up that at the time the plaintiff was injured he was in the exclusive possession of the railway company, as receiver, appointed by the Circuit Court of the United States for the Eastern District of Louisiana in the suit of the Missouri Pacific Railway Company against the Texas & Pacific Railway Company, operating said road under and in conformity to the orders of said court, and he was so in possession and operating said road in *September, 1888, at the [85 date this suit was commenced; that on October 26, 1888, the judge of the Circuit Court of the United States for the Eastern District of Louisiana made an order in the cause of *Missouri Pacific Railway Co.* v. *The Texas & Pacific Railway Co.*, discharging defendant as receiver, and said discharge was to take effect

and did take effect on October 31, 1888, and the receiver was ordered to deliver and did deliver all the property in his hands as receiver to the railway company, October 31, 1888, in strict compliance with the order of the court; that the railway company took and received the property subject to and charged with all traffic liabilities due to connecting lines and all contracts for which the receiver might be held liable, and also subject to any and all judgments which had been theretofore rendered in favor of intervenors in said cause, as well as such judgments as might thereafter be rendered by the court in favor of intervenors who should file interventions therein prior to February 1, 1889; that he had complied fully with the order of the court and delivered the property to the railway company and had been fully and finally discharged, and he prayed to be dismissed with his costs.

The railway company demurred on the ground that the petition showed no cause of action against it; and also answered stating that at the time the plaintiff was injured he was not in the employment of this defendant but of the receiver; that the receiver was discharged October 31, 1888, by an order entered and filed on the 26th of that month in said cause; that on October 31 and November 1, 1888, the receiver delivered to this defendant all the property held by him as receiver, and fully complied with the order of court discharging him, and the railway company received and accepted the property charged with all traffic liabilities due to connecting lines, with all contracts by which the receiver might be held liable, and with the payment of any and all judgments which had theretofore been rendered in favor of intervenors in the case of *Missouri Pacific Railway Co.* v. *The Texas & Pacific Railway Co.*, in the United States court for the Eastern District of Louisiana, as well as 86] such judgments as *might be rendered in favor of intervenors who might intervene in said cause prior to February 1, 1889, and free from any and all other demands or claims. The answer also contained a general denial.

The cause was tried January 18, 1889, and resulted in a judgment of dismissal as to defendant Brown, and a verdict against the defendant railway company in the sum of fifteen thousand dollars, upon which judgment was entered in the following language: "It is further ordered and adjudged by the court that the plaintiff, T. R. Johnson, do have and recover of and from the defendant, the Texas & Pacific Railway Company, the sum of fifteen thousand ($15,000) dollars, with 8 per cent interest thereon from date, together with all costs in this behalf expended as between plaintiff and said defendant, for which let execution issue."

A motion by the railway company for a new trial was made and denied, and it moved to reform the judgment so that it should be entered up as against the company to "be paid in due course of the administration of the property of the Texas & Pacific Railway Company in the United States Circuit Court for the Eastern District of Louisiana, at New Orleans, and that no execution issue from this court to collect said judgment." This motion was overruled, and the company excepted, and thereupon appealed to the supreme court of Texas, by which the judgment was affirmed. The opinion of that court will be found reported in 76 Tex. 421. The company applied for a writ of error, which was allowed, and the case duly docketed in this court.

Upon the trial of the cause there was read in evidence on behalf of the plaintiff the petition of Brown, receiver, filed May 31, 1888, in the receivership case, for discharge as receiver and the order of the court made on said petition, and filed May 31, 1888. By this petition the receiver represented that the objects contemplated by the different bills filed in the causes named in the title had been accomplished, and all parties had agreed that "after the settlement with the receiver and the payment of costs and other liabilities, or provision for such payment fully made," the receiver should be discharged *and the causes dismissed; and that [87 his accounts were in condition for final settlement up to the first of May. Petitioner asked the court to have an accounting with him as receiver, and, when final settlement was made and petitioner fully indemnified against matters unsettled growing out of the receivership, that the property now in his hands "be turned over to the proper officer of the Texas and Pacific Railway Company." He further represented "that a large number of suits are pending in the courts of Texas and Louisiana against him as receiver for alleged torts connected with the conduct of the railway in its operation, and there are also judgments for small amounts before justices of the peace, aggregating about $12,000, for damages to stock and for property burned by sparks from engines. There are also a considerable number of claims pending in this court by proceedings in intervention which have not been finally settled. A statement of these claims will be filed. Petitioner prays that he be fully protected against these claims, and for such other and proper relief as may seem necessary and proper."

The order thereon directed that an accounting be made by the receiver to the first day of June, "and at the coming in of which report, and it being found satisfactory and accepted, the remaining prayers of the petition will be granted by the court. In the meantime the receiver will continue to hold the property under the orders of the court until the first of June, 1888, at which time, if this order is not vacated the railway and its property may be operated by the corporation under such orders as may be made by the court from time to time and under the supervision and control of the receiver, to the end that the property shall not pass beyond the control of the orders of the court nor of the receiver until the accounting takes place with the receiver and until he is fully protected by the corporation for causes of action originating against him and against the property pending the receivership." Then follows a direction in relation to stating the account.

The plaintiff also read in evidence a petition of the receiver of October 26, 1888, and the order of the Circuit Court of the *United [88 States for the Eastern District of Texas on that petition, bearing the same date.

The petition (omitting titles) and order were as follows:

"To the honorable the judges of the said Circuit Court:

"Your petitioner, John C. Brown, as receiver of the Texas & Pacific railway and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of all the bills in these causes have been accomplished by settlement and agreement of the parties, and evidence of that fact filed as part of the record; that on it being so made to appear the court ordered him to render his accounts as receiver up to the first of June, which has been done, and it has been examined and approved, and since that date petitioner has kept his account as with the company. By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time if said order was not vacated the railway company might operate the road under such orders as the court might make from time to time and under the supervision and control of the receiver. No formal delivery of the road and property in his hands has been made to said railway company, and petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be allowed to account to said company according to his account filed up to the first of June and for all receipts and expenditures by him received and made since the first of June. He has carried over on the present books of the company the cash balance and all other balances of property and assets as found in his hands by his report to the first of June aforesaid, and he is now the president of said railroad company and after his discharge will be in possession of all of said company's road, property, and funds as such for the said company. Wherefore he asks that he be discharged from his said receivership, and that his bond as receiver be vacated and annulled on payment of all costs legally taxable, but he prays the court to make such order as will charge the property 89] so turned over in *the hands of said railway company and its assigns with all liability for which he as receiver is or might be held personally liable. Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him and has been settled up to the 31st day of October, 1888, at which time he asks that his discharge take effect.

"(Signed) Jno. C. Brown."

"The Missouri Pacific Railway Company v. The Texas & Pacific Railway Company. } No. 11,181.

"On consideration of the foregoing petition it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of the Texas & Pacific Railway in the above entitled causes, be, and he is hereby, directed to make delivery unto said Texas & Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1st, 1888, and for all receipts and expenditures by him received and made since the said 1st June, 1888. Such delivery will be made as of October 31st, 1888. It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and canceled. It is further ordered that said property nevertheless shall be delivered to and received by said Texas & Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors, while it retains the cases for these determinations or interventions now pending and undetermined or which may be filed prior to February, 1889, together with *needful ex- [90 penses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assigns to the same extent it could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property. The bills in these causes will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver as such up to said thirty-first October, 1888, be presented and prosecuted by intervention prior to February first, 1889, and if not so presented by that date that the same be barred and shall be a charge on the property of said company. It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge and a notice to said claimants to make claim within the time aforesaid, to wit, the first of February, 1889, and that he post a notice of similar purport in the station-houses of said railway.

"New Orleans, October 26th, 1888."

The deposition of John C. Brown was also read in evidence, in which he testified: That he was receiver from December 16, 1885, to and including October 31, 1888; that "all of the earnings and income of the road, after paying operating expenses, in addition to over two millions of dollars voluntarily contributed by the stockholders, were appropriated to the improvement of the road in my hands as receiver;" that the expenditure of the money above alluded to was made under orders of the United States Circuit Court for the Eastern District of Louisiana, at New Orleans; that the improvements and betterments were highly necessary to carry on the business of the road and to operate it as a common carrier; that "debts were created to raise money to make said *improvements to the amount of near [91 ly two millions five hundred thousand dollars, the larger portion of which has been paid, and

some of which is in litigation;" that the circumstances under which the improvements were made were, briefly, as follows: "In the summer or early autumn of 1885 the owners of the property became satisfied that the company could no longer continue paying interest upon the bonded debt without first expending a large amount of money in the renewal of tracks, raising of roadway, widening cuts and embankments, putting in a large amount of new cross-ties, purchasing a large amount of rolling stock and motive power, and the renewal of bridges, etc. A committee was raised by the board of directors to give a personal inspection of the line with the aid of experts and report to the board the condition of the property and the amount necessary to place the property in a fair condition. The ultimate result of the report of that committee was to place the road in the hands of a receiver and suspend the payment of interest, it being then believed that it would be necessary to sell the road finally under foreclosure of mortgage. The committee of reorganization afterwards devised the plan which was approved by the parties in interest which avoided final foreclosure. In the meantime the improvements aforesaid were made."

Plaintiff further offered to prove the money value of the improvements and betterments put upon the road during the receivership, whereupon it was admitted that "such betterments placed on said railroad out of the earnings of the road in excess of the operating expenses, while in the hands of the receiver were of value sufficient to more than cover the amount claimed by plaintiff in this suit."

The record also contains the evidence as to the circumstances surrounding the accident and the nature of the injuries inflicted.

The supreme court of Texas held that a railway company, in the absence of some statute so providing, will not be liable for the acts of its receiver by reason alone of his relation to it; but that if such company and its creditors should by collusion procure a receivership, or if the receiver in fact operated the road under orders of a court without jurisdiction, it would 91] *seem that the railway company would be bound by all acts of such receiver: That a claim for damages caused by injuries inflicted through the negligence of the receiver while he was operating the railway is entitled to payment out of current receipts, and if the current earnings be invested by the receiver in betterments on the road, which, without sale, is returned to the company at the close of the receivership, then the company must be held to have received the property, charged with any claim which the receiver ought to have paid out of the earnings: That when a receiver has been discharged and the property all returned to the company under order of the court in which the proceedings were had, the control of the court over the property is ended, and the property, when released from the custody of the court, stands subject to any claim that may rest against it: That the order of the United States Circuit Court for the Eastern District of Louisiana, in the receivership proceedings affecting the Texas & Pacific Railway, to which the plaintiff was not a party, prescribing that all persons who had claims, with which the property might be charged, should present them by intervention to that court, was without authority of law and not binding upon the plaintiff as affecting his right to enforce his claim by suit; and that the time within which a claim for damages might be prosecuted against a railway company was fixed by law and could not be altered by order of court: That under the Act of Congress of March 3, 1887, persons having claims against receivers might sue upon and establish them in any court having jurisdiction, and this right could not be nullified by order of court; and that after discharging the receiver and restoring the property to its owners, the United States court could not maintain such jurisdiction over the matter as to prevent the prosecution of such claim to judgment and execution: That a suit in a state court for damages for personal injuries caused by the negligent operation of the Texas & Pacific Railway while in the hands of a receiver could be maintained against the railway company after its property was restored to it, the current earnings of the road having been used by the receiver in improving it.

*Other rulings were made in reference [92 to the merits upon which the recovery rested.

Messrs. **John F. Dillon** and *Winslow S. Pierce*, for plaintiff in error:

All questions in this case are open for review by this court.

Union Pac. R. Co. v. *Myers* ("*Pac. R. Removal Cases*") 115 U. S. 1 (29: 319).

Every question involved in the present suit is a Federal question.

Osborn v. *Bank of the United States*, 22 U. S. 9 Wheat. 738 (6: 204); *McNulta* v. *Lochridge*, 141 U. S. 327 (35: 796).

The state court had no power to render a personal judgment against the Texas & Pacific Railway Company upon a cause of action arising out of the negligence of its receiver, nor had it power or jurisdiction to award execution against the railway company upon such judgment.

Farmers Loan & T. Co. v. *Central R. of Iowa*, 7 Fed. Rep. 537; *Hicks* v. *International & G. N. Co.* 62 Tex. 40; *Godfrey* v. *Ohio & M. R. Co.* 116 Ind. 30; *Bell* v. *Indianapolis C. & L. R. Co.* 53 Ind. 57; *Ryan* v. *Hays*, 62 Tex. 42; High, Receivers, § 396; Beach, Receivers, § 72.

The equity upon which the trial court and the supreme court of Texas relied in the rendition and affirmance of the judgment below did not arise in this cause.

Mobile & O. R. Co. v. *Davis*, 62 Miss. 271; *Williams* v. *Gibbes*, 58 U. S. 17 How. 239 (15: 135); *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 247 (4: 382); *Wiswall* v. *Sampson*, 55 U. S. 14 How. 52 (14: 322).

The order of the Federal courts retaining the bills, affording opportunity for intervention, and limiting the time within which interventions could be made so as to establish intervening claims as charges upon the property surrendered, was a legitimate, proper and salutary exercise of jurisdiction.

Brown v. *Brown*, 71 Tex. 357; *Dillingham* v. *Anthony*, 3 L. R. A. 634, 73 Tex. 47; *Harding* v. *Nettleton*, 86 Mo. 658; *Jesup* v. *Wabash, St. L. & P. R. Co.* 44 Fed. Rep. 663.

The personal claim was against the receiver and, before property surrendered by him could be reached with an equitable charge for his liabilities, the claim must have been ascertained and reduced to judgment.

1 Pom. Eq. Jur. § 178; 3 Pom. Eq. Jur. § 1415; *Brown* v. *Long*, 36 N. C. 190, 36 Am. Dec. 43; *Massey* v. *Gorton*, 12 Minn. 145, 90 Am. Dec. 287; *Van Weel* v. *Winston*, 115 U. S. 228 (29: 384); *Brown* v. *Wabash R. Co.* 96 Ill. 297; *Davis* v. *Duncan*, 19 Fed. Rep. 477.

The power in such cases to make orders limiting the time for presentation of claims in order that they shall be chargeable upon the surrendered property has been clearly recognized by this court.

Olcott v. *Headrick*, 141 U. S. 543 (35: 851); *Union Trust Co.* v. *Morrison*, 125 U. S. 591 (31: 825); *Pine Lake Iron Co.* v. *La Fayette Car Works*, 53 Fed. Rep. 853; *Muller* v. *Dows*, 94 U. S. 444 (24: 207).

Messrs. **H. J. May**, *A. H. Garland* and *C. A. Culberson*, for defendants in error:

A refusal by the highest court of the state, in a suit to quiet title to give effect to a judgment of the circuit court of the United States, was held not to be a question of which this court had jurisdiction.

Giles v. *Little*, 134 U. S. 645 (33: 1062).

The question of title from the United States, upon construction, between parties, not overthrowing that title, in a state court gives no jurisdiction here.

California v. *Jackson*, 112 U. S. 233 (28: 712); *McStay* v. *Friedman*, 92 U. S. 723 (23: 767); *Romie* v. *Casanova*, 91 U. S. 379 (23: 374).

This court has no jurisdiction in cases of decisions by the courts of a state against a mere assertion of an exercise of authority of the United States—the validity of the authority must be in question.

Millingar v. *Hartupee*, 73 U. S. 6 Wall. 259 (18: 828); *Cook County* v. *Calumet & C. Canal & D. Co.* 138 U. S. 635 (34: 1110).

The validity of Judge Pardee's order is not denied nor is any denial of its validity made the subject of inquiry.

Hartell v. *Tilghman*, 99 U. S. 547 (25: 357); *Montgomery* v. *Hernandez*, 25 U. S. 12 Wheat. 129 (6: 575); *Maney* v. *Porter*, 45 U. S. 4 How. 55 (11: 873); *Wynn* v. *Morris*, 61 U. S. 20 How. 3 (15: 800); *Winona & St. P. R. Co.* v. *Plainview*, 143 U. S. 371 (36: 191); *Hopkins* v. *McLure*, 133 U. S. 380 (33: 660); *Manning* v. *French*, 133 U. S. 186 (33: 582); *San Francisco* v. *Itsell*, 133 U. S. 65 (33: 570).

Motions in the district court for new trials cannot be passed on by this court.

Dahl v. *Raunheim*, 132 U. S. 260 (33: 324).

Service was regularly had upon plaintiff in error, the plea to the jurisdiction not being insisted upon was waived, and plaintiff answered in bar.

Galveston County v. *Noble*, 56 Tex. 575; *Kauffman* v. *Wootters*, 138 U. S. 285 (34: 962).

The court had jurisdiction to determine the rights of all parties before the court in and to the property in its custody. But it could not affect the rights of parties not in some manner brought within its jurisdiction.

Freem. Judgm. §§ 118, 154, 155, 190; *Shelby* v. *Bacon*, 51 U.S. 10 How. 56 (13: 326); *Kendall* v. *Creighton*, 64 U.S. 23 How. 90 (16: 419); *Andrews* v. *Smith*, 5 Fed. Rep. 833; *Re Howard*, 76 U. S. 9 Wall. 175 (19: 634); *Central Trust Co.* v. *St. Louis, A. & T. R. Co.* 40 Fed. Rep. 426, 41 Fed. Rep. 554, 555; *Mercantile Trust Co.* v. *Laneville Valley R. Co.* 16 Blatchf. 324.

The question is not one of jurisdiction, but is one of contempt. In such cases the remedy is not by plea to the jurisdiction, but by an injunction or an attachment for contempt.

Beach, Receivers, §§ 171, 215; *Kinney* v. *Crocker*, 18 Wis. 80; *St. Joseph & D. C. R. Co.* v. *Smith*, 19 Kan. 225; *Allen* v. *Central R. Co.* 42 Iowa, 683; *Hills* v. *Parker*, 111 Mass. 508; *Chautauque County Bank* v. *Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Camp* v. *Barney*, 4 Hun, 373; *Sprague* v. *Smith*, 29 Vt. 421, 70 Am. Dec. 424.

The receiver Brown, though appointed by the law, was the representative of the plaintiff. The road and its property are, therefore responsible for its negligence.

American Loan & T. Co. v. *Toledo, C. & S. R. Co.* 29 Fed. Rep. 416; *Sage* v. *Memphis & L. R. R. Co.* 5 McCrary, 643; *Ryan* v. *Hays*, 62 Tex. 47, 48; *Bartlett* v. *Keim*, 50 N. J. L. 260, 35 Am. & Eng. R. Cas. 15.

Having accepted and managed the property under this order, which "fully protected" the receiver, the company is liable to parties whose suits were pending when the petition was filed and the order entered, the order never having been revoked.

Beach, Receivers, § 735; High, Receivers, § 398b; Wood, Prac. Ev. § 62; *Murphy* v. *Orr*, 32 Ill. 489.

The exclusive jurisdiction, possessed over the subject-matter of this suit, terminated with the final decree discharging the receiver and directing him to surrender all the property to the railroad company.

Mobile & O. R. Co. v. *Davis*, 62 Miss. 271, 26 Am. & Eng. R. Cas. 428.

The receiver must manage and operate the property according to the requirements of the valid laws of the state in which such property shall be situated.

Blair v. *Walker*, 26 Fed. Rep. 73; *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 (24: 858); *Orvis* v. *Powell*, 98 U. S. 178 (25: 239); *Swift* v. *Smith*, 102 U. S. 450 (26: 196); *Moseby* v. *Burrow*, 52 Tex. 396.

Under the "general equity jurisdiction" of the court appointing the receiver, that court cannot declare the rights of defendants, in respect to their damages, without having them before the court or in any manner subjecting them to the jurisdiction of the court.

Paige v. *Smith*, 99 Mass. 395; *Atkins* v. *Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 161; *Hunt* v. *Columbian Ins. Co.* 55 Me. 290, 92 Am. Dec. 592.

As the defendants in error were not parties to the decree, they are not bound by the decree and may sue the company to which the fund was delivered under the decree.

Bradstreet v. *Neptune Ins. Co.* 3 Sumn. 601; *Windsor* v. *McVeigh*, 93 U. S. 274 (23: 914); *Andrews* v. *Smith*, 5 Fed. Rep. 833; *Re Howard*, 76 U. S. 9 Wall. 175 (19: 634); *Shelby* v. *Bacon*, 51 U. S. 10 How. 66 (13: 330); *Kendall* v. *Creighton*, 64 U. S. 23 How. 90 (16: 419);

Miller v. *Loeb*, 64 Barb. 454; Freem. Judgm. §§ 118, 154, 155, 190; Cooley, Const. Lim. 498, 499.

The notice which is required to be given claimants by publication and posting, provided for in the last paragraph of the order of October 26th, 1888, was not given.

Wade, Notice, §§ 1029, 1030; *Woodruff* v. *Jewett*, 115 N. Y. 275; *Porter* v. *Sabin*, 149 U. S. 480 (37 818).

No court has authority to invade the jurisdiction of another state, and with or without "service of process compel parties there resident or being to submit their controversies to the determination" of that court.

Brigham v. *Luddington*, 12 Blatchf. 237; *Folger* v. *Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747; *Chandler* v. *Siddle*, 3 Dill. 477; *Booth* v. *Clark*, 58 U.S. 17 How. 322 (15: 164).

The claim against the receiver is in the nature of a claim against the property in his hands, upon which, in equity, a charge and lien exists.

Combs v. *Smith*, 78 Mo. 32; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 (29: 963); *Turner* v. *Indianapolis, B. & W. R. Co.* 8 Biss. 527; *Meara* v. *Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633; *Com.* v. *Runk*, 26 Pa. 235; *Kain* v. *Smith*, 80 N. Y. 458, 2 Am. & Eng. R. Cas. 554; *Stratton* v. *European & N. A. R. Co.* 76 Me. 269, 17 Am. & Eng. R. Cas. 277; High, Receivers, § 255.

The original property which came to his hands may be followed in any court of competent jurisdiction and impressed with the lien.

Farmers Loan & T. Co. v. *Central R. of Iowa*, 7 Fed. Rep. 542; *Stratton* v. *European & N. A. R. Co. supra; Chicago, R. I. & P. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 392 (19: 117); Adams, Eq. 308, 309; Story, Eq. Jur. §§ 1251, 1252; 1 Perry, Tr. §§ 241, 242; 2 Pom. Eq. Jur. §§ 1046-1048; 2 Morawetz, Priv. Corp. §§ 780, 790, 791, 794.

The road is liable for the claims against the receiver, because over two million three hundred thousand dollars, the net earnings of the receivership, out of which the claims were payable, was diverted from its equitable course and placed in renewals and betterments, which were delivered to appellant upon the discharge of the receiver.

Union Trust Co. v. *Souther*, 107 U. S. 591 (27: 484); *Burnham* v. *Bowen*, 111 U. S. 776 (28: 596); *Klein* v. *Jewett*, 26 N. J. Eq. 474; *Texas & P. R. R. Co.* v. *Cox*, 3 145 U. S. 593 (36: 829).

Judgments rendered against Brown, receiver, were binding and conclusive on the company.

Swann v. *Fabyan*, 110 U. S. 590 (28: 252); *Turner* v. *Indianapolis, B. & W. R. Co.* 8 Biss. 527.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is a writ of error to review the judgment of the highest court of a state in which a 98] decision in the suit could be *had, under section 709 of the Revised Statutes, providing for such review where the validity of an authority exercised under the United States is drawn in question and the decision is against its validity, or "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed, by either party, under such Constitution, treaty, statute, commission or authority."

Because the suit might have been brought in the circuit court of the United States, or removed thereto from the state court on the ground that it was one arising under the laws of the United States, in that the Texas & Pacific Railway Company was a corporation organized under and by virtue of acts of Congress, it does not follow that the state court decided against any title, right, privilege, or immunity in exercising its jurisdiction. The railway company was not exempted from suit in the state courts by the law of its creation or any other Act of Congress; and we perceive no title, right, privilege, or immunity secured by that law, which was denied by the judgment under consideration.

Nor can jurisdiction be maintained on the ground that a right or immunity was claimed under the authority exercised by the receiver in virtue of the order of the circuit court of the United States, which right or immunity was denied, as in *McNulta* v. *Lochridge*, 141 U. S. 327 [35: 796]. The judgment was in favor of the receiver and the writ of error is brought by the company, and it is well settled that the right or immunity must be one of the plaintiff in error and not of a third person only. *Ludeling* v. *Chaffe*, 143 U. S. 301 [36: 313]; *Giles* v. *Little*, 134 U. S. 645 [33: 1062].

The validity of no treaty or statute of the United States was drawn in question, nor was any claim of right or immunity set up under the Constitution or any treaty or statute of, or commission under, the United States, so that we are confined to the inquiry whether the validity of an authority exercised under the United States in any other regard than above indicated, *or any claim under such authority, [99] was denied. And as the defense was directly made that the plaintiff below was subject to the order of October 26, and must, therefore, resort to the court which entered it for the collection of his claim, and could not recover a judgment *in personam*, collectible by the ordinary process; and, moreover, that his claim was thereby barred; the overruling of that defense may properly be held to have amounted to a decision against the validity of the order, or against a claim of right or immunity thereunder.

As respects the contention for the railway company that a personal judgment could not be rendered against it because it was not liable for acts of negligence committed by the receiver, that was a question of general law and for the state court to pass upon. In the view of that court, a railway campany might be held directly liable when a receiver is appointed in an amicable suit at the instigation of the company and for the company's own purposes, and, these purposes being accomplished, the property is returned to its owner, the rights of no third persons as purchasers intervening, upon the ground that the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the

court, which under such circumstances he would only be *sub modo*. But as the court did not feel authorized to entertain a conclusion which might carry the implication that this receivership would have been created or continued, although its object had only been to place the property temporarily beyond the reach of creditors until it could be augmented in value by improvements made from earnings under the protection of the court, that rule was not applied in this case. The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings to an extent far greater than sufficient to pay the plaintiff had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute (Tex. Laws 1887, chap. 131, p. 120, § 6) and irrespective of statute, on equitable principles applicable under the facts.

100] *The railway company contends that its liability turned upon the fact that it took possession upon condition that its property should be charged with the receivership liabilities, and that it is immaterial whether the property was so charged by the order of the circuit court of the United States or by operation of general doctrines of equity, because, in either aspect, it was the property alone that was charged; if by the order of the court, it could only be with such liabilities as had been or should be adjudged by that court; if upon equitable principles, then it could only be to the extent of the amount diverted to betterments, and defendant in error should have been confined to a lien on specific improvements, measured by the proportion which the aggregate of like claims would bear to the amount diverted; but the state court decided otherwise, holding, in view of the facts disclosed, that the burden assumed by the company was that of a direct liability, and that judgment against it could be rendered in the usual form and collected in the ordinary way.

These conclusions did not rest upon the order of October 26 as affirmatively imposing a specific liability upon the company, and the only question for us to determine is, whether in ruling that that order did not preclude such a judgment as was rendered and did not operate to require the defendant in error to submit his judgment to the circuit court of the United States at New Orleans to obtain its collection in such a manner and to such extent as that court might be advised, a claim of right or immunity under an authority exercised under the United States was erroneously decided against.

The position of plaintiff in error seems to be that the order constituted matter in bar of a recovery against the railway company on the merits, on the theory that the property passed to the company upon certain conditions as to outstanding claims, irrespective of the fact that those conditions were intended to secure payment in that court and not to defeat it, and that the company only resumed its own, augmented in value by the use of earnings which should have been applied to the extinguishment of such claims; or that the judgment should have been originally rendered, or been reformed, so as *to provide for payment **[101** in due course of administration in the circuit court, and not otherwise.

By section three of the Act of March 3, 1887, chap. 373 (24 Stat. at L. 552) as corrected by the Act of August 13, 1888, chap. 866 (25 Stat. at L. 433) every receiver appointed by a court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with the property, without the previous leave of the court by which such receiver was appointed. Necessarily, such suit may be brought in any court of competent jurisdiction and proceed to judgment accordingly. This suit was so brought; the railway company, on being made a party, answered in bar, and judgment followed.

Nevertheless it is insisted that this recovery was effective only as a judicial ascertainment of the amount, and that the judgment itself could only be realized out of the property of the company after it had been presented to the court of the receivership cause and been allowed for payment, subject to the contingency that that court might hold that it was exhibited too late.

This result is declared to arise out of the necessities of the case and to be recognized in the last clause of the third section of the Act of Congress of March 3, 1887, which adds to the provision that suit may be brought against a receiver without leave of the appointing court, the words "but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed so far as the same shall be necessary to the ends of justice." And it is also urged, in repetition of the argument that judgment *in personam* could not be recovered, that this suit as against the railway company was necessarily a proceeding *in rem*, and could only be instituted and the property charged in the court having jurisdiction of the *res*. In other words, the contention assumes that all the property of the company after the discharge of the receiver was still under the protection of the Circuit Court of the United States for the Eastern District of Louisiana in respect of subjection to this and like claims.

We are of opinion that these views are inapplicable to the *case. This action was in **[102** itself in no sense a proceeding *in rem*, and the state court has held on other than Federal grounds that the company was directly liable. The property was no longer in the custody of the circuit court, and it had no possession that would be interfered with by the levy of an execution, so that defendant in error was not obliged to resort to an intervention in that court before he could collect, unless he was personally bound to do so by force of an adjudication to that effect operating upon him. In this connection it should be observed that the property was not sold but merely redelivered to the company. No judgment *in rem* was entered; no fund existed through a sale in foreclosure; the earnings far exceeded the debts during the temporary management; and it did not appear that either in reference to expenses incurred in the administration or in the matter of claims resting on controverted priorities, or otherwise, there were any equities to be adjusted which

required the further exercise of jurisdiction.

The order of October 26 was entered by the Circuit Court for the Eastern District of Louisiana, but the record does not disclose that similar action was taken in Texas, although the titles of the petitions and orders of May 31 and October 26 include the names of two cases as pending in the northern district of the latter state, and reference is made to them; but in any view, the Circuit Court for the Eastern District of Louisiana was deemed the court of primary administration.

The order provided that the property should be delivered to the railroad company subject to "such judgments as may be hereafter rendered by the court in favor of intervenors, while it retains the cases for these determinations or interventions now pending and undetermined, or which may be filed prior to February 1, 1889," and that such as were not so presented and prosecuted by intervention by that date should be barred, and should not "be a charge on the property of said company;" and further, that "the court may, if needful, for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property."

103] *The general equity jurisdiction of the circuit court no doubt embraced the authority to hold possession of the property and to determine the rights of all persons who were parties, or who made themselves parties, to the proceedings before it; and if the property sequestrated had gone to sale and a fund been realized for distribution, then, upon notice appropriate to proceedings *in rem*, the defendant in error might have been bound by the disposition thereupon made; yet, not only was there no proof that the notice required by the order was ever given, or any other notice, but the receiver was discharged, his bond canceled, and the property surrendered, without sale or transfer, so that it is in effect sought to have defendant in error held personally bound by an order to which he was not a party, entered by a court into which he was not brought in any manner. It is impossible to concede that he was in contempt in the recovery of his judgment or would be in enforcing it against the company's property, but that is the necessary result of the position taken by counsel.

Certainly the preservation of general equity jurisdiction over suits instituted against receivers without leave does not, in promotion of the end of justice, make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction; and the right to sue without resorting to the appointing court which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it.

The order was not a decree *in rem* condemning the particular thing seized, but an order providing for the resumption of possession thereafter, if found necessary, to the end that such a decree might then be granted; and we are aware of no principle which would justify us in holding that a court, under the circumstances which existed here, could part with its jurisdiction over property by the complete surrender thereof to its owner, and at the same time constructively retain jurisdiction over such property so as in that respect to bind those who would otherwise be unaffected by its orders.

*The case was not one of a fund in [104 court, and the authorities upon the question of limitation of time for the presentation of claims to share in the distribution of such a fund are not in point. It was not a case of purchase in which compliance with stipulated conditions forms part of the consideration, and the extent of the burdens assumed is defined. It did not present the question of the power of the court in the instance of a sale to deliver the property free from any liabilities whatever incurred in administration. And we do not think the circuit court attempted to accomplish the result contended for, or that its order is open to the interpretation put upon it by counsel for the company.

The receiver was about to be discharged and the property redelivered to the company. On the one hand, the receiver was entitled to protection from liability, and on the other, just claims were entitled to be paid. The circuit court sought to secure both objects by the terms of the order and the conditions annexed to the acceptance of possession, but did not regard itself as constrained to indefinitely prolong the pendency of the equity proceedings for that purpose. It reserved those proceedings, therefore, for the disposition of pending interventions and such as might be filed within a time fixed, at the expiration of which the court could not be called on to allow further claims and assert control over the property for their satisfaction. They would thereafter be barred from prosecution under those proceedings.

In this way the circuit court recognized and relieved itself from the obligation to see that no injustice resulted from the action it was taking, which action operated to withdraw from claimants against the receiver the security of his bond and possibly of the property. But after February 1, 1889, those who had not intervened would cease to be entitled to resort to the circuit court in the equity suits, and would be remitted to such other remedies as might be within their reach. If the recovery of defendant in error and the collection of his judgment had been dependent upon the order or upon any action of the circuit court in his favor in the original suits, a different question would have been presented, but as the matter *stands[105 we perceive no aspect in which that order can be treated as operating in limitation of the rights of defendant in error except in the particular of resort to the circuit court as above indicated.

From these considerations we conclude that there was no error in the result arrived at by the supreme court of Texas in the disposition of Federal questions, and its judgment is accordingly affirmed.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Error,*
v.
TAYLOR M. GRIFFIN and Others.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Error,*
v.
E. S. OVERHEISER.

[Nos. 136, 137.]

IN ERROR in the Supreme Court of the State of Texas.

Same counsel as in preceding case.

Mr. Chief Justice **Fuller:** These cases are reported in 76 Texas, 441, 437, and involve here the same questions as those in the case above decided.

The judgments are severally affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.,*
v.
HENRY SAUNDERS.

(See S. C. Reporter's ed. 105-109.)

Jurisdiction of this court—plea in bar—when objection is too late.

1. Where the judgment of the circuit court, after having been reduced by remittitur, does not exceed the sum of five thousand dollars, exclusive of the costs, and the jurisdiction of the court below was not involved within the meaning of the Act of February 25, 1889, chap. 236 (25 Stat. at L. 693) the writ of error will be dismissed.
2. A plea which was not a plea to the jurisdiction of the circuit court, but a plea in bar which did not seek to oust the jurisdiction that court, does not present any question of jurisdiction, which this court can consider.
3. Where the objection that the suit was brought in the wrong district, came after the defendant had pleaded in bar, it was too late.

[No. 162.]

Submitted Dec. 13, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas, to review a judgment in favor of plaintiff, Henry Saunders, against the defendant, The Texas & Pacific Railway Company, for damages for injuries sustained by plaintiff through the negligence of the receiver of that company, his agents and employés. *Dismissed.*

NOTE.—*As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit,* see note to Roberts v. Lewis, 36: 579.

As to jurisdiction of United States circuit court depending on parties and residence, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute, see note to Schunk v. Moline, M. & S. Co. 37: 256.

Statement by *Mr. Chief Justice* **Fuller:**

*This was an action brought by Henry [106 Saunders, June 4, 1888, in the Circuit Court of the United States for the Eastern District of Texas against John C. Brown, the receiver of the Texas & Pacific Railway Company, to recover damages for injuries sustained by Saunders through the negligence of the receiver, his agents and employés, as he alleged. On February 6, 1889, plaintiff below filed an amended petition making the railway company a party defendant, and alleging the discharge of the receiver and the surrender of its property to the company, without sale, improved by the expenditure of some millions of dollars in betterments paid for out of, and augmented by property, both real and personal, purchased with the earnings during the receivership; and further, that under the order turning over the property, the company took it charged with the receiver's liabilities, which included plaintiff's claim, and that on that account, as well as because plaintiff was entitled to a lien on the betterments and property acquired by the use of the earnings, the company was liable to plaintiff; and he prayed for judgment and for general relief. The death of defendant Brown was suggested and the cause dismissed as to him. The company filed a demurrer and answered on September 12, 1889, assigning as ground of demurrer that the petition showed no cause of action and answering by a general denial, and the averment of contributory negligence.

On September 23, 1889, the railway company, by counsel and not in its own person, further answered, pleading: (1.) "That at the time plaintiff was injured the Texas & Pacific Railway and all its property was in the possession and control of John C. Brown, as receiver, appointed by the United States Circuit Court for the Eastern District of Louisiana. Defendant says that on October 31, 1888, the said John C. Brown was discharged from his trust as receiver by an order made October 26, 1888, in the United States Circuit Court for the Eastern District of Louisiana, and he was ordered to deliver all property in his hands to the defendant, and the defendant was ordered to receive said property, and did receive it on October 31, 1888, charged with all traffic liability due by the *receiver to connecting [107 lines, charged with the performance of all contracts made by the receiver, and charged with the payment of all judgments that may be rendered in favor of claimants who may intervene in the cause of the *Missouri Pacific Railway Company* v. *The Texas & Pacific Railway Company*, in the United States Circuit Court for the Eastern District of Louisiana, at New Orleans, prior to February 1, 1889, and free from all other demands or claims arising against the receiver and prior to October 31, 1888. Defendant says that plaintiff did not intervene in said cause prior to February 1, 1889. Wherefore the defendants say they are not liable at suit of plaintiff in this court, and, if liable at all, they are only liable upon due intervention of plaintiff at New Orleans, as is provided by the order of ——— discharging said receiver; which order is hereby attached and made a part of this plea. Wherefore they pray that this cause be dismissed." (2.) De-

fendant "demurs to plaintiff's petition, and says that petition shows no cause of action, if this court has jurisdiction; and this court has not jurisdiction over the parties plaintiff and defendant nor of the subject-matter." (3.) General denial. (4.) Contributory negligence. (5.) Statute of limitations.

The cause coming on for trial, it appears from the bill of exceptions that the defendant first presented the plea above numbered one, which the court overruled and held insufficient. The defendant then presented its plea or demurrer to the jurisdiction on the ground that Saunders "resided in the eastern district of Texas, and the defendant Brown resided in the county and city of Dallas, Texas, which is by law placed in the northern district of Texas, and there was no fact alleged to give this court jurisdiction," which was also overruled. Exceptions were duly saved. The trial then proceeded, and, among other things, the order of the Circuit Court for the Eastern District of Louisiana for October 26, 1888, discharging the receiver and directing the delivery of its property to the railway company was put in evidence; and it was also proved that plaintiff had resided in Dallas, Texas, since May 2, 1888. At the close of the testimony, defend ant moved to dismiss the cause because plaintiff [108] must intervene at New Orleans, *and, this being overruled, further because, on the pleadings, plaintiff and defendant both resided in the northern district of Texas, which was also denied.

The jury returned a verdict in favor of plaintiff for $7500, which, at the suggestion of the court, plaintiff reduced by remittitur to $2500, and, for the recovery of the latter sum, judgment was entered. The case was then brought on writ of error to this court, and the record filed August 30, 1890.

Messrs. **John F. Dillon** and *Winslow S. Pierce* for plaintiff in error.

Messrs. **James Turner** and *W. H. Pope* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We are of opinion that the writ of error must be dismissed because the judgment does not exceed the sum of five thousand dollars, exclusive of costs, and the jurisdiction of the court below was not involved within the meaning of the Act of February 25, 1889, chap. 236, (25 Stat. at L. 693) empowering this court to review the judgments of circuit courts, when such is the fact. The order of October 26, 1888, of the Circuit Court for the Eastern District of Louisiana directed, among other things, that "all claims against the receiver, as such, up to said 31st day of October, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date, that the same be barred and shall not be a charge on the property of said company." Assuming that the plea based upon the order in question was the sole plea, filed in due time, and technically sufficient in form, it is enough to observe that it alleged that by the terms of that order the property of the company was freed from all demands and claims arising against the receiver and prior to October 31, 1888, which were not adjudicated by the United States Circuit Court for the Eastern District of Louisiana in the cause of the *Missouri Pacific Railway Co.* v. *The Texas & Pacific Railway Co.* *upon intervention prior to Feb- [109] ruary 1, 1889, and that the plaintiff did not intervene in said cause prior to that day. Without discussing the effect of that order, which has already been sufficiently considered in *Texas & Pacific R. Co.* v. *Johnson*, *ante*, p. 81, it will be perceived that on September 23, 1889, when this plea was filed, the time within which the Circuit Court for the Eastern District of Louisiana would take cognizance of the plaintiff's claim had long before expired and the claim was barred as set forth by the plea, certainly so far as that court was concerned, and if the company, if liable at all, was only liable on intervention in that court as the plea asserted, then the plaintiff could not maintain any action in respect of his supposed cause of action. The plea was, therefore, not a plea to the jurisdiction, but a plea in bar. It did not seek to oust the jurisdiction of the Circuit Court for the Eastern District of Texas by reason of jurisdiction in the Circuit Court for the Eastern District of Louisiana or elsewhere, and so give the plaintiff a better writ, but to defeat his recovery altogether. We do not think this presented any question of jurisdiction, as such, which we could consider.

As to the suggestion that the suit was brought in the wrong district, that objection, if it could be raised by the company at all, came after the defendant had pleaded in bar and too late. *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 [35:659]; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 [36:829].

Under these circumstances, as no question of the jurisdiction of the circuit court was open to inquiry, we do not regard this case as coming within the Act of Congress referred to.

Writ of error dismissed.

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*THE TEXAS & PACIFIC RAIL- [110] WAY COMPANY, *Plff. in Err.*, *v.* HENRY HORN.

(See S. C. Reporter's ed. 110, 111.)

Jurisdiction as to amount—Act of Feb. 25, 1889—plea in bar.

1. Where the verdict in the circuit court was for $11,000 and judgment was entered for that sum, and plaintiff entered a remittitur for $6001.00, and it was ordered that execution issue for $4999.00 and the bill of exceptions and the order of allowance of appeal and the bond and citation describe the judgment as for $4999.00, the plaintiff in error cannot claim that the judgment is for a larger sum, although the order allowing the remittitur was inaccurately worded.
2. Where the judgment of the circuit court is only for $4999.00 exclusive of costs, the case is not

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute*, see note to Schunk v. Moline, M. & S. Co. 37: 256.

within the jurisdiction of this court, unless it falls within the Act of Feb. 25, 1889.

3. A plea in bar, and not in abatement to the jurisdiction, does not question the jurisdiction of the circuit court.

[No. 163.]

Argued and Submitted Dec. 13, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas, to review a judgment for the plaintiff, Henry Horn, in a suit brought by him against The Texas & Pacific Railway Company, defendant, for damages for personal injuries by the negligence of the receiver of said railroad, in which the judgment was reduced by remittitur from the sum of $11,000 to the sum of $4999.00. *Dismissed.*

The facts are stated in the opinion.

Messrs. **John F. Dillon** and *Winslow S. Pierce*, for plaintiff in error:

The judgment in this case was for an amount exceeding the sum or value of five thousand dollars, exclusive of interest, and all questions are open to review here.

The award of execution constitutes no part of the judgment.

Freem. Judgm. § 2; *Kramer* v. *Rebman*, 9 Iowa, 114; *Gregory* v. *Nelson*, 41 Cal. 278.

As the jurisdiction has once attached, it cannot be defeated by a waiver or release of the amount in excess of $5000.

New York Elev. R. Co. v. *Fifth Nat. Bank of New York*, 118 U. S. 608 (30: 259).

The court below was without jurisdiction of the subject-matter of plaintiff's action.

McNulta v. *Lochridge*, 141 U. S. 327 (35: 796); *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 (36: 829); *Brown* v. *Brown*, 71 Tex. 357; *Dillingham* v. *Anthony*, 3 L. R. A. 634, 73 Tex. 47; *Harding* v. *Nettleton*, 86 Mo. 658; *Jesup* v. *Wabash, St. L. & P. R. Co.* 44 Fed. Rep. 663.

The personal claim was against the receiver, and, before property surrendered by him could be reached with an equitable charge for his liabilities, the claim must have been ascertained and reduced to judgment.

1 Pom. Eq. Jur. § 178, 3 Pom. Eq. Jur. § 1415; *Brown* v. *Long*, 36 N. C. 190, 36 Am. Dec. 43; *Massey* v. *Gorton*, 12 Minn. 145, 90 Am. Dec. 287; *Van Weel* v. *Winston*, 115 U. S. 228 (29: 384); *Brown* v. *Wabash R. Co.* 96 Ill. 297; *Davis* v. *Duncan*, 19 Fed. Rep. 477.

The power to make orders limiting the time for presentation of claims in order that they shall be chargeable upon the surrendered property has been clearly recognized by this court.

Olcott v. *Headrick*, 141 U. S. 543 (35: 851); *Union Trust Co.* v. *Morrison*, 125 U. S. 591 (31: 825); *Pine Lake Iron Co.* v. *La Fayette Car Works*, 53 Fed. Rep. 853.

Mr. **C. A. Culberson**, for defendant in error:

The legal effect of the order, if applicable to defendant in error, is that he cannot maintain any action at any time, whether present or future, in respect to the supposed cause of action.

1 Chitty, Pl. 445; Stephen, Pl. 89; Gould, Pl. chap. 2, §§ 33, 38, 39, 42.

The circuit court had jurisdiction of the cause.

Texas & P. R. Co. v. *Cox*, 145 U. S. 593 (36: 829); *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237 (37: 717).

The action is a suit at law on a contract of indemnity. The liability of the company does not depend upon any principle of equity, such a demand is appropriately enforced in a court of law.

Morley v. *Thayer*, 3 Fed. Rep. 737; *Sloan* v. *Central Iowa R. Co.* 62 Iowa, 728; *Brown* v. *Wabash R. Co.* 96 Ill. 297; *Schmid* v. *New York, L. E. & W. R. Co.* 32 Hun, 335; Beach, Receivers, § 735; High, Receivers, § 398*b*.

The court properly refused to transfer the case upon the broad ground that defendant in error had a plain, adequate and complete remedy at law.

U. S. Rev. Stat. § 723; *Hayward* v. *Andrews*, 106 U. S. 672 (27: 271).

There is neither pleading nor proof that the publication was made and the notice given, provided for by the order, and without which it did not become operative.

Farmers Loan & T. Co. v. *Central R. of Iowa*, 7 Fed. Rep. 541; *Windsor* v. *McVeigh*, 93 U. S. 277 (23: 915); Brown, Jur. §§ 46, 172.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Upon the trial of this cause a verdict was returned for the plaintiff in the sum of eleven thousand dollars, and upon the suggestion of the court the plaintiff entered a remittitur of six thousand and one dollars, and prayed that the same be allowed, and judgment entered for four thousand nine hundred and ninety-nine dollars. The bill of exceptions states that judgment was rendered for that amount, although, as recorded, the *terms of the judgment, after [111 reciting the return of the verdict, were:

"It is, therefore, ordered and adjudged by the court that the plaintiff, Henry Horn, do have and recover of the defendant, the Texas & Pacific Railway Company, the sum of eleven thousand dollars and all costs in this behalf expended.

"And it appearing to the court that on this day the plaintiff filed, in writing, a remittitur of $6000.

"It is, therefore, ordered and adjudged by the court that execution issue for the sum of $4999 only, and all costs herein."

The writ of error bore date June 24, 1890, and was made a supersedeas, the order of allowance declaring that the judgment was rendered for $4999, February 13, 1890, and that a motion for new trial was filed, but not acted on until June 5, 1890. The bond and citation describe the judgment as for $4999.

Although the judgment was entered immediately upon the return of the verdict in accordance with the practice in that jurisdiction, and, therefore, for the amount of the verdict, it was within the power of the court to allow the remittitur; and while the order to that effect might have been more accurately worded, we are of opinion that, upon the entire record, plaintiff in error cannot be permitted to insist that the judgment as it stands is for a larger sum than $4999, nor can it be hereafter held liable as on judgment for any other amount.

Hence this case is not within our jurisdiction, unless it falls within the Act of Congress of February 25, 1889 (25 Stat. at L. 693) which, for the reasons given in *Texas & P. R. Co.* v. *Saunders*, *ante*, p. 90, we do not think it does. The railway company, in this case as in that, filed a plea based upon the order of October 26, 1888, of the Circuit Court of the United States for the Eastern District of Louisiana, and in this case, as in that, the matter set up was in bar and not in abatement. The jurisdiction of the Circuit Court for the Eastern District of Texas was not thereby questioned.

Writ of error dismissed.

112] *HERMAN R. HARDENBERGH, *Plff. in Err.*,

v.

THOMAS L. RAY ET AL.

(See S. C. Reporter's ed. 112-129.)

Jurisdiction—substitution of landlord—will speaks from death—Oregon law—power to devise after acquired property—intention of testator—construction of words—will of whole estate—when will carries subsequently acquired real estate.

1. If when a suit was brought the court acquired jurisdiction of the parties, no subsequent change of the parties can affect that jurisdiction.
2. In an action of ejectment where the jurisdiction of the court has completely attached against the tenant in possession, the substitution of the landlord as a defendant for such tenant will in no way affect or defeat the jurisdiction of the court.
3. A will speaks from the death of the testator, where there is nothing in its language to indicate a different intention.
4. The Act of 1849, of Oregon territory, adopted from the state of Missouri (and since re-enacted), as construed by the decisions of the supreme court of Missouri, and approved by the supreme court of Oregon, confers testamentary power to devise after acquired real estate.
5. By the laws of Oregon, in force in 1872, a testator was empowered to devise after acquired real property.
6. The intention of the testator expressed in his will is to prevail, provided it be consistent with the rules of law.
7. In ascertaining what the intention of the testator is, the words used in his will are to be taken according to their meaning as gathered from the construction of the whole will.
8. When the words of the will of a testator will fairly carry the whole estate of which he dies seised and possessed, there is no presumption of an intention to die intestate as to any part of his property.
9. Where the testator makes a general devise of his real estate, such a devise will carry not only the property held by him at the execution of the will, but also real estate subsequently acquired, of which he may be seized and possessed at his death, provided there is testamentary power to make such disposition.

[No. 113.]

Argued Dec. 12, 13, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of the United States for the District of Oregon, to review a judgment in favor of Thomas L. Ray *et al.*, defendants, in an action of ejectment brought by Herman R. Hardenbergh, plaintiff, for the possession of real estate in Oregon. *Affirmed.*

See same case below, 33 Fed. Rep. 812.

The facts are stated in the opinion.

Messrs. **Henry B. B. Stapler** and *Henry W. Smith*, for plaintiff in error:

By the rule of the common law, under a statute simply giving the power to make a will of the real estate of the testator real estate acquired after the date of the making of the will did not pass to the devisee, but descended to the heirs-at-law.

Harwood v. *Goodright*, 1 Cowp. 90; *Brunker* v. *Cook*, 11 Mod. 122; *Arthur* v. *Bokenham*, 11 Mod. 148; *Wind* v. *Jekyl*, 1 P. Wms. 575; *Marwood* v. *Turner*, 3 P. Wms. 163; *Van Kleeck* v. *Dutch Church of New York*, 20 Wend. 479,498; *Pond* v. *Bergh*, 10 Paige, 149; *Parker* v. *Bogardus*, 5 N. Y. 310.

The general rule is that a devise of lands will not carry after acquired lands, but only those owned at the date of the will.

Jackson v. *Holloway*, 7 Johns. 394; *Jackson* v. *Potter*, 9 Johns. 312; *Girard* v. *Philadelphia*, 4 Rawle, 323, 26 Am. Dec. 145; *Grimke* v. *Grimke*, 1 Desaus. Eq. 366; *Parker* v. *Cole*, 2 J. J. Marsh. 503; *McKinnon* v. *Thompson*, 3 Johns. Ch. 307; *George* v. *Green*, 13 N. H. 521; *Watson* v. *Child*, 9 Rich. Eq. 129; *Jones* v. *Shewmake*, 35 Ga. 151; *Kemp* v. *McPherson*, 7 Har. & J. 320; *Bruen* v. *Bragaw*, 4 N. J. Eq. 261; *Ballard* v. *Carter*, 5 Pick. 112, 16 Am. Dec. 377; *Johnston* v. *Hunly*, Taylor & C. 305, 1 Am. Dec. 590.

And at common law it made no difference how clearly expressed was the testator's intention to pass such after acquired lands.

Beall v. *Schley*, 2 Gill, 198, 41 Am. Dec. 415; *Roberts* v. *Elliott*, 3 T. B. Mon. 395; *Bowman* v. *Violet*, 4 T. B. Mon. 351; *Girard* v. *Philadelphia*, *supra*.

But by statutes in England and most of the United States, after acquired lands may now pass by devise if such was the testator's intention.

Willis v. *Watson*, 5 Ill. 64; *Peter* v. *Spillman*, 18 Ill. 370; *Turpin* v. *Turpin*, 1 Wythe Ch. 22; *Jack* v. *Schoenberger*, 22 Pa. 416; *Hitchcock* v. *Hitchcock*, 35 Pa. 399.

Messrs. **John H. Mitchell** and **James K. Kelly**, for defendants in error:

The will spoke not merely from the date of the will, but from the date of the death of the testator, and passed all the personal property of which he died possessed, unless, indeed, restrictive words were employed by the testator which clearly evidenced an intention upon his part to exclude from the operation of the will all after acquired property.

2 Bl. Com. chap. 23; 1 Jarman, Wills, 157, note 10; *Haven* v. *Foster*, 14 Pick. 534,539;

NOTE.—*That domicil of testator governs validity of will and distribution; foreign will, necessary to be proved where assets are*, see note to Smith v. Union Bank of Georgetown, 8:212.

As to interpretation of wills: intention of testator to govern, see note to Pray v. Belt, 7:309.

Brimmer v. *Sohier*, 1 Cush. 118,133; *Goodlad* v. *Burnett*, 1 Kay & J. 341.

Men know that their wills are not to take effect until they die and they make them for the purpose of fixing the distribution of their property from that moment.

Applegate v. *Smith*, 31 Mo. 167; *Campbell* v. *Rawdon*, 18 N. Y. 412; *Walker* v. *Williamson*, 25 Ga. 549; *Morse* v. *Macrum*, 22 Or. 236; *Canfield* v. *Bostwick*, 21 Conn. 550; *Gold* v. *Judson*, 21 Conn. 616; *Jette* v. *Picard*, 4 Or. 297; 1 Redf. Wills, 7-9, 210; 1 Jarman, Wills, 286, 287.

The old English rule prevailed in Pennsylvania until 1833.

Girard v. *Pennsylvania*, 2 Wall. Jr. 305.

One's will may operate upon his after acquired real estate whenever such was his obvious intention.

1 Jarman, Wills, 51,326; 2 Redf. Wills, 388; 1 Williams, Executors (Perkin's Notes) 6.

Where it appeared on the face of the will that the purpose of the testator was not to die intestate as to any portion of his estate, it will be presumed this intention still existed where the testator afterwards purchased real estate.

Cushing v. *Aylwin*, 12 Met. 169; *Pray* v. *Waterston*, 12 Met. 262; *Blaney* v. *Blaney*, 1 Cush. 107, 116.

The rule is, unless the contrary appears, that the will shall operate on all the estate held at the date of the death.

1 Redf. Wills, p. 380, § 30, notes 2, 4; *Henderson* v. *Ryan*, 27 Tex. 670; *Wakefield* v. *Phelps*, 37 N. H. 295; *Lorieux* v. *Keller*, 5 Iowa, 196; *McNaughton* v. *McNaughton*, 41 Barb. 50.

A disposition in general terms prima facie includes everything capable of being comprehended under those terms which the testator had power to dispose of.

Morrice v. *Aylmer*, 44 L. J. Ch. 212; *Smith* v. *Bell*, 31 U. S. 6 Pet. 68 (8: 322); *Williams* v. *Ash*, 42 U. S. 1 How. 1 (11: 25); *Robison* v. *Female Orphan Asylum of Portland*, 123 U. S. 707 (31: 295).

The words employed by the testator are sweeping in their import. They cover all estate whatsoever of the testator, except that specifically devised.

Pray v. *Waterston*, 12 Met. 262; *Cushing* v. *Aylwin*, 12 Met. 169; *Bishop* v. *Bishop*, 4 Hill, 139; *De Peyster* v. *Clendining*, 8 Paige, 295; *Re Learned's Estate*, 70 Cal. 140; 1 Redf. Wills, p. 387, note 31.

It is the reasonable presumption that the testator did not intend to die intestate as to any of his estate.

Annin v. *Vandoren*, 14 N. J. Eq. 135; *Collier* v. *Collier*, 3 Ohio St. 374; *Cate* v. *Cranor*, 30 Ind. 292; *Gourley* v. *Thompson*, 2 Sneed, 387; *Jarnagin* v. *Conway*, 2 Humph. 50.

Mr. Justice **Jackson** delivered the opinion of the court:

117] *The principal questions presented by the record in this case are, first, whether by the laws of Oregon, in force in 1872, a testator was authorized or empowered to devise after acquired real property; and, second, whether if such power existed, the after acquired real estate in controversy passed by the testator's will in the present case.

The facts which give rise to these questions are as follows: Peter De Witt Hardenbergh, unmarried and without children, a citizen of Portland, Oregon, died in 1886, leaving a will executed by him, May 15, 1872, which was duly probated and remains in full force and effect. By the first clause of the will the testator devised to several nephews, named therein, a certain farm in Ulster county, New York; by the second clause he devised to his sister, Catherine L. Tremper, all his right, title, and interest in and to all other lands in that county and state; and by the third and last clause he gave and bequeathed to his sister, Ellen E. Ray, "all my right, title, and interest in and to all my lands, lots, and real estate, lying and being in the state of Oregon, or elsewhere, except as aforesaid; also all my personal property and estate of whatsoever kind and nature."

At the date of the will the testator owned certain real property in Portland, Oregon, and in January, 1882, some ten years after the will was executed, he purchased, and at the time of his death owned, a parcel of land in the city of Portland, valued at $30,000, which is the subject of controversy in this suit.

Ellen E. Ray, the devisee under the third clause of the will, died intestate in 1873, leaving as her heirs Thomas L. Ray, Rachel L. Ray, Hylah E. Ray, and Mary E. Arbuckle, citizens of Oregon; John De Witt Ray, a citizen of Illinois; and Sarah E. Ray, a citizen of New York. Upon the death of the testator these heirs of Ellen E. Ray, who, under the laws of Oregon (Hill's Anno. Laws of Oregon, § 3077) succeeded to her rights as devisee, took possession of the premises in controversy, as well as other real property in Oregon owned by the testator at the time the will was executed.

Herman R. Hardenbergh, a brother of the testator, claimed *and demanded an in- [118 terest in common with the heirs of Ellen E. Ray in the real property acquired after the execution of the testator's will, on the ground that as to those lands he died intestate. This claim was denied and he thereupon brought an action at law in the nature of ejectment against Charles Sliter, J. C. Miller, and W. H. West, citizens of Oregon, who were in possession of the demanded premises as tenants of the heirs of Mrs. Ellen E. Ray.

Subsequently on their own motion, these heirs were substituted as defendants in place of their tenants, against whom the action was originally brought, and by their answer set up that by the law of Oregon the land in question passed to them by the third clause of the will, and that the testator did not die intestate in respect thereto.

The heirs of Ellen E. Ray having thus made themselves parties to the suit, and one of them (Sarah A. Ray) being a citizen of the same state (New York) as the plaintiff, the point was made in the court below, and has been presented in this court, that the jurisdiction of the United States circuit court was thereby defeated.

This objection to the jurisdiction of the court is without merit, and was properly overruled by the lower court. When the original suit was brought against Sliter, Miller, and West, the persons in possession, the court acquired jurisdiction of the controversy, and no subse-

quent change of the parties could affect that jurisdiction. This is well settled by the authorities. *Mollan* v. *Torrance*, 22 U. S. 9 Wheat. 537 [6: 154]; *Dunn* v. *Clarke*, 33 U. S. 8 Pet. 1 [8: 845]; *Clark* v. *Mathewson*, 37 U. S. 12 Pet. 164 [9: 1041]; *Whyte* v. *Gibbes*, 61 U. S. 20 How. 542 [15: 1016]; *Phelps* v. *Oaks*, 117 U. S. 236, 240 [29: 888, 890]. In this last case it was held that in ejectment against tenants in possession of real estate, whose landlord is a citizen of another state, the plaintiff has a real and substantial controversy with the defendant within the meaning of the act for the removal of causes from state courts, which continues after the landlord is substituted and becomes a party for the purpose of protecting his own interests. The rule announced in this case clearly settles, in a case like the present, that where the jurisdiction of the court has **119**] completely attached against the *tenant in possession, the substitution of the landlord as a defendant for such tenant will in no way affect or defeat the jurisdiction of the court.

By stipulation of parties the trial of the cause by jury was waived, and all questions of law and fact were submitted to the court for its decision. The court found the facts substantially as set out above, and the conclusions of law announced were to the effect that at the time the will was made the testator was empowered and authorized by the laws of Oregon to devise any real estate situated in that state, whether acquired before or after the making of the will, of which he might die seized and possessed. Also, that the intention of the testator, as manifested by the will in the present case, was to devise all of his real estate situated in the state of Oregon to Ellen E. Ray, and that under and by virtue of the devise the demanded premises, on the death of the testator, vested in the defendants as her heirs, and that they were entitled to the exclusive possession thereof. 33 Fed. Rep. 812.

The present writ of error is prosecuted to reverse that judgment. The two assignments of error present the questions heretofore stated.

For the plaintiff in error it is contended that the testator died intestate in respect to the demanded premises, for the reasons that at the time of the execution of his will he possessed no testamentary power to devise after acquired lands, and because his will manifests no intention to dispose of such property. If either of these propositions can be sustained, the judgment of the court below must be reversed.

In support of the first proposition, it is urged, on behalf of the plaintiff in error, that the common law, with its limitations and restrictions upon testamentary power in respect to real estate, was in force in the state of Oregon at the date of the execution of the will, and up to the death of the testator. Without reviewing the authorities, it is well settled that by the common law lands were not devisable, except in particular places where custom authorized it. This disability of the common law was partially removed by the statute of 32 Henry VIII. which authorized persons having title to **120**] land to dispose *thereof by will, and was construed as restricting the right of devising lands, to such an interest only, as the testator had at the time of the execution of the will. Under this statute real estate, subsequently acquired, could not pass by devise; in other words, under the statute of 32 Henry VIII. the will as to lands spoke from the date of its execution. So that a general devise of all the testator's estate would comprehend and include all the personalty to which he was entitled at the time of his death, but would not embrace after acquired land, though such might be the expressed intention of the testator. The reason given for the distinction between real and personal estate was that a devise of land was regarded in the same light as a conveyance, and as a conveyance at common law would not rest for want of seizin, it was therefore held to be operative only on such real estate as the testator might have at the time of the making of the will, that is to say, that a devise was in the nature of a conveyance or appointment of real estate then owned, to take effect at a future date, and could not therefore operate on future acquisitions.

While this strict and arbitrary rule of the common law has been modified by the statutes of most, if not all, of the states of the Union, it is contended for the plaintiff in error that the rights of the parties in the present case are controlled by it, for the reason that the legislature of Oregon did not confer by statute testamentary power to dispose of after acquired real property until February, 1891.

The provisional government of Oregon in 1844 formally declared by its legislature that "all the statute laws of Iowa territory, passed at the first legislative assembly of that territory, and not of a local character, and not incompatible with the conditions and circumstances of this country, shall be the law of this country, unless otherwise modified; and the common law of England, and principles of equity, not modified by the statutes of Iowa, and of this government, and not incompatible with its principles, shall constitute the law of the land."

Among the laws enacted by the first territorial legislature of Iowa, and thus adopted by the provisional government of Oregon, was the following act relative to wills:

*"SECTION 1. *Be it enacted by the Coun-* [**121** *cil and the House of Representatives of the Territory of Iowa*. That any person having an estate in any lands, tenements, or hereditaments, or any annuity or rent charged upon, or issuing out of the same, or any goods or chattels, rights, credits, and choses in action, or in possession, and property of every description, whatever, may give or devise the same to any person by last will and testament by him or her lawfully executed." (Laws of the first session of the legislative assembly of the territory of Iowa, 1838-39, p. 471.)

This statute was substantially the same as that of 32 Henry VIII. under which, as settled by the decisions of the English courts, and by those of the states where that statute is in force, after acquired real estate could not pass by will.

This statute remained in force until 1849, the year after Oregon became a territory, when the legislature adopted a statute of wills, copied from the Revised Statutes of Missouri, which provided that "every person of twenty years of age and upwards, of sound mind, may, by

last will, devise all his estate, real and personal, saving to the widow her dower." This Missouri statute, thus adopted by the territory of Oregon, was a revision of the Virginia statute of 1785, which, by the first section thereof, empowered every adult person of sound mind to devise by last will and testament in writing "all the estate, right, title, and interest in possession, reversion, or remainder, which he or she hath, or at the time of his or her death, shall have of, in, or to, lands, tenements, etc.; also all goods and chattels."

When the laws of Missouri were revised in 1835, it appearing that one section of the Virginia act gave to the testator the same testamentary power over his real estate that was given him in a separate and distinct clause over his personal estate, the superfluous words were dropped, and the testamentary power over both real and personal properties were united in the one section above quoted.

The Missouri statute thus adopted by Oregon was re-enacted in December, 1853, and took effect May 1, 1854, as a part of the code of the territory. After the admission of the state into 122] *the Union in 1859, the legislature of Oregon, in 1862, re-enacted without change the above quoted section conferring testamentary power, which has since continued to be the law of Oregon. Hill's Anno. Code of Oregon, § 3066.

By an act of the legislature of Oregon, approved February 20, 1891, it has been provided that "any estate or interest in real property, acquired by any one after the making of his or her will, shall pass thereby, unless it clearly appears therefrom that such was not the intention of the testator; nor shall any conveyance or disposition of real property by any one after the making of his or her will prevent or affect the operation of such will upon any estate, or interest therein, subject to the disposal of that testator at his or her death."

The construction which the plaintiff in error seeks to have placed upon these statutes is, that the territorial statute of 1849, copied from the Missouri statute, simply conferred the power to make a will devising real estate, which, under the rules of the common law, would not operate to pass real estate acquired after the making of the will, and that such testamentary power over after acquired real estate was first conferred by the act of 1891.

Prior to the adoption of the Missouri statute by the territorial government of Oregon, that statute had received no construction by the supreme court of Missouri, but subsequently, in 1856, that court was called upon, in the case of *Liggat* v. *Hart*, 23 Mo. 127, to decide whether after acquired real estate would pass by will under the statute, where such appeared to be the intention of the testator. The court said: "The question is as to the construction of the present law. Must we hold that the act now in force does not confer testamentary power over after acquired land, and, on account of the change in phraseology of the statute, which was made in 1835, go back to the construction put upon the original statute? We think not. The language now used does not require such a construction at our hands. It is different from the English statute of wills. The testamentary power is given here in general language; it embraces both real and personal property, and is a power to make testamentary *disposition of all the testator's prop- [123 erty, without any distinction between real and personal property, and not a mere power of particular disposition. It is more in the nature of a Roman will than an English devise of real property. But, however this may be, when we consider the plan of revising that was adopted, the impolicy of creating changes in laws of daily practical importance, the little probability, when all around us were abandoning the old, narrow construction of the testamentary power, that our legislature should adopt it, for the first time, by an express provision for that purpose, and when we consider, too, that neither the community nor the profession have generally, as we believe, been aware of the supposed change, . . . we do not think we would be warranted in declaring that the legislature, by the change in the language, intended to effect the substantial change in the meaning of the law that is supposed, and we shall accordingly give to the act, as it now stands, as liberal a construction in favor of the testamentary power as we should have felt constrained to have given to the original act."

Again, in *Applegate* v. *Smith*, 31 Mo. 166, 169, the same court said: "We consider that the case of *Liggat* v. *Hart*, 23 Mo. 167, settles the one now under consideration. That case determines that the power over the after acquired lands possessed by the testator is the same as that which he possessed over lands which he owned at the making of the will; that with respect to after acquired lands, when the question arises whether they have passed by the will, it is just the same and to be determined on the same considerations as would determine the question whether lands owned by the testator at the date of his will passed by it, or, in other words, that after acquired lands, as to the power of disposition, rests on the same ground as the lands owned by the testator at the date of his will, and the personal estate. According to this there can be no question but that the lands in Missouri passed by the will."

The construction which the supreme court of the state of Missouri has thus given to its statute since its first adoption thereof by Oregon does not have the same controlling effect it would *have if the decisions had been ren- [124 dered before such adoption, still, they are strongly persuasive of the proper interpretation of the act, and have been so regarded by the courts of Oregon, which have clearly indicated that the statute of wills of that state should receive the same construction which has been placed thereon by the Missouri decisions. Thus in *Gerrish* v. *Gerrish*, 8 Or. 355, 34 Am. Rep. 585, decided after the Missouri cases, it was said by the court: "Our statute of wills is an exact copy of the Missouri statute, and the courts of that state having been called upon frequently to construe it, we must look principally to the decisions of that state to ascertain its judicial construction."

This approval of the construction placed by the supreme court of Missouri upon the statute, after its adoption by the territorial government, in connection with its re-enactment

by the legislature of the state in 1862—after the date of the Missouri decisions—may be fairly considered as settling its proper interpretation by the courts of Oregon. If the same construction had been placed upon the statute by the courts of Missouri before its original adoption by the territorial government of Oregon, it is clear, upon the authorities, that that construction would have been adopted with the statute, and the same effect would seem properly to follow from an approval by the supreme court of the state of the construction placed upon the statute by the supreme court of Missouri, prior to its re-enactment in 1862 by the legislature of the state of Oregon.

If the later act of 1849, copied from the Revised Statutes of Missouri, is no broader in its scope and operation than the statute of 32 Henry VIII. which was embodied in the Iowa statute adopted by the provisional government of Oregon in 1844, then there would be a lack of testamentary power to dispose of after acquired real property. This is practically what the contention of the plaintiff in error comes to. But the power of testamentary disposition conferred by the act of 1849 (copied from the Missouri statutes) and re-enacted in 1853 and 1862, as construed by the courts of Missouri and Oregon, is more comprehensive in its provisions [125] than the act of 32 Henry VIII.; *confers a larger and broader power of disposition over real estate of which the testator may die seized and possessed, and extends to and includes after acquired real estate.

In respect to the question of testamentary power of disposition over real estate, the Missouri act adopted by the territorial government, and re enacted by the state of Oregon, was unquestionably intended to be as broad and comprehensive as the Virginia act of 1785, which conferred the testamentary power to devise after acquired land, and was more comprehensive than the prior act of 1844, taken from the Iowa statute. As already stated, the language of the statute makes no distinction between personalty and realty. It confers the power to dispose of the realty as broadly as the personalty. The saving to the widow her dower is itself indicative of an intention to make the will speak as of the date of the testator's death, at which time the widow's right of dower would come into actual possession and practical enjoyment, whether the dower right extended to all lands owned during coverture or possessed by the husband at his death.

In conformity with this construction, the supreme court of Oregon has held in *Morse* v. *Macrum*, 22 Or. 236, that the will, as a general rule, speaks from the death of the testator, and not from its date unless its language, by a fair construction, indicates a contrary intention, in this respect adopting the rule laid down by the supreme court of Connecticut in *Canfield* v. *Bostwick*, 21 Conn. 550; *Gold* v. *Judson*, 21 Conn. 616, where it is stated to be the general rule that a will speaks from the death of the testator, where there is nothing in its language to indicate a different intention.

Having reached the conclusion that the act of 1849, adopted from the state of Missouri, (and since re enacted) as construed by the decisions of the supreme court of Missouri, and approved by the supreme court of Oregon, confers testamentary power to devise after acquired real estate, it is not material to consider the statute of February 20, 1891, or to determine whether that statute was intended to be declaratory of the previous law, or was intended to *prescribe a rule for the construction [126] of wills in respect to which the authorities have been and are in great conflict, many of the cases holding, as in *Smith* v. *Errington*, 12 U. S. 8 Cranch, 66 [3: 490], that even where the power exists to dispose of after acquired real property, it would not pass unless such was the clear and manifest intention on the part of the testator; in other words, that the presumption in respect to such property was in favor of the heir at law. This rule of presumption, or construction, the Oregon statute of 1891 may have been intended to change by declaring that unless it appeared clearly from the will it was not the intention of the testator, such after acquired real property would pass.

On this branch of the case our conclusion is that the testator (Hardenbergh) possessed the testamentary power to devise the after acquired lands in controversy.

The remaining question is whether by the third and last clause of his will the testator intended to dispose of all the real estate in Oregon, or elsewhere, of which he might die seized and possessed.

The cardinal rule for the construction of wills, to which all other rules must bend, as stated by *Chief Justice* Marshall in *Smith* v. *Bell*, 31 U. S. 6 Pet. 68 [8: 322], is, that "the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. This principal is generally asserted in the construction of every testamentary disposition. It is emphatically the *will* of the person who makes it, and is defined to be 'the legal declaration of a man's intention, which he wills to be performed after his death.' These intentions are to be collected from his words, and ought to be carried into effect if they be consistent with law."

In *Jasper* v. *Jasper*, 17 Or. 590, the same rule is adopted, and in ascertaining what the intention of the testator is, the words used are to be taken according to their meaning as gathered from the construction of the whole instrument. It is furthermore settled by the authorities that when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate. *Phelps* v. *Phelps*, 143 Mass. 570; *James* v. *Pruden*, 14 Ohio St. 251; *Gilpin* v. *Williams*, 17 Ohio St. 396; **Leigh* v. *Savidge*, 14 N. J. Eq. 124; *Gourley* v. *Thompson*, 2 Sneed, 387; *United Presb. Church Board of Mission's App.* 91 Pa. 507.

In the present case the devise to the testator's sister of all his right, title, and interest in and to all his lands, lots, and real estate lying and being in the state of Oregon, or elsewhere, except as to the specific devises previously made; and also all of his personal property and estate of whatsoever kind or nature, is sufficiently comprehensive to indicate an intention to pass everything of which he might die seized and possessed, both of real and personal property. This disposition, residuary in its character, is utterly inconsistent with an intention to die

intestate as to any portion of his estate, real or personal. When the words of the will of a testator will fairly carry, as in the present case, the whole estate of which he dies seized and possessed, there is no presumption of an intention to die intestate as to any part of his property. This general rule is laid down in *Given* v. *Hilton*, 95 U. S. 594 [24: 459], where it is further stated that "the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may be reasonably given (*Vernon* v. *Vernon*, 53 N. Y. 351) and certainly when, as in this case, the intent to make a complete disposition of all the testator's property is manifest throughout his will, its provisions should be so construed, if they reasonably may be, as to carry into effect his general intent."

Without going into any review of the authorities, special reference may be made to the case of *Wait* v. *Belding*, 24 Pick. 129, which arose under a will executed in 1797, before the Revised Statutes of Massachusetts went into effect, which devised to the testator's two sons the whole of his "lands and buildings, lying and being in the town of Hatfield." By a codicil, dated May 2, 1812, he gave to the same sons lands, not enumerated in the will, purchased since then, in the town of Hatfield or elsewhere. In construing this will, *Chief Justice* Shaw said: "In general, a will looks to the future; it has no operation, either on real or personal property, till the death of the testator. 128] General words, therefore, may *as well include what the testator expects to acquire, as what he then actually holds. The term, 'all my property,' may as well include all which may be his at his decease, as all which is his at the date of the will, and will be construed to be so intended, unless there are words in the description which limit and restrain it. We are then brought back to a particular description, 'the whole of my lands and buildings lying and being in the town of Hatfield.' There are certainly no words, and nothing in the will, showing an intent to limit it to the lands and buildings then held by him. No such intent can be presumed. Had it been 'all my lands and buildings in Hatfield or elsewhere' in the original will the law would have equally restrained its operation to lands then held, not because it was the intent of the testator that it should so operate, but because, assuming that it was his intent that all should pass, such intent is in contravention of the rule of law, and cannot be carried into effect.

"The court are of opinion that this general description of the whole of his lands and buildings, in Hatfield is broad enough to embrace the whole estate there, whether acquired before or subsequently to the making of the will, and there is nothing in the terms or construction of the will which would warrant us in restraining it to the lands then owned. By the Revised Statutes it is provided that a will shall embrace after acquired real estate as well as personal property, when such is the intent of the testator. These statutes do not affect this will, and I only allude to them by way of illustration. Suppose this will had been made after the Revised Statutes, and the question should be, whether the estate now in controversy passed by the devise. There seems to be no doubt that it would, the description being general of all lands in Hatfield, without limitation as to the time of acquisition. Then, if this description was sufficient to include all real estate in Hatfield, it would have passed by the original will, but for the rule of law restraining the operation of all devises to estate held by testator at the date of the devise. But when the date is brought down by the republication of the will, it takes effect upon all estate acquired between the original date and the republication, *and held by the testator at [129 the time of the republication. Had there been a general residuary clause, for instance, such would clearly have been the effect of a republication. But the only difference is that a residuary clause embraces all estate whenever acquired; but if the description actually used is sufficiently large to embrace the estate in controversy, the result must be the same as to such estate."

These views are directly in point in the present case, where the language is just as comprehensive, and manifests just as clearly an intention of the testator to devise all his lands in the state of Oregon.

It may, therefore, be laid down as a general proposition, that where the testator makes a general devise of his real estate, especially by residuary clause, he will be considered as meaning to dispose of such property to the full extent of his capacity; and that such a devise will carry, not only the property held by him at the execution of the will, but also real estate subsequently acquired of which he may be seized and possessed at the date of his death, provided there is testamentary power to make such disposition. 1 Jarman, Wills, (5th ed.) 326, and other authorities cited.

From the foregoing considerations we are of opinion that there was no error in the judgment of the court below, and the same is accordingly affirmed.

THE CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*,
v.
WILLIAM McGEORGE, Jr., ET AL.

(See S. C. Reporter's ed. 129-135.)

Privilege of being sued in district of domicil—when such privilege waived—such waiver not overruled by intervening parties.

1. The exemption from being sued out of the district of defendant's domicil is a personal privilege which may be waived, and which is waived by pleading to the merits.
2. Where a corporation, sued out of the district of its domicil, did not choose to plead the provision of the statute exempting it from being sued in that district, but entered a general appearance

NOTE.—*As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit*, see note to Roberts v. Lewis, 36: 579.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to jurisdiction of United States courts over common law offenses, see note to United States v. Coolidge, 4: 124.

and joined with the plaintiff in its prayer for a receiver it waived its privilege of being sued only in the district of its domicil.

8. Where the defendant company has submitted itself to the jurisdiction of the court, such voluntary action can not be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who have been permitted to become such by an intervening petition.

[No. 965.]

Submitted Nov. 27, 1893. Decided Jan. 3, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Virginia, vacating an order appointing receivers and dismissing the complaint in a suit brought by the Central Trust Company, plaintiff, against the Virginia, Tennessee, & Carolina Steel & Iron Company, defendant, in which William McGeorge *et al.*, became intervening defendants. On motion to advance and hear appeal under rule 32, and to reverse the decree. *Reversed.*

Statement by *Mr. Justice* **Shiras:**

On the 8th day of August, 1892, the Central Trust Company, a corporation created by and existing under the laws of the state of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia against the Virginia, Tennessee & Carolina Steel & Iron Company, created by and existing under the laws of the state of New Jersey.

The bill alleged that the defendant company had a place of business and carried on its business at Bristol in the western district of Virginia, and owned property, real and personal, at Bristol and elsewhere in the state of Virginia; that the said defendant company was insolvent; that the plaintiff company had obtained a judgment on the law side of the court, on which an execution had been sued out and returned by the marshal *nulla bona*, and prayed for the appointment of a receiver. The defendant company appeared by its president, John C. Haskell, and consented to the appointment of a receiver, and thereupon Judge Bond made an order appointing said John C. Haskell and D. H. Conklin receivers of said defendant company.

On the same day two other bills were filed in suits styled as follows: *The Central Trust Company of New York* v. *The South Alantic & Ohio Railroad Company*, and *The Virginia, Tennessee & Carolina Steel & Iron Company* v. *The Bristol Land Company.*

In each of said additional bills the complainant company alleged the insolvency of the defendant company as evidenced by a judgment obtained against it by confession, in the court on its law side, on which an execution had issued and been returned on the same day as *nulla bona*. In the first named 131] of these last two suits, the *defendant company appeared by its vice president, John C. Haskell, and consented that a receiver should be appointed; and in the last named suit the defendant company appeared by its president, John C. Haskell, and consented to the appointment of a receiver, and thereupon Judge Bond appointed said John C. Haskell and D. H. Conklin receivers of each of said companies respectively.

On the 19th day of October, 1892, a petition was presented to the circuit court by William McGeorge and others, claiming to be stockholders and creditors of the Virginia, Tennessee & Carolina Steel & Iron Company, and John M. Bailey, claiming to the be "valid receiver" of the corporations named, by virtue of an order made by Hon. D. W. Bolen, judge of the 15th judicial circuit of Virginia, in vacation, on the 6th day of August, 1890, asking that they might be made parties complainants or defendants, as the court might determine, and that the several causes named might be consolidated and heard together. The petition further alleged that the Virginia, Tennessee & Carolina Steel & Iron Company was the main and substantial company; that the South Atlantic & Ohio Railroad Company and the Bristol Land Company were mere offshoots or dependent companies; that the several confessions of judgments, entered in the court on the 8th day of August, 1892, were made by a person who had no power or authority to make such confessions of judgment; that said judgments were procured by fraud and collusion between the representatives, respectively, of the complainant and defendant companies, and that the orders made by *Judge* Bond, appointing receivers for each of said defendant companies, were obtained by misrepresentation, fraud, and collusion by and between said representatives of the complainant and defendant companies. The petition further alleged that in the cause of *The Central Trust Company of New York* v. *The Virginia, Tennessee & Carolina Steel & Iron Company* the court was without jurisdiction, for the reason that the complainant company was a corporation created by and existing under the laws of the state of New York and a citizen and resident of said state of New York, and that the defendant company was a corporation created by and existing under the laws of the state of New Jersey, and a citizen and resident of said state of New Jersey.

*The said petition was filed by leave [132 of the court, and a rule was awarded, returnable on the 6th day of December, 1892.

The complainant company, the Central Trust Company of New York, filed an elaborate answer to said petition, denying under oath its material allegations. The defendant company, the Virginia, Tennessee & Carolina Company, filed a separate answer to the said petition, denying its allegations, as did also the other two defendant companies.

On the 16th day of May, 1893, the district judge filed an opinion and decree, declining to consolidate the said cases, and treating the petition of McGeorge and others as the answer of co-defendants. The court decided that it had no jurisdiction, because while the parties complainant and defendant were citizens of different states, yet neither of them was a citizen of the state in which the suit was brought. The order appointing the receivers was accordingly vacated and the bill of complaint dismissed. From this decree an appeal was taken and allowed to this court.

Mr. **Adrian H. Joline,** for appellant:

The case having been brought to this court by appeal under section 5 of the Act of March 3, 1891, chap. 517, and the only question in issue being the question of the jurisdiction of the court below, it is entitled to be advanced on motion and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals.

The circuit court had jurisdiction of the suit and the objection that it was not brought in the district of the residence of either the plaintiff or the defendant was waived by the general appearance of defendant.

Gracie v. *Palmer*, 21 U. S. 8 Wheat. 699 (5: 719); *Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 330 (9: 1093, 1105); *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 (36: 829); *Pollard* v. *Dwight*, 8 U. S. 4 Cranch, 421 (2: 666); *Barry* v. *Foyles*, 26 U. S. 1 Pet. 311 (7: 157); *Shields* v. *Thomas*, 59 U. S. 18 How. 253, 259 (15: 368, 370); *Butterworth* v. *Hill*, 114 U. S. 128, 133 (29: 119, 120): *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, 132 (35: 659, 661); *Ex parte Schollenberger*, 96 U. S. 369, 378 (24: 853, 855); *Fitzgerald & M. Constr. Co.* v. *Fitzgerald*, 137 U. S. 98 (34: 608); *First Nat. Bank of Charlotte* v. *Morgan*, 132 U. S. 141 (33: 282).

The circuit court erred in dismissing the bill for want of jurisdiction, because the suit was one in equity to enforce an equitable lien or claim against real and personal property within the district where the suit was brought.

Ames v. *Holderbaum*, 42 Fed. Rep. 341; *Single* v. *Scott Paper Mfg. Co.* 55 Fed. Rep. 553; *Spencer* v. *Kansas City Stock Yards Co.* 56 Fed. Rep. 741.

The circuit court erred in dismissing the bill for want of jurisdiction, because it was a creditor's bill based upon a judgment at law in the same court, and execution thereon returned unsatisfied and was ancillary and dependent to the original suit.

Wait, Fraud. Conv. (2d ed.) 90, 105, 106; *McCartney* v. *Bostwick*, 32 N. Y. 53; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Hagan* v. *Walker*, 55 U. S. 14 How. 29 (14: 312); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 (17: 886); *Mattingly* v. *Nye*, 75 U. S. 8 Wall. 370 (19: 380); *Kern* v. *Huidekoper* ("*Dietzsch* v. *Huidekoper*") 103 U. S. 494 (26: 497).

No counsel for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

The court below, in holding that it did not have jurisdiction of the cause, and in dismissing the bill of complaint for that reason, acted in view of that clause of the Act of March 3, 1887, as amended in August, 1888, which provides that "no civil suit shall be brought in the circuit courts of the United States against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant;" and, undoubtedly, if the defendant company, which was sued in another district than that in which it had its domicil, had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court would have been right.

But the defendant company did not choose to plead that provision of the statute, but entered a general appearance, and joined with the complainant in its praver for the appointment *of a receiver, and thus was [133 brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicil is a personal privilege which may be waived, and which is waived by pleading to the merits.

In *Ex parte Schollenberger*, 96 U. S. 378 [24: 855], which arose under the Judiciary Act of 1875, it was said: "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not ousted because he has consented."

So, under the Act of February 18, 1875 (18 Stat. at L. 316) which exempted national banks from suits in state courts in counties other than the county or city in which the bank was located, it was held, in *First Nat. Bank of Charlotte* v. *Morgan*, 132 U. S. 141 [33: 282], that such exemption was a personal privilege which could be waived by appearing to such a suit brought in another county, and making defense without claiming the immunity granted by Congress.

St. Louis & S. F. R. Co. v. *McBride*, 141 U. S. 127, 131 [35: 659, 661], was a case wherein it was contended in this court that the court below, the Circuit Court of the United States for the Western District of Arkansas, had no jurisdiction, because the suit was brought against a railway company whose domicil was in another state, and therefore within the operation of the Judiciary Act of 1887, as amended in 1888, providing that no suit shall be brought against any person in any other district than that whereof he is an inhabitant; but it was held, citing *Ex parte Schollenberger*, 96 U. S. 378 [24: 855], and *First Nat. Bank of Charlotte* v. *Morgan*, *supra*, that "without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits, waives any right to challenge thereafter the jurisdiction of the court, on the ground that the suit had been brought in the wrong district."

The court below based its ruling on *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768], and on *Southern [134 *Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942], and it is true that the right of a corporation to avail itself of the exempting clause of the Act of 1887 was there maintained, but, in both cases, the defendants specially appeared and set up such right, in the one case by a motion to set aside the service of the process, and in the other by a special demurrer.

The opinion in *Ex parte Shaw* contains a full history of the legislation on this subject, and refers to the several questions that have arisen and been determined by this court under such legislation. The court, speaking through *Mr. Justice* Gray, said

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the southern district of New York by a citizen of another state, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different states, brought in a wrong district. . . . All that is now decided is that, under the existing Act of Congress, a corporation, incorporated in one state only, cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state."

In *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942], where the subject was again elaborately discussed, it was said: "It may be assumed that the exemption from being sued in any other district might be waived by the corporation, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction," and the case of *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 [35: 659] was cited to that effect.

The court below suggested that the present case is distinguishable from the others in which it was held that the right of exemption might be waived, in that neither the plaintiff nor the defendant resided in the district in which the suit was brought, that is, the Mercantile Trust Company, the plaintiff, had its residence in New York, and the Virginia, Tennessee, & Carolina Company, the defendant, was a corporation of New Jersey.

135] *But a similar state of facts existed in the case of *Ex parte Shaw*, 145 U. S. 444 [36: 768], inasmuch as Shaw, the plaintiff, was a citizen of Massachusetts, and the mining company was a corporation of the state of Michigan, and the suit was brought in the Circuit Court for the Southern District of New York. Nor do we see any reason for a different conclusion, as to the subject of waiver, when the question arises where neither of the parties are residents of the district from that reached where the defendant only is such resident.

It is scarcely necessary to say that, as the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition.

In view, then, of the authorities cited, and upon principle, we conclude that the court below erred in vacating the order appointing receivers and in dismissing the bill of complaint, and we reverse its decree to that effect and remand the cause with directions for further proceedings not inconsistent with this opinion.

LUCAS A. VOORHEES, *Appt.*, v. THE JOHN T. NOYE MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 135-137.)

Appeal, when brought—circuit court of appeals.

1. Where a motion for a rehearing is made in season, and entertained by the court, the decree does not take final effect for the purposes of an appeal, until the motion is disposed of.
2. Where an appeal from the U. S. circuit court to this court was allowed in January, 1891, and afterwards a motion for rehearing was made which was denied, in February, 1892, and the taking a new appeal became necessary, upon the denial of the rehearing, the appeal could only be taken to the circuit court of appeals, under the act and joint resolution of March 3, 1891, where the jurisdiction of the court below depended solely on the diverse citizenship of the parties.

[No. 734.]

Submitted Dec. 19, 1893. Decided Jan. 2, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Nebraska, reforming a mortgage and annuling a deed and another mortgage and an assignment of the latter, and for a foreclosure and sale of the premises, in suit brought by the said manufacturing company against J. R. Voorhees *et al.*, to which Lucas A. Voorhees was subsequently made a party defendant. *Dismissed.*

The facts are stated in the opinion.

Mr. **C. S. Montgomery** for appellant.

Messrs. **C. J. Green** and *Alfred Hazlett* for appellee.

The Chief Justice: The decree in this cause was entered on January 7, 1891, at the November term, 1890, of the Circuit Court of the United States for the District of Nebraska, and at its foot the court minuted: "Lucas A. Voorhees prays an appeal, which is allowed;" and also, "L. A. Voorhees has leave to file motion for rehearing Saturday." On the tenth of January, which was the Saturday following, the application of L. A. Voorhees for rehearing was filed.

It appears of record that on January 9, 1892, at the November, 1891, term of the court, "this cause coming on to be heard this day on the motion for rehearing filed herein, was argued and submitted to the court by solicitors for the respective parties; whereupon the court takes the same under consideration." On February 3, 1892, at the January term, 1892, the the record shows that the motion for rehearing of the cause "on its merits was reargued and submitted to the court by solicitors for the respective parties," and taken under advisement.

February 17, 1892, the same January term,

NOTE.—*As to what is "final decree" or judgment of state or other court from which appeal lies*, see note to Gibbons v. Ogden, 5: 302.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit, see note to Roberts v. Lewis, 36: 579.

As to colorable conveyances to enable the suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

the motion for rehearing was denied, the court holding that "it is now too late to sustain said motion or to interfere with the decree." March 23, 1892, the refusal of certain defendants to join in an appeal was filed, which refusal was dated January 17, 1891. April 15, 1892, an appeal bond was given by Lucas A. Voorhees, conditioned for the prosecution of the appeal allowed January 7, 1891, approved by the court and filed April 18, 1892. The record was filed in this court, April 19, 1892, certified by the clerk of the circuit court, April 5, 1892. The bond is certified to by the clerk of the circuit court under date, April 21, 1892.

The jurisdiction of the court below depended solely upon the diverse citizenship of the parties, and by the Act of March 3, 1891 (26 Stat. at L. 826, chap. 517) the jurisdiction of this court **137**]in *such cases was taken away, although preserved by the joint resolution of March 3, 1891 (26 Stat. at L.1115) as to pending cases and cases wherein the appeal should be taken before July 1, 1891. The appeal was allowed January 7, 1891, but the decree did not take final effect as of that date for the purposes of an appeal nor until February 17, 1892, because the application for rehearing was entertained by the court, filed within the time granted for that purpose, and not disposed of until then. *Aspen Min. & Smelt. Co.* v. *Billings*, 150 U. S. 31 [37: 986].

The appeal bond was not given until April 15, 1892, but the record was filed in this court April 19, 1892, which was one of the days of the October term, 1891, of this court. Notwithstanding this, however, and without considering the question as to whether this appeal was properly prosecuted in respect of parties, within *Hardee* v. *Wilson*, 146 U. S. 179 [36: 933], we are of opinion that as the circuit court had jurisdiction, and this court had not, long after July 1, 1891, the taking of a new appeal became necessary upon the denial of the rehearing, and this could only be to the Circuit Court of Appeals for the Eighth Circuit. *Cincinnati Safe & L. Co.* v. *Grand Rapids Safety Deposit Co.* 146 U. S. 54 [36: 885].

Appeal dismissed.

THE BALTIMORE TRACTION COMPANY, *Plff. in Err.*,
v.
THE BALTIMORE BELT RAILROAD COMPANY.

(See S. C. Reporter's ed. 137, 138.)

State decisions—Federal questions.

1. This court is bound to accept the conclusion of the state court as to the proper construction of the statute of the state.

2. When it was objected that a statute of Maryland as to condemnation of lands, violated the U. S. Constitution in that an owner of land could be deprived thereunder of his property without due process of law because the statute did not provide for any notice to him, and the court of appeals of that state had decided that the statute, properly construed, required notice, held, that this court is bound by the state decision, and the want of requirement of notice did not exist, and no Federal question is involved.

[No. 994]

Submitted Dec. 11, 1893. Decided Jan. 8, 1894.

IN ERROR to the Baltimore City Court, to review an order confirming an inquisition of a jury finding and assessing the damages for the taking of land in condemnation proceedings. On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

Messrs. **John K. Cowen** and *Wm. Irvine Cross*, for defendant in error, in favor of motion.

Mr. **Nicholas P. Bond** for plaintiff in opposition.

THE CHIEF JUSTICE: These were proceedings in condemnation, commenced June 15, 1892, in accordance with section 167 of article 23 of the Code of Public General Laws of the state of Maryland, plaintiff in error appearing therein.

It was objected below that that section violated the 14th Amendment of the Constitution of the United States, in that the owner of land condemned thereunder might be deprived of his property without due process of law because the act did not provide for any notice to him of the proceedings; but it had been previously decided by the court of appeals of Maryland that the act, properly construed, required notice. *Baltimore Belt R. Co.* v. *Baltzell*, 75 Md. 103.

We are bound to accept the conclusion of the state court as to the proper construction of the statute of the state. *Green* v. *Neal*, 31 U. S. 6 Pet. 291 [8:402]; *Davie* v. *Briggs*, 97 U. S. 628 [24:1086]; *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 590 [33:785]. At the time of these proceedings, therefore, notice was required. No suggestion is made that the validity of the statute was drawn in question as repugnant to the Constitution of the United States in any other particular, and as the want of requirement of notice did not exist, the alleged ground of our jurisdiction fails.

Writ of error dismissed.

NOTE.—*As to jurisdiction in the United States Supreme Court, where a Federal question arises, or where are drawn in question statutes, treaty or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see notes to Hart v. Lamphire, 7:679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question, see note to Hamblin v. Western Land Co. 37: 267.

THE KEYSTONE MANUFACTURING COMPANY, *Appt.*, v. HENRY A. ADAMS.

(See S. C. Reporter's ed. 139-149.)

Patent for improvement in cornshellers—general use—profits—other patents—incompetent proof—nominal damages.

1. Patent No. 132,128, granted Oct. 15, 1872, to Henry A. Adams, for an improvement in cornshellers, is valid, and is infringed by the machines made and sold by defendant.
2. The fact that a patented device has gone into general use, and has displaced other devices, is entitled to weight, when the question is whether it exhibits patentable invention.
3. A plaintiff, who has established the validity of his patent and proved an infringement, can demand in equity, an account of the profits actually realized by the defendant from his use of the patented device; the burden of proof of profits is on the plaintiff.
4. Where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents and how much was a manufacturer's profit, the complainant is entitled to nominal damages only.
5. In a suit for infringement of a patent and to recover profits, it is error to permit the plaintiff to prove, not the defendant's profits, but those realized by other companies.
6. In a suit for infringement of a patent and recovery of profits, where plaintiff relied, notwithstanding defendant's objections, on incompetent and irrelevant evidence, to show the amount of profits recovered, the decree in his favor, in so far as it awards more than nominal damages, cannot be sustained.

[No. 156.]

Argued Dec. 8, 11, 1893. Decided Jan. 8, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, in a suit brought by Henry A. Adams, plaintiff, against the Keystone Manufacturing Company *et al.*, for infringing a patent granted to plaintiff, No. 132,128, for an improvement in cornshellers, such decree sustaining the validity of the patent, and the infringement, and decreeing the payment by the defendant company of the sum of $27,620, and the costs, and dismissing the suit as against the other defendants. Reversed, with costs in this court to be paid by the appellee and cause remanded with directions to enter a decree for nominal damages with costs.

Statement by *Mr. Justice* **Shiras**:

On the 14th day of May, 1886, Henry A. Adams filed in the Circuit Court of the United States for the Northern District of Illinois a bill of complaint against the *Keystone [140 Manufacturing Company, a corporation of the state of Illinois, and Thomas A. Galt, J. B. Patterson, George S. Tracy and E. L. Galt, officers and managers of the said company, complaining that the defendants were infringing his rights as the patentee and owner of letters patent No. 132,128, granted on October 15, 1872, by the United States to him as the original and first inventor of a certain new and useful improvement in cornshellers. The bill contains the usual averments and prayed for an account and an injunction. On August 2, 1886, the defendants filed a joint answer admitting that letters patent had been issued to the complainant, as alleged, denying that said patent described any new or patentable invention, alleging that the said alleged invention had been anticipated in numerous other specified letters patent, and denying that the machines made and sold by the defendant company were infringements of any rights possessed by the complainant.

A replication was duly filed, evidence was taken, and argument had, the result of which was that, on June 30, 1888, the court entered an interlocutory decree sustaining the validity of the patent, finding an infringement, directing an account, and appointing a master to state the same. Afterwards, on June 21, 1889, the master filed a report awarding the sum of $27,620 to the complainant, being the amount of the profits he found to have accrued to the defendants from their use of the patented machines, to which report exceptions were filed. On February 5, 1890, a final decree was entered overruling the exceptions to the master's report, decreeing the payment by the defendant company of the sum of $27,620 and costs, and dismissing the bill for want of equity as against Thomas A. Galt, J. B. Patterson, George S. Tracy and E. L. Galt.

From this decree an appeal was taken to this court.

NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism; articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must, when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to notes given for patent rights; purchaser before maturity, see note to Mandeville v. Welch, 5: 87.

That prior use or sale of invention renders patent void, see note to French v. Carter, 34: 664.

As to reissued patents for inventions, when valid; effect of issue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 644.

As to what constitutes infringement of patent; similarity of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

Mr. **John G. Manahan** for appellant.
Messrs. **Lewis L. Coburn** and **John M. Thacher** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

Prior to the invention patented in 1872 by Henry A. Adams, a well known defect in cornsheller consisted in the clogging or choking of the chute through which the ears of corn descended to the sheller. As the ears would approach the throat of the machine they were liable to stop and wedge against each other. This sometimes necessitated the stopping of the machine in order to break the clog in the feed or chute, and usually the services of an attendant were required to clear the chute and break the clog by punching the ears with a stick.

The object of the Adams invention was to remedy this defect, and the device invented is described in the first claim of the patent in the following terms: "The combination with a cornsheller of a series of wings, wheels, or projections, so arranged on a shaft as to revolve in the same direction which the corn is running, and so placed relative to the throat as to force into the machine all misplaced or hesitating ears, substantially as specified." Resorting to the specification, we find the following description of the invention:

143] *"This invention relates to an improvement upon the cornsheller patented by Augustus Adams, as described in his letters patent No. 54,659, dated May 15, 1866. In said patented cornsheller a winged shaft is placed above the openings into the sheller, and is revolved oppositely to the direction of the entering corn, in such a manner that the said wings strike the upper ear, if two ears attempt to enter the throat at once, and throw said upper ear back into position to descend properly; but I have discovered that the ear so thrown back retards the feed, inasmuch as the following ears are likely to override the ear so thrown back, and the difficulty is thus continued.

"In the present invention I propose to overcome this objection by forcing all the ears, as they approach the throat, to pass rapidly out of the way into the sheller; and to this end I arrange a shaft above the throat, with a series of wings, wheels, or projections, to revolve in the same direction as the entering corn, so as to force the corn rapidly forward into the sheller, which is capable of shelling all the corn that can be forced through the throat. By this means I avoid any chance of clogging the feed under ordinary circumstances."

That the patented device is useful and successfully overcomes the choking or clogging that interfered with the operation of cornshellers as previously constructed, is clearly made out in the case. The evidence is positive as to this point, and also to the effect that the application of the invention dispensed with the extra attendant, whose duty it was to remove the clog by using a stick or fork, and increased the ordinary capacity of the machines. It is also made to appear that the invention has gone into general use.

While it is true that the mere fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, does not establish, in all cases, that the later device involves invention within the meaning of the patent laws, yet such fact is always of importance, and is entitled to weight, when the question is whether the machine exhibits patentable invention. *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 495 [23: 954.]

We, therefore, agree with the court below that "the change *was a substantial and **[144** meritorious one, and one which was well worthy of a patent, by reason of the improvement which it produced in the operative effect of the cornsheller."

We also concur in the reasoning and conclusion of the court below respecting the novelty of the invention. While it is true that the device patented by Augustus Adams, the father of the present patentee, in May, 1866, was intended to effect the same purpose, and used likewise a revolving shaft with wings or protuberances, yet the mode of operation was entirely different. The theory of the earlier machine was to prevent the clogging of the ears of corn in the throat of the sheller by driving back some of the ears, and thus keeping them from entering the sheller simultaneously. But it seems that this interrupted the continuous flow of the ears into the sheller, and retarded the operation of shelling.

Another patent alleged as an anticipation was that granted to Augustus Adams, August 6, 1861, No. 1861, and which is asserted to contain a rotating shaft with little wheels fastened thereon, having teeth or prickers on their faces. This shaft, however, is located underneath the chute, down which the ears of corn descend, and the evidence shows that this device did not operate so as to prevent clogging. On the contrary, the clogging of the feed in this machine required the attention of one man all the time. This was the defect which the same patentee, Augustus Adams, sought to obviate by the device patented by him in 1866.

It must be admitted that both of these patents granted to Augustus Adams, one in 1861, the other in 1866, describe mechanical contrivances closely resembling the invention in question, patented by H. A. Adams, October 15, 1872. There is present in all three machines a rotating shaft with spurs or wings, and the purpose sought to be effected is the same.

But, as we have seen, when the test of practical success is applied, the conclusion is favorable to the last patent.

Where the patented invention consists of an improvement of machines previously existing, it is not always easy to point out what it is that distinguishes a new and successful machine from an old and ineffectual one. But when, in a class of *machines so widely used **[145** as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the Patent Office has granted a patent to the successful inventor, the courts should not be ready to adopt a narrow or astute construction, fatal to the grant.

The question of infringement is readily disposed of. The defendant, the Keystone Manufacturing Company, manufactures and sells

machines made under certain patents granted to Harvey Packer, and it is claimed that because, in these machines, the ears of corn do not drop down a chute to the point where they pass into the throat of the sheller, but are brought directly to the shelling devices by carriers, such difference in the mode of bringing the corn to be operated on by the shelling devices distinguishes the machines. But we agree with the court below, that there is nothing in the H. A. Adams patent which restricts his device to cornshellers where the ears are fed into a chute, through which they drop to the throat of the sheller. It is equally well adapted to be used in that form of machine where the chute is dispensed with, and where the ears of corn are brought by other means to the throat of the machine. What we have to compare is the forcing device in the respective machines, and as we find that the defendant uses a spiked shaft at the entrance to the throat of his machine, revolving in the same direction in which the corn is running, for the purpose of urging or compelling the ears to enter the sheller, we cannot hesitate to hold it an infringement of the complainant's device.

It may be proper to say that there is a feature of the Packer machines, having reference to its operation after the corn has passed beyond the reach of the picker shaft, not found in the Adams, which seems to be a further improvement in the art of cornshelling, and which may have justified the granting of a patent for such improvement, though, of course, such a question is not now before us.

These views justify the decree of the court below, so far as it declares the validity of the patent sued on, and its infringement by the defendant. But we are unable to sustain that 146] *decree in overruling the exceptions to the master's report, and in adjudging, in accordance with the finding of the master, the payment by the defendant company to the plaintiff of the sum of twenty-seven thousand six hundred and twenty dollars.

The record shows that the complainant did not seek to recover a license fee, nor did he offer any evidence from which his damages could be computed. He relied entirely on the proposition that the amount which he was entitled to recover could be based on the profits realized by the defendant from the sale of the patented invention, and the amount of such profits he claimed to have shown by evidence tending to show what certain third companies were alleged to have made from the sale of similar devices in similar cornshelling machines.

The reasoning of the master and of the court below on this subject can be made clearly to appear by the following extracts from the opinion of the learned judge:

"The complainant, to establish the extent of the defendant's profits, called witnesses familiar with the cost and selling price of the Sandwich, Joliet, and Marseilles machines, and showed what the profits of these manufacturers were on the different sizes of machines made by them and what proportion of these profits were fairly attributable to the defendant's device. No proofs were introduced by either party as to the actual profits realized by the defendant company, but it was evidently assumed by the master that the machines of the defendant were so near like those of the other companies in their material, form and cost of construction that the profits of defendant on machines made and sold by it must have been substantially the same as the profits made by these other manufacturers.

"Here are competing manufacturers making the same kind of machine for the same market, and the natural conclusion is that they would pursue substantially the same business methods and realize about the same profits."

While it is undoubtedly established law that complainants in patent cases may give evidence tending to show the profits realized by defendants from use of the patented devices, and thus enable the courts to assess the amounts which the *complainants are entitled [147 to recover, yet it is also true that great difficulty has always been found, in the adjudicated cases, in applying the rule that the profits of the defendant afford a standard whereby to estimate the amount which the plaintiff is entitled to recover, and in defining the extent and limitations to which this rule is admittedly subject.

Such a measure of damages is of comparatively easy application where the entire machine used or sold is the result of the plaintiff's invention; but when, as in the present case, the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the defendant, serious difficulties arise.

It is unnecessary, in this opinion, to review the numerous cases, some at law, others in equity, wherein this court has considered various aspects of this question. It is sufficient to say that the conclusions reached may be briefly stated as follows: It is competent for a complainant, who has established the validity of his patent and proved an infringement, to demand, in equity, an account of the profits actually realized by the defendant from his use of the patented device; that the burthen of proof is on the plaintiff; that where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only. *Seymour* v. *McCormick*, 57 U. S. 16 How. 480 [14: 1024]; *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 788 [19: 566]; *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 620 [20: 860]; *Elizabeth* v. *American Nicholson Pav. Co.* 97 U. S. 126 [24: 1000].

In the case last named it was said: "It is unnecessary here to enter into the general question of profits recoverable in equity by a patentee. The subject, as a whole, is surrounded with many difficulties, which the courts have not yet succeeded in overcoming. But one thing may be affirmed with reasonable confidence, that if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits; the patentee, in such case, *is left [148 to his remedy for damages. It is also clear that a patentee is entitled to recover the profits

that have been actually realized from the use of his invention."

In *Garretson* v. *Clark*, 111 U. S. 120 [28:371], this court quoted with approval the statement of the rule made in the court below by *Mr. Justice* Blatchford: "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."

Tilghman v. *Proctor*, 125 U. S. 136 [31:664], is an important case, in which many of the earlier cases were reviewed, and it was there said: "The infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for are not those which he might reasonable have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages."

In the light of these decisions there was error in the court below, not in any formal disregard of the rule restricting the plaintiff's recovery to the profits actually realized, but in permitting the plaintiff to prove, not the defendant's profits, but those realized by other companies. This was in effect showing what, in the opinion of the master and the court, "he might reasonably have made, and not those which he did make."

The fallacy of this application of the rule is obvious, for nothing is more common than for one manufacturing concern to make profits where another, with equal advantages, operates at a loss.

The learned judge seems to have thought that the course of the defendant, in not himself disclosing the condition of his business, justified the master in estimating his profits upon 149] *the basis of those of other similar establishments. But, as we have seen, the burden of proof was upon the plaintiff. He relied, notwithstanding defendant's objections, on incompetent and irrelevant evidence, and the decree in his favor, in so far as it awards more than nominal damages, cannot be sustained.

The decree of the court below is reversed; the costs in this court to be paid by the appellee; and this cause is remanded with directions to enter a decree for nominal damages with costs.

HENRY M. BATES ET AL., *Plffs. in Err.*,
v.
SARAH A. PREBLE.

Books of account, when evidence—memoranda, when evidence—error in allowing jury to take a book—concealment of fraud, when affects statute of limitations—evidence showing conspiracy.

(See S. C. Reporter's ed. 149-163.)

1. Books of account kept in the usual and regular course of business when supplemented by the oath of the party who kept them, may be admitted in evidence.
2. Memoranda made by a witness which are not sufficiently authenticated to make it proper to submit them to the jury, are inadmissible in evidence.
3. Where an entire book was suffered to be taken to the jury room when but three pages were in evidence, the instruction not to look at the unproved part does not relieve its admission to the jury room from error.
4. In Massachusetts the mere silence of the defendant, or his failure to inform the plaintiff of the cause of action, if there is no fiduciary relation between the parties, and plaintiff has the means of discovering the facts, is not such a fraudulent concealment of the cause of action as will prevent the bar of the statute of limitations, but if the fraud itself be secret in its nature, and such that its existence cannot be readily ascertained, or if there be fiduciary relations between the parties, there need be no evidence of a fraudulent concealment other than that implied from the transaction itself.
5. Evidence showing a conspiracy between two persons to defend a third, does not show necessarily that they fraudulently concealed the cause of action for the fraud from the person defrauded, where there was no such confidential relations existing between them as would cause silence on their part to be imputed as a fraud.

[No. 123.]

Argued Nov. 28, 29, 1893. Decided Jan. 8, 1894.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment for plaintiff, Sarah A. Preble, against Henry M. Bates *et al.*, defendants, for the value of certain securities, the property of plaintiff, which were converted by defendants to their own use. *Reversed, with instructions to grant a new trial.*

Statement by *Mr. Justice* **Brown**:

*This was an action at law brought by [150 Sarah A. Preble to recover of the defendants Bates and Walley, stock brokers, the value of certain securities, the property of the plaintiff, which she alleged had been converted by the defendants to their own use.

The facts were substantially as follows: Mrs. Preble, a widow and a resident of Portland,

NOTE.—*As to use of memoranda to refresh memory of witness*, see note to Republic F. Ins. Co. v. Weide, 20: 894.

That persons jointly indicted cannot be witnesses for each other; exceptions to the rule; when wife of one may be, see note to United States v. Reid, 13: 1023.

As to effect of refusal to produce, or destruction of paper, see note to Hanson v. Eustace, 11: 416.

Me., acquired by her husband's will certain securities, consisting of stocks and bonds, which she kept in a box in the vaults of the Union Safe Deposit Company, in Boston. Upon the trial she gave evidence tending to show that she entrusted the key of the box to her son, Edward Preble; that she visited the box herself in 1878 and found all her securities there; that she next visited it in the autumn of 1882 and found them all gone; that at various times between these dates her son had abstracted these securities from the box, to which she had given him access, and had taken them to the defendants, who were stock brokers, without authority from her, and that the defendants had sold the securities for him; that Walley, one of the defendants, had notice that the securities belonged to the plaintiff and had fraudulently concealed from her the fact of the conversion, and that she did not discover the conversion until within six years before bringing of the suit.

Defendants claimed that some of her securities they had never sold or dealt with in any way; that others they had received from Edward Preble, and had disposed of by his directions and upon his account in the ordinary course of business, believing them to be his property; that they had no knowledge or notice than any of the property belonged to the plaintiff; that in fact some of the securities did not belong to her, and that if she ever had any cause of action against them for the conversion of these securities, the same arose more than six years before the bringing of her suit, and hence that such action was barred by the statute of limitations.

The jury returned a verdict for the plaintiff 151] for $34,772.88 *damages, and handed to the court with their verdict a schedule containing the special items upon which they held the defendants liable, showing the securities which they found to have been converted by the defendants with the value of the same, and the date of their conversion from which interest was computed. Upon motion for new trial, the court held that there was no evidence to sustain the finding of the jury with respect to certain of the securities; that the value of such securities should be remitted from the verdict, or that a new trial should be granted. Judgment was finally entered for the plaintiff for $28,496.52, being the amount of the verdict less the amount remitted. Defendants sued out a writ of error from this court.

***Mr.* Samuel Hoar,** for plaintiffs in error:

Greater latitude is allowed in cross-examining a party to a suit than in cross-examining an ordinary witness.

Rea v. *Missouri*, 84 U. S. 17 Wall. 532 (21: 707); *Com.* v. *Nichols*, 114 Mass. 285, 19 Am. Rep. 346.

A party who offers himself as a witness at a trial cannot refuse to answer questions as to a conversation with his counsel on the ground that it was a privileged communication.

Woburn v. *Henshaw*, 101 Mass. 193, 3 Am. Rep. 333.

A mere private memorandum, not made in course of any business or by one who had a duty to make it, is not admissible under the rule which admits entries made in the usual course of business or by one whose duty it was to make them.

Shove v. *Wiley*, 18 Pick. 558; *Perkins* v. *Augusta Ins. & Bkg. Co.* 10 Gray, 312, 323, 71 Am. Dec. 654; *Costello* v. *Crowell*, 133 Mass. 355; *Nichol's* v. *Webb*, 21 U. S. 8 Wheat. 326 (5: 628); *McCormick* v. *Pennsylvania Cent. R. Co.* 49 N. Y. 304; *Howard* v. *McDonough*, 77 N. Y. 593; *Com.* v. *Fox*, 7 Gray, 585; *Dugan* v. *Mahoney*, 11 Allen, 572; *Com.* v. *Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Com.* v. *Jeffs*, 132 Mass. 5.

It is only as auxiliary to, and not as a substitute for, the oral testimony of the witness, that the writing is admissible.

Russell v. *Hudson River R. Co.* 17 N. Y. 134; *Howard* v. *McDonough*, 77 N. Y. 593; *Halsey* v. *Sinsebaugh*, 15 N. Y. 485; *Alcord* v. *Collin*, 20 Pick. 418; *Briggs* v. *Rafferty*, 14 Gray, 525; *Ætna Ins. Co.* v. *Weide*, 76 U. S. 9 Wall. 677 (19: 810); *Republic F. Ins. Co.* v. *Weide*, 81 U. S. 14 Wall. 375 (20: 894); *New Haven County Bank* v. *Mitchell*, 15 Conn. 206; *Hacen* v. *Wendell*, 11 N. H. 112; *Watson* v. *Walker*, 23 N. H. 471; *Parsons* v. *Wilkinson* ("*Maxwell's Errs.* v. *Wilkinson*") 113 U. S. 656 (28: 1037); *Ballard* v. *Ballard*, 5 Rich. L. 495.

If the witness cannot swear positively to the accuracy of the memoranda, or they are shown to be inaccurate, they are not admissible in evidence.

Flood v. *Mitchell*, 68 N. Y. 507; *Stickney* v. *Bronson*, 5 Minn. 215; *Ruch* v. *Rock Island*, 97 U. S. 693, 695 (24: 1101, 1102); *Farmers & M. Bank* v. *Boraef*, 1 Rawle, 152; *Acklen* v. *Hickman*, 63 Ala. 494, 35 Am. Rep. 54; *Collins* v. *Rockwood*, 64 How. Pr. 57; *Kelsea* v. *Fletcher*, 48 N. H. 282; *Paine* v. *Sherwood*, 19 Minn. 315; *National Bank of Commerce* v. *Meader*, 40 Minn. 325; *Kent* v. *Mason*, 1 Ill. App. 466; *State* v. *Baldwin*, 36 Kan. 3.

When a memorandum which is not admissible in evidence has been given to the jury, the error is not cured by instructing them that they are not to consider it as evidence.

Com. v. *Edgerly*, 10 Allen, 184; *Stoudenmire* v. *Harper*, 81 Ala. 242.

Where a part of the conversation, account, or other writing has been put in evidence as material to some question in the trial, this does not admit other parts of such conversation, accounts, or writings that do not relate to the same subject-matter.

Straw v. *Greene*, 14 Allen, 206; *Dole* v. *Wooldredge*, 142 Mass. 161; *Ashley* v. *Wolcott*, 3 Gray, 571; *Abbott* v. *Pearson*, 130 Mass. 191.

A party cannot, for the purpose of supporting his witness, introduce evidence of prior statements by that witness of the facts testified to by him at the trial, except when the witness has been impeached by the opposing party in a particular way.

Conrad v. *Griffey*, 52 U. S. 11 How. 480 (13: 779); *United States* v. *Holmes*, 1 Cliff. 98; *Com.* v. *Jenkins*, 10 Gray, 485; *Deshon* v. *Merchants Ins. Co.* 11 Met. 199; *Robb* v. *Hackley*, 23 Wend. 50; *Reed* v. *Spaulding*, 42 N. H. 114; *People* v. *Doyell*, 48 Cal. 85; *Nichols* v. *Stewart*, 20 Ala. 358; *Smith* v. *Morgan*, 38 Me. 468.

Where the other side in cross-examination or otherwise, puts in evidence tending to show that the testimony is a fabrication of recent date, it is proper to show that the same ac-

count was given by the witness before its ultimate effect and operation arising from a change of cirumstances could have been forseen.

1 Phil. Ev. Cowen's ed. 307; 1 Stark. Ev. 149; *Robb* v. *Hackley*, 23 Wend. 55; *Hewitt* v. *Corey*, 150 Mass. 445; *French* v. *Merrill*, 6 N. H. 465; *Hester* v. *Com.* 85 Pa. 139; *Stolp* v. *Blair*, 63 Ill. 541; *Stewart* v. *People*, 23 Mich. 63, 9 Am. Rep. 78.

Where pleadings consist of specific allegations of matters of action or defense, such as allegations about specific pieces of property, they are competent evidence in another suit to prove admissions by a party or to contradict a witness.

Gordon v. *Parmele*, 2 Allen, 212; *Bliss* v. *Nichols*, 12 Allen, 443; *Johnson* v. *Russell*, 144 Mass. 409; *Parsons* v. *Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Green* v. *Bedell*, 48 N. H. 546; *Williams* v. *Cheney*, 3 Gray, 215; *Judd* v. *Gibbs*, 3 Gray, 539.

Where there is no fiduciary relation between the parties, mere silence of the defendant or his failure to inform the plaintiff of the cause is not such a fraudulent concealment as is contemplated by the statute of Massachusetts.

Walker v. *Soule*, 138 Mass. 570; *Nudd* v. *Hamblin*, 8 Allen, 130; *Atlantic Nat. Bank* v. *Harris*, 118 Mass. 147; *Manufacturers Nat. Bank* v. *Perry*, 144 Mass. 313.

There is no concealment if the plaintiff possesses the means of acquiring knowledge of the facts.

Nudd v. *Hamblin*, 8 Allen, 130.

The fraudulent concealment must be that of the defendant and not of some third person.

Abbott v. *North Andover*, 145 Mass. 484.

Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

Stanley v. *Stanton*, 36 Ind. 445; *Wynne* v. *Cornelison*, 52 Ind. 313; *Stone* v. *Brown*, 116 Ind. 78; *Miller* v. *Powers*, 4 L. R. A. 483, 119 Ind. 79; *Rouse* v. *Southard*, 39 Me. 404; *Boomer Dist. Twp.* v. *French*, 40 Iowa, 601; *Evans* v. *Montgomery*, 50 Iowa, 325; *Sankey* v. *McKleevey*, 104 Pa. 265, 49 Am. Rep. 575; *Pratt* v. *Northam*, 5 Mason, 95; *Chamberlain* v. *Chicago, B. & Q. R. Co.* 27 Fed. Rep. 181; *Stevenson* v. *Robinson*, 39 Mich. 160.

Messrs. **Robert M. Morse** and **Louis C. Southard**, for defendant in error:

The admission of testimony as to the plaintiff's instructions to her son, was correct.

Story, Agency, § 54; *Gestring* v. *Fisher*, 46 Mo. App. 603.

Communications between client and counsel are privileged.

Vogel v. *Gruaz*, 110 U. S. 311 (28: 158); *Whiting* v. *Barney*, 30 N. Y. 330; *Foster* v. *Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Hunt* v. *Blackburn*, 128 U. S. 464 (32: 488).

And it is not a sufficient answer that the client took the stand as a witness.

Duttenhofer v. *State*, 34 Ohio St. 91; *Bigler* v. *Reyher*, 43 Ind. 112.

The fact that client has called his legal adviser as a witness is not a waiver of the privilege.

Montgomery v. *Pickering*, 116 Mass. 227.

Where evidence which is offered for a particular purpose only is not admissible for that purpose and is properly excluded, its exclusion is not error, although if offered for other purposes it might have been competent.

Brown v. *Leach*, 107 Mass. 364; *Britton* v. *Worcester County*, 123 Mass. 309.

The pleadings in an action in which judgment has not been rendered are not evidence.

Walcott v. *Kimball*, 13 Allen, 460; *Phillips* v. *Smith*, 110 Mass. 61; *Taft* v. *Fiske*, 140 Mass. 250, 54 Am. Rep. 459.

A complaint in one suit not under oath or signed by the plaintiff but only by his attorney is incompetent in another suit to prove an admission by the plaintiff.

Delaware County Comrs. v. *Diebold Safe & L. Co.* 133 U. S. 473 (33: 674).

Books of account containing original entries and supplemented by the testimony of the party who kept them, are admissible in evidence.

Ætna Ins. Co. v. *Weide*, 76 U. S. 9 Wall. 677 (19: 810); *Cogswell* v. *Dolliver*, 2 Mass. 217, 3 Am. Dec. 45; *Prince* v. *Smith*, 4 Mass. 454; *Smith* v. *Sanford*, 12 Pick. 139, 22 Am. Dec. 415; *Harwood* v. *Mulry*, 8 Gray, 250; *Pratt* v. *White*, 132 Mass. 477; *Miller* v. *Shay*, 145 Mass. 162; *Passmore* v. *Passmore*, 60 Mich. 463; *Singer* v. *Brockamp*, 33 Minn. 501; *Webster* v. *Clark*, 30 N. H. 245; *Merrill* v. *Ithaca & O. R. Co.* 16 Wend. 586, 30 Am. Dec. 130; *Dunn* v. *James*, 62 How. Pr. 307; *Payne* v. *Hodge*, 7 Hun, 612; *Shove* v. *Wiley*, 18 Pick. 558; *Farmers & M. Bank* v. *Boraef*, 1 Rawle, 152.

Sheets of paper on which separate entries have been made have been received.

Hooper v. *Taylor*, 39 Me. 224; *Smith* v. *Smith*, 4 Harr. (Del.) 532; *Taylor* v. *Tucker*, 1 Ga. 231.

Papers not evidence *per se*, but found to have been true statements of fact, are admissible in connection with the testimony of a witness who made them.

Republic F. Ins. Co. v. *Weide*, 81 U. S. 14 Wall. 375 (20: 894).

Notes of testimony or of conversations, accompanied by the testimony of the person who made the memoranda have been admitted.

People v. *Murphy*, 45 Cal. 137; *Mineral Point R. Co.* v. *Keep*, 22 Ill. 9; *Labar* v. *Crane*, 56 Mich. 585; *Halsey* v. *Sinsebaugh*, 15 N. Y. 485; *Clark* v. *Vorce*, 15 Wend. 194, 30 Am. Dec. 53; *Huff* v. *Bennett*, 4 Sandf. 120; *Jones* v. *Ward*, 3 Jones L. 24, 64 Am. Dec. 590; *McAdams* v. *Stilwell*, 13 Pa. 90; *Glass* v. *Beach*, 5 Vt. 172; *Marsh* v. *Jones*, 21 Vt. 378, 52 Am. Dec. 67; *Haven* v. *Wendell*, 11 N. H. 112.

A paper which is in part legal evidence and in part not, may go to the jury if they are instructed to disregard the part which is not evidence.

Com. v. *Wingate*, 6 Gray, 485; *Com.* v. *Dow*, 11 Gray, 316.

Unless it appears affirmatively that the defendants were prejudiced by the exclusion of evidence they have no ground of exception.

Smith v. *Collins*, 115 Mass. 388; *Boston & M. R. Co.* v. *Montgomery*, 119 Mass. 114; *Morville* v. *American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40; *Warner* v. *Jones*, 140 Mass. 216.

It is the rule that evidence of an inferior

nature, which supposes evidence of a higher in existence and which may be had, shall not be admitted.

Com. v. *Kinison*, 4 Mass. 646; *Waterman* v. *Robinson*, 5 Mass. 303.

To hold that, by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud, the means by which it is made successful and secure.

Bailey v. *Glover*, 88 U. S. 21 Wall. 342 (22: 636); *Manufacturers Nat. Bank* v. *Perry*, 144 Mass. 313; *Rosenthal* v. *Walker*, 111 U. S. 185 (28: 395); *Wood* v. *Carpenter*, 101 U. S. 135 (25: 807).

154] *Mr. Justice* **Brown** delivered the opinion of the court:

There are thirty-four assignments of error in this case, many of which are of little importance, and as we have come to the conclusion that the case must be reversed and a new trial ordered, it is neither necessary nor advisable that we should dispose of them all.

(1) The seventh and eighth assignments are taken to the admission of certain pages of a memorandum book purporting to contain a list of securities owned by the plaintiff. Concerning this book she testified that "it was her own book, in her own handwriting, never seen by any one until it went into the hands of counsel; that the entries were made in it from time to time; that it showed the securities which she had, which went into the box in the safe deposit vaults." One page she testified was cut from an earlier book kept by her, which was pinned into this book, and that page showed what securities she had in her box in 1878. On cross-examination, she testified with reference to the first page, "that the figures on top in pencil she put there when she took the page out of the other book and put it into that book. Those figures in pencil were 1877 and 1878; that she did not remember at what time she did this; that it was before 1882, and was after she cut it out of the other books; . . . that she had no memorandum except what was on that paper in the book; that some of it was written in ink and some in pencil; that what was in ink was written when it was in the other book; that the pencil part was written after it was put in this book; that the summing up was made by her, but was not correct; that at the bottom of the page the value appeared to be as of 1871; she did not know whether it was its correct value in 1871 or 1877," etc. "That the entries in her memorandum book were not reliable; that she could not tell when she made the entries upon them or when the figures were set down; that she could not tell why she made the entries, nor why she had struck out any of them." This book was sought to be used, not for the 155] purpose of refreshing the memory *of the witness, but was laid before the jury as independent evidence of the character and value of the securities.

There is no doubt that books of account kept in the usual and regular course of business, when supplemented by the oath of the party who kept them, may be admitted in evidence. *Ætna Ins. Co.* v. *Weide*, 76 U. S. 9 Wall. 677 [19: 810]; *Cogswell* v. *Dolliver*, 2 Mass. 217, 3 Am. Dec. 45; *White* v. *Ambler*, 8 N. Y. 170. But whether this rule extends to memoranda made by a witness contemporaneously with the event they purport to record, is open to very considerable doubt, elementary writers and courts being about equally divided upon the subject. 1 Greenl. Ev. § 437, note 3; 1 Smith, Lead. Cas. (6th Am. ed.) 508, 510. In New York they are held to be admissible. *Halsey* v. *Sinsebaugh*, 15 N. Y. 485; *McCormick* v. *Pennsylvania Cent. R. Co.* 49 N. Y. 303, 315. The cases in Massachusetts apparently favor a different view. *Com.* v. *Fox*, 7 Gray, 585; *Dugan* v. *Mahoney*, 11 Allen, 572; *Com.* v. *Ford*, 130 Mass. 64, 39 Am. Rep. 426; *Com.* v. *Jeffs*, 132 Mass. 5; *Field* v. *Thompson*, 119 Mass. 151. In this court it was held in *Republic F. Ins. Co.* v. *Weide*, 81 U. S. 14 Wall. 375 [20: 894], that a statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another statement contained in a book, itself destroyed in the fire, accompanied by proof that on a certain day the witness took a correct inventory of the merchandise, and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what was offered was a correct copy, was admissible in evidence in a suit against the insurance company to fix the value of the merchandise burnt, though there was no independent recollection by the witness of the value stated. In delivering the opinion of the court *Mr. Justice* Strong observed: "How far papers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has been many times decided that they are to be received. And why should they not be? Quantities and values are retained in *the memory with great | 156 difficulty. If at the time when an entry of aggregate quantities or values was made the witness knew it was correct, it is hard to see why it is not at least as reliable as the memory of the witness." This case might have been properly supported on the ground that they were entries made in the usual course of business, since from the report of a similar case (*Ætna Ins. Co.* v. *Weide*, 76 U. S. 9 Wall. 677 [19: 810]) this seems to have been the character of the entries. See also *Chaffee* v. *United States*, 85 U. S. 18 Wall. 516 [21: 908].

In *Parsons* v. *Wilkinson*, 113 U. S. 656 [28: 1037], a memorandum of a transaction which took place twenty months before its date, and which the person who made the memorandum testified that he had no recollection of, but knew it took place because he had so stated in the memorandum, and because his habit was never to sign a statement unless it were true, was held to be inadmissible. Many of the authorities are cited, but the inadmissibility of the memorandum was put upon the ground that it was made long after the transaction it purported to state. The general question of the admissibility of such memoranda

as independent evidence was not, however, decided.

In *Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 99 [30: 299], which was an action against a railroad company by a passenger to recover for personal injuries, a written statement as to the nature and extent of his injuries, made by his physician while treating him for them, for the purpose of giving information to others with regard to them, was held not to be admissible in evidence against the company, even when attached to the deposition of the physician, in which he swore that it was written by him, and that in his opinion it correctly stated the condition of the patient. Numerous authorities were cited upon both sides of the general question as to the admissibility of such memoranda, but the court held that the case did not require an examination of such authorities, inasmuch as it did not appear but that at the time the witness testified he had, "without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection there was no necessity whatever for reading that paper to the jury."

157] *We do not regard any of these cases as committing this court to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness.

But even if it were conceded that such a memorandum as that in question made contemporaneously with the deposit of the securities, and properly authenticated by oath of the plaintiff, would be admissible as independent evidence, the testimony of the plaintiff fell far short of establishing the requisite qualifications for its admission. It does not appear when the memorandum was made, or that it was contemporaneous with the deposit of the securities. Upon the other hand, it seems the entries were made from time to time, though not apparently as the securities were deposited in the box. Indeed, the plaintiff swears directly that she could not tell when she made the entries upon them, or when the figures were set down; that she could not tell why she made the entries, or why she struck out any of them, and that the entries were not reliable. She further testified that she never "saw any Oregon Navigation six per cent bonds, and never saw or received any Easterm Illinois bonds; . . . that she never had any New York & New England seven per cent bonds in her possession, and never saw them in her box; that she never saw any certificate of Consolidated Virginia stock;" and yet entries relating to these securities appear upon several of the pages of the book. Upon two or three of the pages there is not an entry that has the remotest connection with the question at issue, and it is difficult to see any ground upon which these pages were admitted.

Upon the whole, we think these memoranda, if inadmissible for no other reason, were not sufficiently authenticated to make it proper to submit them to the jury.

(2) By the ninth assignment of error it appears that after the close of the case, and when the jury were about to retire to consider their verdict, the court allowed the whole of the memorandum book to go to the jury without any sealing or other protection of the leaves and pages not put in evidence. It appears that when the court admitted the leaves and pages containing the memoranda above alluded to, it directed the *rest of the book to be sealed [158 up or otherwise protected from the inspection of the jury; but that when the jury were about to retire, the plaintiff offered to send the whole book without such protection, and the court directed the jury not to examine any part of the book except what was put in evidence, and permitted the whole book with that instruction to go to the jury. To this the defendants excepted. We think the court should have adhered to its directions to take such measures as were necessary to prevent the jury from seeing other portions of the book, as they contained matter, which though bearing upon the issue, was wholly inadmissible as testimony, and was calculated to create in the minds of the jury a strong prejudice against the defendants. This error was not cured by the instructions to the jury not to examine any part of the book except what was put in evidence. Such instructions might have healed the error, if the contents of the book had been unimportant. But the objectionable portions in this case were such as were likely to attract the eye of the jury, and accident or curiosity would be likely to lead them, despite the admonition of the court, to read the plaintiff's comments upon the defendants and her private meditations, which had no proper place in their deliberations. The precise question involved here arose in *Kalamazoo Novelty Mfg. Co.* v. *McAlister*, 36 Mich. 327, where an entire book was suffered to be taken to the jury room when but three pages were in evidence, and it was held that the instruction not to look at the unproved part should not be taken as relieving its admission to the jury room from error. See also *Com.* v. *Edgerly*, 10 Allen, 184; *Stoudenmire* v. *Harper*, 81 Ala. 242.

(3) The errors alleged in the 30th, 31st and 32d assignments relate to the instructions given by the court upon the applicability of the statute of limitations, and to the competency of the testimony introduced to take the case out of the bar of the statute. The Massachusetts statute provides as follows (Pub. Stat. chap. 197):

"Sec. 1. The following actions shall be commenced within six years next after the cause of action accrues and not afterwards. . .

*"Fourth. All actions of tort, except [159 those hereinafter mentioned. . . .

"Sec. 14. If a person liable to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action."

It is undisputed in this case that the embezzlements which formed the subject of the action were committed between 1878 and 1882, and in the schedule brought in by the jury and handed up with their verdict, interest was computed upon all the securities alleged to have been converted from a date anterior to January 25, 1881. As the writ by which the action was begun was dated January 25, 1887, the action would appear to have been barred

by the statute unless the evidence was such as to justify the jury in finding that there had been a fraudulent concealment of the embezzlement from the knowledge of the plaintiff. If the statute had simply provided that the six years should run from the discovery of the fraud, there could be no doubt of the right of the plaintiff to maintain this action, as there is no evidence that she discovered the fraud prior to her examination of the contents of her box in 1882. Such seems to have been the rule in common law actions, adopted by the supreme judicial court of Massachusetts prior to the enactment of section 14. *Homer* v. *Fish*, 1 Pick. 435, 11 Am. Dec. 218; *Welles* v. *Fish*, 3 Pick. 74; *Farnum* v. *Brooks*, 9 Pick. 212, 244. In construing this statute, however, the courts of Massachusetts have held, in a number of cases, that the mere silence of the defendant, or his failure to inform the plaintiff of the cause of action, is not such a fraudulent concealment as is contemplated by the statute, and that some positive act of concealment must be proved. Thus, in *Nudd* v. *Hamblin*, 8 Allen, 130, it was held that the omission to disclose a trespass upon real estate to the owner, if there is no fiduciary relation between the parties, and the owner has the means of discovering the facts, and nothing has been done to prevent his discovering them, is not such a fraud-[160] ulent *concealment of the cause of action as will prevent the bar of the statute. The court cited with approval the case of *Cole* v. *McGlathry*, 9 Me. 131, in which the defendant had received from the plaintiff funds to pay certain debts, and falsely affirmed that he had paid them. It was held that though he was guilty of a breach of moral and legal duty, having added falsehood to his neglect to pay, yet it was not such a fraudulent concealment as would take the case out of the statute, because the plaintiff had the means of discovering the truth at all times by inquiry of the persons who should have received the money. The court also cited the case of *McKown* v. *Whitman*, 31 Me. 448. This was an action to recover money which the defendant had agreed to deposit in a certain bank for the plaintiff, and which he told the plaintiff he had deposited. It was held that, even if this statement was untrue, it did not constitute a fraudulent concealment, because the plaintiff had at all times the means of discovering the truth. In *Walker* v. *Soule*, 138 Mass. 570, the action was founded upon certain representations made by the defendant, the administrator of an estate, that he was licensed by the probate court to sell the real estate of his intestate; that he had good right to sell it; that the title to it was good; and that the deed, a copy of which was in evidence, was in proper form and sufficient to pass the title. It was held that, as these representations were as to the contents of public records, which the plaintiff had full opportunity of examining, they were not sufficient to prove a subsequent fraudulent concealment from the knowledge of the plaintiff. So in *Abbott* v. *North Andover*, 145 Mass. 484, it was held that the representation by a township officer that he had authority to bind the town by the renewal of a promissory note, when in fact he had no such authority, was not a fraudulent concealment by the town of the cause of action, and hence that an action could not be maintained on the note, of which this was a renewal, which was not brought within six years.

On the other hand, if the fraud itself be secret in its nature, and such that its existence cannot be readily ascertained, or if there be fiduciary relations between the parties, there need be *no evidence of a fraudulent conceal-[161] ment other than that implied from the transaction itself. This is illustrated by the case of *First Massachusetts Turnp. Corp.* v. *Field*, 3 Mass. 201, 3 Am. Dec. 124, in which the defendants, having contracted with the plaintiffs to make for them a turnpike road upon a firm foundation, with suitable materials, etc., made a road upon a bad foundation, using unsuitable materials and unfaithfully executed the work, and fraudulently and deceitfully concealed the foundation and materials by covering the same with earth and smoothing the surface, so that it appeared to the plaintiffs that the contract had been faithfully executed, it was held that the contract was of such a nature as to admit of a fraudulent and deceitful execution, and that the fraud was in fact concealed from the knowledge of the plaintiffs. So in *Manufacturers Nat. Bank* v. *Perry*, 144 Mass. 313, a bank overpaid to the clerk of the defendant the sum of $200 on a cheque drawn by the defendant. Defendant, being notified by the clerk of the mistake, instructed him not to return the money, and to deny to the bank that he had been overpaid, which he did. It was held that his approval and adoption of the lie told by the clerk to the bank teller were active steps taken by him to prevent the bank from discovering the fact that he had received the money, and constituted a fraudulent concealment of the plaintiff's cause of action. So in *Atlantic Nat. Bank* v. *Harris*, 118 Mass. 147, a state bank paid to its president money which he falsely represented that he had paid to an agent to whom the bank was indebted. Subsequently the agent brought an action against the bank, and recovered the amount due him. It was held, in an action for money had and received, brought by the bank against the president, that the court was warranted in finding that the defendant had fraudulently concealed the cause of action from the bank, on account of the peculiar relations between them. "A bank," said the court, "must necessarily act through its officers. Its officer upon whom it relied in this instance was the defendant, who had charge of this particular transaction with Pierce, and he who should have disclosed the cause of action, was the party engaged in concealing it." See also *Wood v. Car-[162] penter*, 101 U. S. 135 [25:807]; *Felix* v. *Patrick*, 145 U. S. 317 [36: 719].

In this connection the court in the case under consideration charged the jury as follows:

"Now, gentlemen, I shall charge you as a matter of law this: That if you believe that the defendants here were not guilty of any fraud in these transactions, if you believe that they took these negotiable securities in, if you please, the ordinary course of their business and sold them, then Mrs. Preble would not have a right in this case to bring suit for anything that took place prior to January, 1881; but, on the contrary, if from the evidence you

believe that Walley, one of the defendants, conspired with young Preble to obtain these bonds and afterwards to conceal the fact from the mother, he, Edward, having the key to the safety box containing the securities, this would be evidence going to prove a fraudulent concealment of the cause of action, such as would bring it within the exception of the statute. So that, gentlemen, whether there was a fraudulent concealment of the transaction such as would make Mrs. Preble's whole claim good here turns upon the question whether you believe from the evidence which has gone in before you that the defendants here acted in the ordinary course of their business or whether you believe upon the evidence that one of the defendants, Walley, was a coconspirator with Preble in these transactions, and that young Preble also had the key to his mother's safe, so that, if you please, his mother with great difficulty could obtain access to it or knowledge as to whether those securities existed or not. Those rules of law, gentlemen, you will apply upon the subject of the statute of limitations."

We think the court erred in this instruction. It assumes that the same evidence which tended to show a conspiracy between Edward Preble and the defendants to obtain these bonds was also evidence of an intention on defendants' part to keep a knowledge of the transaction from the plaintiff. This, however, does not necessarily follow. If it did, the result would be that whenever a party has been guilty of a fraud, which it is for his interest should not be 163] known by the *person upon whom it is committed, he would practically lose the benefit of the statute, though he may not have made the slightest effort to keep it secret. The vice of the instruction in this particular was that there was no evidence whatever that the defendants, or either of them, said or did anything before or after the securities came into their hands, to conceal the transaction from the plaintiff. There was no claim that the defendant Bates knew anything about it. Defendant Walley was the active partner in the transaction, and there is nothing to indicate that he made any effort at concealment. While he sometimes called at the plaintiff's house, it does not appear that he ever spoke to her about business until the autumn of 1882, when he called upon her and told her that her son was in trouble and had been arrested in New York. Upon plaintiff offering to raise money and assist him by the sale of some of her bonds and stock, he then informed her that he was afraid they were lost. Within two or three days after that she went to the vault and found that they had been abstracted. Granting that the relations between Edward Preble and his mother were such as to make a revelation of the facts a duty upon his part, there were no such confidential relations between the plaintiff and defendants as would cause silence upon their part to be imputed as a fraud. Even admitting that they and Edward Preble were coconspirators, and that they were responsible for his acts connected with such conspiracy, it would be carrying the doctrine to an unwarrantable extent to hold that his subsequent silence upon the subject could be chargeable to them.

Without discussing the other assignments we think the case should be reversed and remanded to the circuit court with instruction to set aside the verdict and grant a new trial.

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*MARSHAL TUCKER, *Plff. in Err.*, [164
v.
THE UNITED STATES.

(See S. C. Reporter's ed. 164-170.)

U. S. Rev. Stat. § 878—pleadings—evidence obtained by judicial proceeding—affidavit of defendant in criminal case, when evidence against him—instructions to jury—exceptions, when necessary.

1. An affidavit made by defendant to procure the summoning and payment by the United States of witnesses in his behalf under U. S. Rev. Stat. § 878, is not a pleading of defendant nor discovery or evidence obtained from him by a judicial proceeding, within U. S. Rev. Stat. § 860.
2. Pleadings are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them.
3. Discovery or evidence obtained from a party by a judicial proceeding includes only facts or papers which the party is compelled by judicial process to disclose, and is inapplicable to testimony voluntarily given, or to documents voluntarily produced.
4. Where an affidavit is neither a pleading of defendant, nor discovery or evidence obtained from him, within the meaning of the statute, the statements therein are competent evidence to contradict his testimony in a criminal case.
5. Where the instructions given to a jury were quite as favorable to the defendant as that which he requested, the fact that the court instructed the jury in its own words, and declined to adopt the language of the counsel to the same effect, affords no ground of exception.
6. Instructions to the jury, to which the defendant objected, are not subject to review, where the bill of exceptions does not show that he excepted to them.

[No. 970.]

Submitted Dec. 4, 1893. Decided Jan. 3, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment of that court convicting Marshal Tucker, of the murder of Lula May at the Choctaw Nation in the Indian country on October 16, 1892, and sentencing him to death. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an indictment, found at November term, 1892, of the Circuit Court of the United States for the Western District of Ar-

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NOTE.—*As to exception, when must be taken, to be available on review*, see note to Phelps v. Mayer, 14: 643.

As to what particularity in exceptions is necessary in order to a review in appellate court, see note to Moore v. Bank of Metropolis, 10: 172.

In equity cases, admission of illegal evidence is not of itself ground of reversal or a bill of exception, see note to Field v. United States, 9: 94.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, see note to Parks v. Turner, 13: 883.

kansas, against Marshal Tucker for the murder of Lula May, a white woman, by shooting her with a pistol, at the Choctaw Nation in the Indian country in that district on October 15, 1892.

The defendant pleaded not guilty; and by agreement of the parties the case was ordered to be continued to the next term and set down for trial on February 23, 1893.

On February 21, 1893, the defendant, by his attorney, filed an application, dated February 20, and signed and sworn to by him pursuant to section 878 of the Revised Statutes, setting forth that certain persons named were material wit-[165]nesses for *his defense; that "by the three first named witnesses, who reside at South McAlester, he can show that he was so intoxicated at the time of the alleged homicide that he had no knowledge of what he was doing, and was incapable of forming any design;" that "these statements he believes to be true, and he is not possessed of sufficient means, and is actually unable to procure the attendance of said witnesses;" and therefore praying that they might be summoned at the expense of the United States. Thereupon the court ordered that the legal expense of procuring the testimony of those witnesses be paid by the United States, and that a subpœna be issued for them returnable February 23.

At the trial, in March, 1893, the government introduced evidence tending to show that the woman killed was an inmate of a house of ill fame, and that the defendant, on the evening of October 15, 1892, went to the house and asked for admittance, and, the door not being opened, fired a pistol through the door and killed the woman.

The defendant called none of the witnesses named in his application; but, having offered himself as a witness in his own behalf, testified as to what took place at the time of the killing, and, among other things, that he did not fire any shot at all; that after he had asked to be admitted to the house, a shot was fired by some other person, whether from the inside or the outside he did not know, and afterwards his pistol was put into his hand by another man whom he named.

On cross-examination, the defendant testified that he signed the application aforesaid; that he had not since changed his mind about whether he knew what was going on there or not; that the witnesses named were present, and saw him intoxicated at the time of the killing; that the defense then intended was not that he was crazy; and further testified that on the night of the killing he was not so drunk as not to know what he was doing, and everything that was going on.

The district attorney, in rebuttal, offered in evidence the application for witnesses. The counsel for the defendant objected that it was [166] incompetent, under section 860 of *the Revised Statutes. But the court admitted the paper in evidence, and the defendant excepted to its admission.

The defendant contended that he did not kill the woman; that, if he did, his crime was manslaughter only; and that, at the time of the killing, he was intoxicated.

The substance of the instructions of the court upon the subject of intoxication sufficiently appears by the following extracts: "If the statement of the defendant himself, that he did know what he was doing, is true, and he intentionally drew the pistol, presented it, and fired it so as to take the life of this woman, that would not be a state of case where there would be that absence of that premeditation which goes to make malice aforethought. If he was in a condition of mind, at the time that he was so acting, that his mind was so disturbed by drinking, by a drunken condition, that he was incapacitated so that he was incapable of forming any intent, or intent to do a wrongful act that might result in death, that may be taken into account for the purpose of showing a state of case where the crime would be of less grade than that of murder." "When a man's mind is in a condition where he can form an intent to do a wrongful act that may result in murder, and he does deliberately form that intent, as evidenced by the drawing and presenting and firing his pistol, then intoxication does not mitigate his offense. If he is carried beyond that, although he may not be absolutely insane, so that his will power is gone, so that he has no control over it, so that he cannot restrain it, while he may not be insane, then there is an absence from the case of what is denominated by law as malice aforethought, and his offense would be manslaughter." "You are not to excuse him to the extent of mitigating his crime because he was drunk, unless he was in that condition where he was incapable of forming an intent, where he was incapable of coming to a conclusion—and it does not mean alone incapable of forming a specific intent to kill, but it means incapable of forming a specific intent to do an act that may kill, that goes so far as to reduce the grade of the crime. If he could not form a specific intent to do the act he did do, then that would reduce the grade of the crime, because of drunkenness."

*The defendant requested the court to [167] instruct the jury that if they believed from the evidence "that the defendant was at the time of the killing of Lula May, drunk, and that before becoming drunk, he entertained no malice toward her and had no intention to take her life, and that his intoxication was so deep as to render the formation of any specific intent to take life impossible on his part, he could not be convicted of murder." This request was refused, "because the law had been correctly given on the subject of drunkenness;" and to the refusal of the court to so instruct the jury the defendant at the time excepted.

The bill of exceptions further stated that the defendant objected to the instructions given by the court to the jury in several particulars, but did not show that an exception was taken to any of those instructions.

The defendant was convicted of murder and sentenced to death, and sued out this writ of error.

Mr. **A. H. Garland**, for plaintiff in error:

The court erred in permitting to be read to the jury in evidence defendant's application for witnesses.

Boyd v. *United States*, 116 U. S. 616 (29: 746); *Com.* v. *Lockwood*, 109 Mass. 331, 12 Am. Rep. 699; *United States* v. *Three Tons of*

Coal, 6 Biss. 388; *Johnson* v. *Donaldson*, 3 Fed. Rep. 22.

The fact that defendant is a witness for himself does not deprive him of the right of ordinary witnesses.

Johnson v. *Donaldson* and *Boyd* v. *United States*, *supra*; *Stockwell* v. *United States*, 3 Cliff. 284; *Re Platt*, 7 Ben. 261; *United States* v. *Hughes*, 12 Blatchf. 558; *United States* v. *Mason*, 6 Biss. 350.

When a particular condition of mind is requisite to constitute an offense, intoxication may be proved to explain such condition.

1 Whart. Crim. Law (9th ed.) § 51.

Whenever evidence is offered to a jury in its nature prima facie proof, its character as such is not to be disregarded, and the court has no right to direct the jury to disregard it.

Crane v. *Morris*, 31 U. S. 6 Pet. 598 (8: 514).

While the court may sum up the facts in a case, the law should be separated from the facts left to the jury in unequivocal terms.

McLanahan v. *Universal Ins. Co.* 26 U. S. 1 Pet. 170 (7: 98).

And in that event the jury should be made distinctly to understand that the instruction was not given as a point of law.

Tracy v. *Swartwout*, 35 U. S. 10 Pet. 80 (9: 354); *Games* v. *Dunn*, 39 U. S. 14 Pet. 322 (10: 476).

Mr. **Holmes Conrad**, *Assistant Atty. Gen.*, for defendant in error:

The court did not err in admitting to be read in evidence by the prosecution the application made by the defendant for witnesses.

The judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact, which he submits to their determination.

Simmons v. *United States*, 142 U. S. 148 (35: 968); *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545 (30: 257); *United States* v. *Philadelphia & R. R. Co.* 128 U. S. 113 (31: 138); *Lovejoy* v. *United States*, 128 U. S. 171 (32: 389).

Mr. Justice **Gray** delivered the opinion of the court:

The only exception argued to any ruling upon evidence was to the admission, in contradiction of the defendant's own testimony at the trial, of the application made by him on oath, a few days before, for the summoning and payment by the United States of witnesses in his behalf.

That application was made under section 878 of the Revised Statutes, which is as follows: "Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or **168**] within one hundred *miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of witnesses, the court in term, or any judge thereof in vacation, may order that such witnesses be subpœnaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States."

The objection to the admission of this affidavit or application was founded on section 860 of the Revised Statute, which is as follows: "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The paper in question was neither a "pleading of any party," nor "discovery or evidence obtained from a party or witness by means of a judicial proceeding." "Pleadings of parties" are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issue to be tried and determined between them. "Discovery or evidence obtained from a party or witness by means of a judicial proceeding" includes only facts or papers which the party or witness is compelled by subpœna, interrogatory or other judicial process to disclose, whether he will or no; and is inapplicable to testimony voluntarily given, or to documents voluntarily produced. The clause as to discovery or evidence is conceived in the same spirit as the 5th Amendment of the Constitution, declaring that no person shall be compelled in any criminal case to be a witness against himself; and as the Act of March 16, 1878, chap. 37 (20 Stat. at L. 30) enacting that a defendant in any criminal case may be a witness at his own request, but not otherwise, and that his failure to make *such request shall not create any pre- [**169** sumption against him. *Boyd* v. *United States*, 116 U. S. 616 [29:746]; *Wilson* v. *United States*, 149 U. S. 60 [37:650]; *Lees* v. *United States*, 150 U. S. 476 [37:1150].

The application for witnesses, or "affidavit," as it is called in section 878, is clearly not a pleading of the defendant for the purpose of defining the issue to be tried in the case. Nor is it obtained from him by any judicial process, which he is obliged to obey. But it is made of his own motion; and it states such facts, and such only, as he, being in no way interrogated or cross-examined, may choose to state. His oath to the nature and materiality of the desired testimony, and to his own want of means, is required merely to establish the good faith of his demand that particular witnesses shall be summoned and paid by the government.

The affidavit being neither a "pleading" of the defendant, nor "discovery or evidence obtained" from him, within the meaning of the statute, the statements therein, as in any other paper voluntarily signed by him, whether upon oath or not, were competent evidence to contradict his testimony upon the stand.

In the matter of instructions to the jury, the only exception reserved at the trial was to the refusal to give the instruction requested as to

the effect of the defendant's drunkness upon his guilt.

In *Hopt* v. *Utah*, 104 U. S. 631 [26: 873], this court recognized the general rule that, at common law, voluntary intoxication affords no excuse, justification or extenuation of a crime committed under its influence; and went no further in favor of admitting evidence of intoxication than to hold that a defendant, indicted under a territorial statute establishing degrees of murder and requiring deliberate premeditation to constitute murder in the first degree, might show that at the time of the killing he was in such a condition by reason of drunkenness, as to be incapable of deliberate premeditation.

No Act of Congress has established degrees of the crime of murder. By the common law, neither deliberate premeditation, nor express malice or intent to kill, is required to make an unlawful homicide murder, but malice may 170] be *implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter. It has often been held, and was formerly considered to be settled law, that a wanton killing without provocation could not, by reason of being done by a man voluntarily intoxicated to any degree not amounting to insanity, be excused, or reduced from murder to manslaughter. *United States* v. *Cornell*, 2 Mason, 91, 111; *United States* v. *Drew*, 5 Mason, 28; *United States* v. *McGlue*, 1 Curt. 1, 13; *People* v. *Rogers*, 18 N. Y. 9, 72 Am. Dec. 484; *Kenny* v. *People*, 31 N. Y. 330; *Com.* v. *Hawkins*, 3 Gray, 463; *State* v. *Johnson*, 41 Conn. 584; *State* v. *John*, 30 N. C. 330, 49 Am. Dec. 396; 1 Bishop, New Criminal Law, §§ 400, 401. But that view has not been universally accepted in recent times, and we are not required in the present case to express any opinion in regard to it.

The instruction requested was that if the defendant at the time of killing the woman was so drunk as to render the formation of any specific intent to take her life impossible on his part, and before becoming drunk he entertained no malice towards her and no intention to take her life, he could not be convicted of murder. This instruction was refused, because it had been covered by the instructions given. In those instructions the jury were distinctly told that if the defendant at the time of the killing, although not insane, was in such a condition of mind, by reason of drunkenness, as to be incapable of forming a specific intent to kill, or to do the act that he did do, the grade of his crime would be reduced to manslaughter. The instructions given were quite as favorable to the defendant as that which he requested; and the fact that the court instructed the jury in its own words, and declined to adopt the language of the counsel to the same effect, affords no ground of exception. *Anthony* v. *Louisville & N. R. Co.* 132 U. S. 172 [33: 301].

The other instructions to which the defendant objected are not subject to review, because the bill of exceptions does not show that he excepted to them. *United States* v. *Breitling*, 61 U. S. 20 How. 252 [15: 900].

Judgment affirmed.

*JOHN CADWALADER, Collector of Customs for the District of Philadelphia, *Plff. in Err.*, [171

v.

JOHN E. F. ZEH ET AL.

(See S. C. Reporter's ed. 171-179.)

Rule of interpretation of Tariff Act—Tariff Act of 1883—question for jury—hearsay evidence.

1. It is a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted.
2. The Tariff Act of 1883 contains nothing from which it can be inferred that the word "toys" is used therein in any other than its commercial meaning.
3. Upon the question whether certain articles came within a certain class named in a Tariff Act, the comparative weight to be allowed to the different witnesses, or classes of witnesses, was a matter for the consideration of the jury.
4. Where the question was whether certain articles come within the designation of "toys," as used in a Tariff Act, testimony of witnesses as to what each of them was told, upon inquiring for such articles at a large toy shop in Philadelphia just before the trial, was rightly excluded.

[No. 106.]

Argued Nov. 23, 1893. Decided Jan. 8, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment for the plaintiffs, John E. F. Zeh *et al.*, against John Cadwalader, collector, defendant, for an excess of duties paid upon certain imported earthenware. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action, begun May 22, 1888, against the collector of the port of Philadelphia, to recover an excess of duties paid under protest upon four lots of earthenware, consisting of small cups, saucers and mugs, and plates five or six inches in diameter, having upon them pictures of animals and of other objects, and letters of the alphabet, imported by the plaintiffs during the winter of 1887-'88, invoiced as toys, and which the plaintiffs contended should have been assessed under the clause in Schedule N in the Tariff Act of March 3, 1883, chap. 121, "dolls and toys, thirty-five per centum *ad valorem;*" but which the collector assessed under Schedule B of that Act, imposing a duty on "china, porcelain, parian and bisque, earthen, stone and crockery ware, including plaques, ornaments, charms, vases and statuettes, painted, printed or gilded,

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note Greely v. Thompson, 13: 397.

or otherwise decorated or ornamented in any manner, sixty per centum *ad valorem*." 22 Stat. at L. 495, 512.

At the trial, one of the plaintiffs and many other importers and sellers of china and earthenware, and of toys and fancy goods, in Philadelphia, called as witnesses for the plaintiffs, 172] *testified that there was a class of goods in their business, made of earthenware, and consisting of cups, saucers, mugs and plates, commercially known and designated, bought and sold, as toys; that the articles in question (samples of which were produced by the plaintiffs) belonged to that class, were sold at six dollars a gross or fifty cents a dozen, and were intended for children to play with, although they could be, and sometimes were, used by children to drink or eat from.

The defendant called as witnesses two dealers in china and earthenware, who had been appraisers in the custom house, and many manufacturers of earthenware at Trenton in the state of New Jersey, all of whom testified that there was a class of earthenware goods known in the trade as toys, but that the articles in question did not come within that class, because they were not small enough, and were fit for practical use; and some of whom testified that they were commonly bought and sold as cups, saucers, plates and mugs.

The defendant offered to prove by one of these witnesses that just before the trial he called at the toy shop of Schwarz in Philadelphia, and asked for toy ware like the articles in question, was told that they did not keep such articles, and was shown tea sets of a smaller size. And he offered to prove by another of the witnesses that about the same time he called at John Wanamaker's establishment in Philadelphia, and, upon inquiry at the toy department thereof, was informed that the articles in question were not sold in that department as toys, but were to be found in the regular china or crockery department, and that he thereupon went to that department, and was shown such articles. The court excluded this evidence, and the defendant excepted to its exclusion.

The only other witness for the defendant testified, without objection by the plaintiffs, that he had been for two years in Mr. Wanamaker's employ as assistant manager of the crockery, china and glass department; that he knew the articles in question in his business; that they were known to the trade as plates, cups, saucers and mugs, and were sold as child's sets, and their principal use was to eat and drink from; that the business in his department was not large in those articles; and 173] *that he knew nothing about a toy department in Mr. Wanamaker's establishment, except by passing through it.

The defendant requested the court to give to the jury the following instructions:

"1st. If you believe that the goods in question are bought, sold and used as earthen, stone or crockery ware, and not as toys, then your verdict should be for the defendant.

"2d. If you believe that the articles in question on March 3, 1883, and prior thereto, were commercially known and designated as earthenware, and if you believe that they were not at that time described and designated as toys, then it is immaterial how they have since been known and designated, and your verdict should be for the defendant.

"3d. If you believe that the articles in question are known as earthenware in the trade, and are chiefly used as other articles of earthenware, stone and crockery ware are used, and are not chiefly used as playthings for children, then your verdict should be for the defendant.

"4th. The circumstance that the articles in question may possibly be used for purposes other than household purposes is not controlling, and, even if you believe that sometimes they are incidentally used by children as playthings, your verdict should be for the defendant if you believe that their chief use is for household purposes and that they are not known as toys in the trade.

"5th. If you find that there is no trade designation of these articles as toys, then the question becomes purely and simply one of fact, viz: what is the predominating use to which these articles are devoted, and if you believe that they are not chiefly used as playthings for children, then your verdict should be for the defendant.

"6th. If you believe that the articles in question are bought and sold under the names of a cup, saucer and plate, and not under the name of toys, then your verdict should be for the defendant.

"7th. A 'toy' is an article used exclusively for the amusement of children; and if you believe that the articles in question are chiefly used by children otherwise than as playthings, then *they are not toys within the mean- [174 ing of the Tariff Act, then your verdict should be for the defendant; provided the word 'toys' has no special trade meaning.

"8th. Upon the evidence in this case, the term 'toys' should not be given any technical or particular or commercial meaning, but should receive its proper signification and natural import; and if the articles in question are not 'toys' in the popular and general sense of the term, but are used for ordinary household purposes, like other articles of earthenware, and if such use is predominating, and not exceptional, then your verdict should be for the defendant."

The court gave all those instructions, except the third; declined to give the third, because "if they were denominated toys by the trade at that time, then it is unimportant how they were used;" and instructed the jury that all the subsequent instructions were predicated upon the idea that the jury "do not find this term 'toy' to have a trade signification." To this instruction, as well as to the refusal to give the third instruction requested, the defendant excepted.

The court further instructed the jury that the signification of the term "toys," in common speech, embraces only such things as are primarily intended for the entertainment and amusement of children; that "the term 'toys' used in the statute, is to receive the signification ordinarily attributed to it in common speech, unless the evidence shows that it has a different trade signification, that is, that it is differently used and understood when applied to such merchandise by those engaged in commerce respecting it, and had such different

signification at the date of the statute in 1883;" that, if it had such different signification in trade and commerce, the statute must be understood as using the term in that sense; that the evidence seemed to put beyond doubt that the term had a well understood trade signification, inasmuch as the witnesses on both sides testified that at and before the date of the statute it was in common use among those engaged in this branch of commerce, and differed only as respected the scope of its application; and concluded the instructions to the jury as follows: "If you find that the term in question [175] has a well *known trade signification (had at the date of the statute) and that these articles fall within it, your verdict must be for the plaintiff, no matter whether the trade designation seems to you to be reasonable or not. If you do not so find, your verdict must be for the defendant."

To those passages of the instructions given, which are above printed in quotation marks, the defendant excepted, and, after verdict and judgment for the plaintiff, sued out this writ of error.

Mr. **Edward B. Whitney,** for plaintiff in in error:

The alleged commercial designation does not govern the common meaning of the word "toy" in the present case.

Maddock v. *Magone*, 41 Fed. Rep. 882; *Maillard* v. *Lawrence*, 57 U. S. 16 How. 251 (14: 925); *Greenleaf* v. *Goodrich*, 101 U. S. 278 (25: 845); *Schmieder* v. *Barney*, 113 U. S. 64 (28: 1130); *Newman* v. *Arthur*, 109 U. S. 132 (27: 883); *Cochran* v. *Schell* ("*Barber* v. *Schell*") 107 U. S. 617 (27: 490); *Reimer* v. *Schell*, 4 Blatchf. 328; *DeForest* v. *Lawrence*, 54 U. S. 13 How. 278 (14: 145); *Hedden* v. *Richard*, 149 U. S. 346 (37: 763).

Presumptively the trade meaning is the colloquial meaning.

Swan v. *Arthur*, 103 U. S. 597 (26: 525).

A commercial designation is one species of commercial usage. It is necessary that the usage should be general and certain.

United States v. *Buchanan*, 49 U. S. 8 How. 83, 102 (12: 997, 1004); *Oelricks* v. *Ford*, 64 U. S. 23 How. 49 (16: 534).

Foreign usages cannot be appealed to.

Elliott v. *Swartwout*, 35 U. S. 10 Pet. 137, 151 (9: 373, 378).

It is the right of the manufacturer to testify upon the question of trade signification.

Erhardt v. *Ballin*, 55 Fed. Rep. 968.

It is a settled rule, in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used.

Dieckerhoff v *Robertson*, 44 Fed. Rep. 160; *Arthur* v. *Morrison*, 96 U. S. 108 (24: 764); *Arthur* v. *Lahey*, 96 U. S. 112 (24. 766); *Arthur* v. *Butterfield*, 125 U. S. 70 (31: 643).

While the usage of retailers is entitled to less weight than that of jobbers, nevertheless it is of some weight in the solution of the problem.

The rule against hearsay is not fully applicable to questions such as that at bar.

One Hundred Twenty-Five Baskets of Champagne v. *United States* ("*Cliquot's Champagne*") 70 U. S. 3 Wall. 114 (18: 116), *Three Hundred Baskets of Champagne* v. *United States* ("*Fenerstein's Champagne*") 70 U. S. 3 Wall. 145 (18: 121); *Whitney* v. *Thacher*, 117 Mass. 533; *Hine* v. *Manhattan R. Co.* 15 L. R. A. 591, 132 N.Y. 477; *Chaffee* v. *United States*, 85 U. S. 18 Wall. 516 (21: 908).

Mr. **Frank P. Prichard,** for defendants in error:

The charge of the court upon the question of commercial designation was in exact accordance with the decisions of this court.

Robertson v. *Salomon*, 130 U. S. 412 (32: 995); *Hedden* v. *Richard*, 149 U. S. 346 (37: 763).

The word "toys" must be considered as a word of special description limiting the operation of all the general clauses of the Tariff Act.

Solomon v. *Arthur*, 102 U. S. 208 (26: 147); *Hartranft* v. *Meyer*, 135 U. S. 237 (34: 110); *American Net & T. Co.* v. *Worthington*, 141 U. S. 468 (35: 821); *Arthur* v. *Zimmerman*, 96 U. S. 124 (24: 770); *Hartranft* v. *Langfeld*, 125 U. S. 128 (31: 672); *Robertson* v. *Edelhoff*, 132 U. S. 614 (33: 477); *Cadwalader* v. *Wanamaker*, 149 U. S. 532 (37: 837).

Mr. Justice **Gray** delivered the opinion of the court:

The question in this case is whether four invoices of small earthenware cups, saucers, mugs and plates, having upon them letters of the alphabet and figures of animals or the like, are to be classed, under the Tariff Act of 1883, as "toys," subject to a duty of thirty-five per cent, or as "earthenware, decorated or ornamented in any manner," subject to a duty of sixty-five per cent *ad valorem*.

The jury were instructed that the word "toys," in common speech, means playthings for children; that the word was to have that meaning in this case, unless the evidence showed that at the time of the passage of the Tariff Act it had a different trade signification; that is, that it was differently used and understood when applied to such merchandise by those engaged in commerce respecting it; and that, if it then had a well known trade signification, the statute must be understood as using it in that sense. The principal exception of the defendant is to this last instruction. The words "trade" and "commerce" was evidently used throughout the instructions requested and those given, as including both domestic and foreign traffic in this country.

*The instruction excepted to was in [176] accordance with the uniform current of decision in this court. It has long been a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted. *Re Two Hundred Chests of Tea*, 22 U. S. 9 Wheat. 430, 438 [6: 128, 129]; *Tyng* v. *Grinnell*, 92 U. S. 467 [23: 733]; *Miller* v. *Butterfield*, 125 U. S 70 [31:

643]; *Robertson* v. *Salomon*, 130 U. S. 412, 415 [32: 995, 996]; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468 [35: 821]; *Toplitz* v. *Hedden*, 146 U. S. 252 [36: 961]; *Nix* v. *Hedden*, 149 U. S. 304 [37: 745.] Among the words to which this rule has been applied are "refined sugar," *Barlow* v. *United States*, 32 U. S. 7 Pet. 404 [8:728]; "sugar" and "syrup," *United States* v. *112 Casks of Sugar*, 38 U. S. 8 Pet. 277 [8: 944]; "wool" and "worsted," *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 137 [9: 373]; "cotton bagging," *Curtis* v. *Martin*, 44 U. S. 3 How. 106 [11: 516]; "silk veils," *Arthur* v. *Morrison*, 96 U. S. 108 [24:764]; "bar iron," *Worthington* v. *Abbott*, 124 U. S. 434 [31: 494]; "furniture finished," *Hedden* v. *Richard*, 149 U. S 346 [37: 763].

None of the cases cited in behalf of the collector have any tendency to shake this rule; but all of them depended on special provisions of the statutes.

The case of *Maillard* v. *Lawrence*, 57 U. S. 16 How. 251 [14: 925], which was much relied on, arose under the Act of July 30, 1846, chap. 74, imposing a duty of thirty per cent on "clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress or manufacturer;" and a duty of twenty-five per cent on "manufactures of silk or, of which silk shall be a component material," and on "manufactures of worsted, or of which worsted shall be a component material." 9 Stat. at L. 45, 46. It was because of the peculiar language of the first of those clauses, making the designed object and actual use of the things the sole test, 177] that this court, affirming the *judgment of the circuit court in 1 Blatchf. 504, held that the words "wearing apparel" must be given their natural and ordinary meaning, and that evidence that shawls of silk or of worsted were not known in trade and commerce as "wearing apparel" was not admissible to show that they were not included in that clause. In the circuit court, *Mr. Justice* Nelson said that "this phraseology, for the purpose of describing a dutiable article, was used for the first time in the Act of 1846, and was introduced for the purpose of describing a class of articles, not as known in trade and commerce by any particular appellation, but by the actual use for which they were designed, and to which they were adapted, taken in connection with the fact that they were made up or manufactured wholly or in part by the tailor, sempstress or manufacturer;" and that "Congress intended to depart from the commercial designation as the test to determine the description within which the duty should or should not be charged, and to leave such determination to the test of the actual use of the article." 1 Blatchf. 505. And *Mr. Justice* Daniel, in delivering the judgment of this court, said that it must be understood as being the intention of the legislature to comprise "every article which in its design and completion and received uses is an article of wearing apparel," "no matter of what material composed, either in whole or in part, or by whom composed or made up." 57 U. S. 16 How. 260 [14: 929].

The decision in *De Forest* v. *Lawrence*, 54 U. S. 13 How. 274 [14: 143], was an application of the rule that where goods of a particular kind, which would otherwise be comprehended in a class described by a term having a settled commercial signification, have been described in the customs laws by a more specific designation and subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties. See *Seeberger* v. *Cahn*, 137 U. S. 95, 98 [34: 599, 600], and cases cited.

In *Greenleaf* v. *Goodrich*, 101 U. S. 278 [25: 845], and in *Schmieder* v. *Barney*, 113 U. S. 645 [28: 1130], the extent of the decision was that the phrase "of similar description" was not a technical or commercial term; and that while it might be competent to *ask merchants[178 and importers what the words, in the Act of July 14, 1862, chap. 163 (12 Stat. at L. 553) "goods of similar description to delaines" were commercially understood to mean, they could not be asked whether in their opinion the goods in question were of similar description to delaines.

In *Cochran* v. *Schell* ("*Barber* v. *Schell*") 107 U. S. 617, 621 [27: 490, 492], the words held not to be affected by commercial usage were "all manufactures composed wholly of cotton, which are bleached, printed, painted or dyed." Act of March 3, 1857, chap. 98, § 2 (11 Stat. at L. 193). That designation, as observed by *Mr. Justice* Blatchford, speaking for this court, and following the decision of *Mr. Justice* Nelson in *Reimer* v. *Schell*, 4 Blatchf. 328, was a designation of articles by special description of quality or material, as contradistinguished from designation by a commercial name.

In *Newman* v. *Arthur*, 109 U. S. 132 [27: 883], the decision was that the clear meaning of the provisions of section 2504 of the Revised Statutes, fixing the rate of duty on manufactures of cotton by a classification based on the number of threads to the square inch, without reference to the mode of counting, could not be controlled by evidence as to what goods were usually bought and sold by the count of threads.

No reason is shown for taking the present case out of the general rule. The Tariff Act of 1888 contains nothing from which it can be inferred that the words "toys" is used therein in any other than its commercial meaning. At the trial the witnesses on both sides testified that there was a class of earthenware goods commonly known in trade and commerce as toys. They differed, indeed, upon the question whether these articles came within that class; the plaintiff's witnesses testifying that they did, and the defendant's witnesses that they did not. But the comparative weight to be allowed to the different witnesses, or classes of witnesses, was a matter for the consideration of the jury. If the whole testimony in the case enabled the jury to determine whether the articles in question were commercially known as toys, their commercial designation by those carrying on the business of dealing in them was a safer test, and more in accord with the apparent *intent of Congress, and with the [179 rule of construction judicially established in similar cases, than to leave the question, whether "toys" or "earthenware" was the fitter

name for these articles, to be decided by the opinion of jurors, based upon their personal knowledge or experience. The jury having been distinctly instructed that if they found that there was no trade designation of these articles as toys, and that they were not chiefly used as playthings for children, the verdict should be for the defendant, the defendant has no just ground of exception to the instructions given, or to the refusal to instruct as requested.

The only other exception argued is to the exclusion of the testimony of two witnesses as to what each of them was told, upon inquiring for such articles, at a large toy shop in Philadelphia just before the trial. This testimony was rightly excluded. Upon the question of the ordinary meaning of the word "toys," it was irrelevant. If such testimony could have been competent under any circumstances to prove a commercial meaning (which we do not intimate) it certainly had no tendency to prove what that meaning was at the time of the passage of the Act of 1883.

Judgment affirmed.

CAROLINE SOUTHWORTH, Executrix of JOHN P. SOUTHWORTH, deceased, *Appt.*, *v.* THE UNITED STATES.

(See S. C. Reporter's ed. 179-186.)

Claim against the government—refusal of court to approve account of commissioner—right of officer to compensation—services rendered—U. S. Rev. Stat. § 1986.

1. Although the magnitude of a claim against the government for the services of an officer be startling, it does not follow that a demurrer to the petition therefore was properly sustained or that the claim can rightfully be denied by reason of the mere suspicion of wrong.
2. The refusal of the court to approve the account of a circuit court commissioner is no bar to an action therefor in the Court of Claims, although such refusal may be a matter for consideration in respect at least to the good faith of the transaction.
3. The right of an officer to compensation for instituting criminal prosecutions does not rest on the fact that the offense was stated in the complaint with such precision as to be beyond the reach of challenge. It is sufficient if the complaint is full enough to clearly inform the defendant of the offense with which he is charged.
4. A commissioner does not guarantee to the government the sufficiency of the complaint filed before him, and is not deprived of compensation if it be found defective; if he has proceeded in good faith to render the services, and heard and decided the criminal charge.
5. When the defendant is arrested and examination held there is a "criminal case," but unless there be an arrest and examination, there is no "case," within the meaning of U. S. Rev. Stat. § 1986.

[No. 171.]

Argued Dec. 15, 16, 1893. Decided Jan. 8, 1894.

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8:587.

As to ministerial officer, protected in the execution of regular process, see note to Erskine v. Hohnbach 20:745.

APPEAL from a judgment of the Court of Claims, dismissing the petition of John P Southworth, to recover of the United States $82,830.00 for services as a Circuit Court Commissioner, for the District of Louisiana. *Reversed.*

See same case below, 19 Ct. Cl. 278.

Statement by *Mr. Justice* **Brewer:**

This is an appeal from a judgment of the Court of Claims. The action was commenced by John P. Southworth on December 16, 1882, to recover the sum of $82,830, for services as a circuit court commissioner for the district of Louisiana. The petition alleged that during the year 1876, 8283 complaints were made to him as such commissioner, charging certain persons named therein with the violation of section 5512, Revised Statutes; that on such complaints the petitioner, as commissioner, duly issued warrants against the persons named, and delivered them to the marshal of the district; that of the persons named in these complaints and warrants 6903 were not found, and 1380 were arrested; that of those arrested 77 were held for trial, while the remaining 1303 were, on examination, discharged.

The complaints are stated to have all been in this form:

"UNITED STATES OF AMERICA."

"District of Louisiana, }
Parish of Orleans. }

"——, ——, having been duly sworn, each for himself, on oath says, that he is a citizen of the state of Louisiana, residing in and a qualified elector of said parish of Orleans, duly registered, and that his name appears as a registered elector or voter upon the registration books of said parish for the year 1876; and they further say, each for himself, that they have *made due and diligent personal inquiry [181 for ——, registered upon the registration book of the —— ward of the city of New Orleans, No. —, and claiming to reside at No. — —— street in said ward and city; and that said —— does not reside in said —— ward or parish of Orleans aforesaid; that therefore said ——, on or about the — day of ——, 187-, did fraudulently obtain registration as aforesaid in said —— ward and parish as stated, as an elector in said ward and parish, contrary to the 21st section of act No. 155 of the session of 1874, of the general assembly of the state of Louisiana, and contrary to and in contravention of section 5512 of the Revised Statutes of the United States. —— ——.
—— ——.

"Sworn to and subscribed on the — day of ——, 1876.

"JNO. P. SOUTHWORTH,
[L. S.] *United States Commissioner of the Circuit Court in and for the District of Louisiana.*"

The petition further alleged that the petitioner, as commissioner, made a docket entry of all the proceedings in each case, as required by law, including therein the title of the case with the name of the defendant, the drawing of the affidavit or complaint and the date of the same, the issuing of the warrant and its date, the return of the officer, the arrest and

examination of the person charged in each case where an arrest was made, the number of oaths administered and affidavits filed, and that he also kept full and correct files in each case of all the papers therein, including affidavits, warrants, etc.; that he presented his account, duly verified by his oath, to the district attorney of said district of Louisiana, who submitted the same in open court to the district court, and the court passed upon the same by approving the account as to the seventy-seven cases in which the persons arrested were held for trial, the amount of which was, as afterwards admitted, paid by the government, and disallowing and refusing to certify the same as to the other cases. It further alleged a presentation of his claim to the proper accounting 182] *officers of the United States for settlement, and their refusal to allow the same.

A demurrer to this petition having been sustained (19 Ct. Cl. 278) the plaintiff amended, by adding allegations to the effect that act No. 50 of the session laws of the general assembly of Louisiana, for the year 1874, required a registration of voters for the election in 1876, and showing in a general way the facts and circumstances which justified the commissioner, as claimed, in finding that there was probable cause to believe that offenses had been committed, and in issuing the warrants.

A demurrer to this amended petition was thereafter filed and sustained, and judgment rendered dismissing the petition.

Pending the proceedings in the Court of Claims the petitioner died, and the suit was revived in the name of the present plaintiff, his executrix.

Section 5512, Revised Statutes, is in chapter seven of the title "Crimes." By section 1982, the commissioners, with other officers, are "authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of chapter seven of the title 'Crimes,'" and by section 1986 the commissioner is "entitled to a fee of ten dollars for his services in each case, inclusive of all services incident to the arrest and examination."

Messrs. **Lewis Abraham** and **George A. King** for appellant.

Messrs. **J. E. Dodge**, *Assistant Atty. Gen.*, and *James H. Nixon* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The magnitude of this claim is startling. If the fact be, as stated in the report of the comptroller, attached as an exhibit to the petition, that these complaints were filed and warrants issued during the twelve days from October 26 to November 6, or at the rate of about seven hundred a day, as only one out of six of the persons named was ever found and arrested, it 183] *is calculated to arouse a suspicion that these proceedings were not had in the due and orderly administration of criminal law, and with a view to the arrest and punishment of offenders, but rather for the sake of rolling up a pecuniary claim against the government, or from some other equally dishonest motive. But it does not follow that the demurrer was properly sustained or that the claim can rightfully be denied by reason of the mere suspicion of wrong. If there had been but a single case before the commissioner and the proceedings in that, as stated, be sufficient to establish a valid claim against the United States, then the demurrer ought to have been overruled, for the mere multiplication of the cases, even into the thousands, does not, as a matter of law, disclose any illegality. The facts attending the prosecutions should be fully presented in order that the bona fides of the transaction may be determined. We pass, therefore, to consider the petition as though it alleged but one case before the commissioner, one complaint filed, one warrant issued, and one party arrested.

That the refusal of the court to approve the account is no bar to the action is settled by *United States* v. *Knox*, 128 U. S. 230 [32: 465], although such refusal may be a matter for consideration in respect at least to the good faith of the transaction. *United States* v. *Jones*, 134 U. S. 483 [33: 1007].

It is insisted by the government that the complaint does not state an offense; that in consequence there was no foundation for the issue of the warrant, or for the subsequent proceedings, and hence that there was in law no case before the petitioner as commissioner. We quote from the brief this statement of the alleged defects:

"It is not alleged that the accused did register; nor that he had no lawful right to register; nor that the registration books upon which his name appeared were made for an election at which a Representative in Congress might be chosen; nor, indeed, for any election whatever.

"It is, of course, perfectly clear that the affiants do not pretend to swear, as to facts, that accused fraudulently obtained registration contrary to law, but merely to express *a [184 conclusion from the fact of nonresidence at a certain place."

It may be conceded that the offense is not stated with the fullness and technical accuracy required in an indictment, but we do not think that the complaint can be treated as an absolute nullity. In the seventy-seven cases in which the parties were arrested and held for trial it would seem that its sufficiency was conceded, for the account therefor was allowed and paid. While no estoppel is created by the act of the government in making such payment, yet it is significant as showing that no technical accuracy in a complaint is considered essential. Doubtless the defect in a complaint may be so great as to suggest a lack of good faith on the part of the commissioner, but it would be placing an undue burden on such officers to hold that their right to compensation rested on the fact that the offense was stated with such precision as to be beyond the reach of challenge. It is sufficient if the complaint is full enough to clearly inform the defendant of the offense with which he is charged. It was well said by the supreme court of Alabama, in *Crosby* v. *Hawthorn*, 25 Ala. 223:

"In preliminary proceedings of this nature, which are usually had before justices of the peace, technical accuracy cannot be expected, and is not required. It is sufficient, if, giving to the language employed its ordinary signifi-

fication, the court may gather from it that an offense against the criminal law has been committed or attempted. If such proceedings were to be subjected to the rigid rules of criticism, and all the constituent elements of the offense sought to be investigated were required to be set forth in the affidavit or warrant with certainty, the administration of the criminal law would be greatly embarrassed, and offenders would often go unpunished, by reason of the hazard which the justice who issues, the party who procures, and the officer who executes the warrant for arresting them would incur. We must be content to gather the meaning of the party from the affidavit, and disregard the want of technical accuracy of description."

There can be no mistake as to what was in-
185 | tended to be *charged in this complaint. It in effect alleges that the defendant was registered upon the registration books of a named ward, and registered as claiming to reside at a given number on a particular street in that ward; that he did not reside in such place, or in the ward or parish of Orleans, and that, therefore, he was fraudulently registered in violation of a specified section of the statutes. Fraudulent registration is the crime charged, and charged with particularity of section, ward, residence claimed, and section of the statute violated. Whether a party arrested upon a warrant issued on such complaint could be discharged on habeas corpus, it is unnecessary to determine. *Ex parte Watkins*, 28 U. S. 3 Pet. 193-203 [7: 650-653]. For it cannot be that a commissioner guarantees to the government the sufficiency of the complaint filed before him, and is entitled to no compensation if it be found defective. If he has proceeded in good faith to render services to the government, acting upon a complaint manifestly intended to charge an offense, and, the defendant having been arrested upon such complaint, holding an examination, and rendering a judicial decision thereupon,—in the language of the statute, "hearing and deciding on criminal charges," he is entitled to compensation. We conclude, therefore, that this affidavit is not so defective as to deprive the commissioner of a right to compensation for services rendered in good faith in the proceedings founded thereon.

It, of course, cannot be tolerated, in the absence of express language, that compensation is to be paid when the defendant is bound over for trial, and not when he is discharged. That when the defendant is arrested and examination held there is a "criminal case," is clear. *Counselman* v. *Hitchcock*, 142 U. S. 547 [35: 1110]; *United States* v. *Patterson*, 150 U. S. 65 [37:999]. That unless there be an arrest and examination, there is no "case" within the meaning of section 1986 is equally clear. The amount allowed, ten dollars, precludes the idea that the mere filing of a complaint and issue of a warrant is sufficient. And the language of the statute is plain. The allowance is "for his services in each case, inclusive of all services incident to the arrest and examination."

186] *It follows from these considerations that a cause of action was stated as to the 1303 cases in which there was an arrest, examination, and discharge of the defendant, and that the Court of Claims erred in sustaining the demurrer to this petition. Judgment will, therefore, be reversed, and the case remanded, with instructions to overrule the demurrer, and for further proceedings in conformity to law.

W. L. MILLER ET AL, *Appts.*,
v.
THE EAGLE MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 186-209.)

Two patents for same invention—invention covered by former patent—separate invention—patents both for machine and manufacture—improvement on a patent—later patent—splitting invention—patents cover means—single element—anticipation—first inventor—interchangeability—patent anticipated—infringement.

1. Two valid patents for the same invention cannot be granted either to the same or to a different party.
2. No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; in such case the second patent is void.
3. Where the second patent covers matters described in the prior patent, essentially distinct and separable from the invention covered thereby, and claims made thereunder, its validity may be sustained, if for a separate invention.
4. A single invention may include both the machine and the manufacture it creates, and in such cases, if the inventions are really separa-

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NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to notes given for patent rights; purchaser before maturity, see note to Mandeville v. Welch, 5: 87.

That prior use or sale of invention renders patent void, see note to French v. Carter, 34: 664.

As to reissued patents for inventions, when valid; effect of issue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 644.

As to what constitutes infringement of patent; similarity of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

ble, the inventor may be entitled to a monopoly of each.

5. An inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent.

6. A later patent may be granted where the invention is clearly distinct from, and independent of, one previously patented.

7. A patentee cannot split up his invention for the purpose of securing additional results, or of extending, or of prolonging the life of any or all of its elemental parts.

8. Patents cover the means employed to effect results.

9. A single element or function of a patented invention cannot be made the subject of a separate and subsequent patent.

10. That which infringes a patent, if later, anticipates it, if earlier.

11. Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringments, although they contain improvements in mechanism.

12. The interchangeability, or non-interchangeability of the devices of two patents is an important test in determining the question of infringement.

13. The patent No. 242,497, dated June 7, 1881, to Edgar A. Wright, for an improvement in cultivators, is anticipated by patent No. 222,767, dated Dec. 16, 1879, to the same person, and the first claim thereof is also anticipated by the patent of W. P. Brown, No. 190,816, dated May 15, 1877, for an improved coupling for cultivators.

14. The patent No. 222,767, to Edgar A. Wright, dated Dec. 16, 1879, is, in view of the state of the art, to be limited and restricted, if it has any validity at all, to the specific spring therein described; and, as thus restricted, it is not infringed by the cultivators sold by defendant, manufactured by P. P. Mast & Co. under several patents.

[No. 143.]

Argued Dec. 11, 12, 1893. Decided Jan. 8, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Iowa, in favor of the Eagle Manufacturing Company, as assignee of two patents, issued to Edgar A. Wright for improvements in wheel cultivators, and sustaining the validity of both patents, and holding that the defendants, W. L. Miller *et al.*, had infringed the same, and enjoining the defendants from making, using or selling cultivators containing the patented devices. *Reversed, with directions to dismiss the suit.*

The facts are stated in the opinion.

Messrs. **John T. Morgan, H. A. Toulmin** and *L. T. Bond*, for appellants:

The inventor of a device is entitled to all its uses, whether all are mentioned in the patent or not.

Roberts v. *Ryer*, 91 U. S. 105 (23: 267); *Heald* v. *Rice*, 104 U. S. 737, 755 (26: 910, 916); *Stow* v. *Chicago*, 104 U. S. 547 (26: 816).

When a claim only embraces for its novelty a feature of what is shown in and covered by another claim, it is void.

James v. *Campbell*, 104 U. S. 356 (26: 786); *McClain* v. *Ortmayer*, 141 U. S. 419 (35: 800).

Patents cover the means and not the result.

Fuller v. *Yentzer*, 94 U. S. 288 (24: 103); *Underwood* v. *Gerber*, 149 U. S. 224 (37: 710).

The patent is void if the described result cannot be obtained by the described means.

Mitchell v. *Tilghman*, 86 U. S. 19 Wall. 287, 297 (22: 125, 137); *Crouch* v. *Speer*, 1 Bann. & Ard. 145, 147.

Law of double use. The thing itself which is patented must be new, and not the mere application of it to a new purpose or object.

Bean v. *Smallwood*, 2 Story, 408, 411; *Tucker* v. *Spalding*, 80 U. S. 13 Wall. 453, 455 (20: 515, 516); *Roberts* v. *Ryer*, 91 U. S. 150-157 (23: 267-270); *Royer* v. *Roth*, 132 U. S. 201 (33: 322); *Pennsylvania R. Co.* v. *Locomotive Engine S. Truck Co.* 110 U. S. 490 (28: 222); *Blake* v. *San Francisco*, 113 U. S. 679, 682 (28: 1070, 1071); *Aron* v. *Manhattan R. Co.* 132 U. S. 84 (33: 272); *St. Germain* v. *Brunswick*, 135 U. S. 227 (34: 122); *Underwood* v. *Gerber*, 149 U. S. 224, 229 (37: 710, 712).

The "discovery of a new use for an old device does not involve patentability."

Grant v. *Walter*, 148 U. S. 547, 556 (37: 552, 557); *Lowell Mfg. Co.* v. *Cary*, 147 U. S. 623, 637 (37: 307, 312); *Blake* v. *San Francisco*, 113 U. S. 679 (28: 1070); *Stephenson* v. *Brooklyn Cross-Town R. Co.* 114 U. S. 149 (29: 58).

A weight operating in a cultivator to accomplish the same purpose as a spring in a cultivator, is the equivalent of a spring.

Gill v. *Wells*, 89 U. S. 22 Wall. 1, 29 (22: 699, 711); *Woodbury Patent Planing Mach. Co.* v. *Keith*, 101 U. S. 479, 489 (25: 939, 942); *Imhaeuser* v. *Buerk*, 101 U. S. 647, 656 (25: 945).

It is not necessary that the prior machine should have been actually used for the purpose contemplated; but if it is capable of such use, and its adaptation to such be within the knowledge of a mechanic of competent skill, it will be a bar to the validity of a subsequent invention.

Agawam Woolen Co. v. *Jordan*, 74 U. S. 7 Wall. 602 (19: 181); *Johnson* v. *Root*, 1 Fish. Pat. Cas. 366; *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 563 (24: 1057).

Wright's readjustment of Brown did not involve invention.

Stow v. *Chicago*, 104 U. S. 547, 550 (26: 816, 817); *Tucker* v. *Spalding*, 80 U. S. 13 Wall. 453, 455, 456 (20: 515, 516); *Roberts* v. *Ryer*, 91 U. S. 150 (23: 267); *Phillips* v. *Page*, 65 U. S. 24 How. 164 (16: 639); *Ralston* v. *Smith*, 11 H. L. Cas. 223; *Swain Turbine & Mfg. Co.* v. *Ladd*, 102 U. S. 408 (26: 184).

Claims 1, 2, 3, 4 and 6, Wright's 1879 patent, and 1, 2, 3, 4 and 5, Wright's 1881 patent, said to be infringed, set forth no construction, but describe a function. Function is not patentable.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Klein* v. *Russell*, 86 U. S. 19 Wall. 433 (22: 116); *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22: 241); *Brown* v. *Guild*, 90 U. S. 23 Wall. 181 (23: 161); *Brown* v. *Davis*, 116 U. S. 237 (29: 659); *Weir* v. *Morden*, 125 U. S. 98 (31: 645).

An improver who effects the desired result, in a better manner, has no claim to the whole art or machine improved.

Burr v. *Duryee*, 68 U. S. 1 Wall. 571 (17: 658); *McCormick* v. *Talcott*, 61 U. S. 20 How. 405 (15: 930); *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554 (24: 1053).

Things are not necessarily equivalents because they produce the same result.

Brooks v. *Fiske*, 56 U. S. 15 How. 219 (14: 668).

Appellee cannot assert or maintain that the bend and inclined planes of the Wright's spring are immaterial.

Vance v. *Campbell*, 66 U. S. 1 Black, 427 (17: 168); *Union Water Meter Co.* v. *Desper*, 101 U. S. 332 (25: 1024).

The scope of a claim cannot be enlarged by language in the specification.

Lehigh Valley R. Co. v. *Mellon*, 104 U. S. 112 (26: 639); *Western Electric Mfg. Co.* v. *Ansonia Brass & C. Co.* 114 U. S. 453 (29: 212).

The test of interchangeability is important and often decisive of infringement.

Fuller v. *Yentzer*, 94 U. S. 295 (24: 106); *Schumacher* v. *Cornell*, 96 U. S. 555 (24: 678); *Pattee Plow Co.* v. *Kingman*, 129 U. S. 301 (32: 705).

The modes of operation of Wright's and appellants' springs are different. There can be no infringement when this is true.

Walker, Patents, p. 263, § 341; *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 373 (29: 950); *Field* v. *DeComeau*, 116 U. S. 187, 190 (29: 596, 597).

Wright's elements and appellants' elements are all different in themselves, and in their combined relations. No infringement.

Prouty v. *Ruggles*, 41 U. S. 16 Pet. 336 (10: 985).

Appellant's elements or parts are arranged differently from Wright's, on a different plan. This avoids infringement.

Brooks v. *Fiske*, 56 U. S. 15 How. 212 (14: 665).

Even where all of the parts are the same except one, which differs in construction and operation, there is no infringement.

Prouty v. *Ruggles*, 41 U. S. 16 Pet. 336 (10: 985); *Eames* v. *Godfrey*, 68 U. S. 1 Wall. 78 (17: 547).

The inventor of a device is entitled to all the uses to which it can be applied, whether such uses are mentioned in the patent or not.

Stow v. *Chicago*, 104 U. S. 547 (26: 816); *Underwood* v. *Gerber*, 149 U. S. 224 (37: 710); *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 (26: 783).

Mr. **George H. Christy**, for appellee:

The second patent is not void on account of the prior issue of the first.

Discretion must be left to the Patent Office as to the number of patents to be issued.

Bennett v. *Fowler*, 75 U. S. 8 Wall. 448 (19: 432); *McKay* v. *Dibert*, 5 Fed. Rep. 590.

It is common practice to issue several patents for different features of an invention, and it it is also common practice to embrace them in one patent.

Suffolk Mfg. Co. v. *Hayden*, 70 U. S. 3 Wall. 315 (18: 76); *Brown* v. *Guild*, 90 U. S. 23 Wall. 181, 227 (23: 161,171); *Sewall* v. *Jones*, 91 U. S. 190 (23: 279); *Bates* v. *Coe*, 98 U. S. 48 (25: 74); *Garratt* v. *Seibert*, 98 U. S. 75, 77 (25: 84, 85); *McComb* v. *Brodie*, 1 Woods. 153; *Wheeler* v. *McCormick*, 11 Blatchf. 334; *Millan* v. *Rees*, 1 Fed. Rep. 722; *McKay* v. *Dibert*, 5 Fed. Rep. 588; *Graham* v. *McCormick*, 11 Fed. Rep. 859; *Vermont Farm Mach. Co.* v. *Marble*, 19 Fed. Rep. 307; *Cahn* v. *Wong Town On*, 19 Fed. Rep. 424.

Where the entire invention consist of a particular device separate patents cannot be patented for the separate uses.

Combined Patents Can Co. v. *Lloyd*, 11 Fed. Rep. 153; *Pattee* v. *Moline Plow Co.* 9 Fed. Rep. 821.

To afford the necessary protection, there must be separate claims, either in the same or separate patents.

Gill v. *Wells*, 89 U. S. 22 Wall. 24 (22: 710); *Brown* v. *Guild*, 90 U. S. 23 Wall 224 (23: 170.

Combinations which produce different functions are different, even though the devices in both are the same.

Rowell v. *Lindsay*, 113 U. S. 97, 103 (28: 906, 908).

The principles or rules of law applicable to the facts under the issue of infringement are so well known that a brief reference to adjudicated cases will suffice.

McComb v. *Ernest*, 1 Woods, 195; *Shaver* v. *Skinner Mfg. Co.* 30 Fed. Rep. 70; *Hat Sweat Mfg. Co.* v. *Davis Sewing Mach. Co.* 32 Fed. Rep. 403; *Consolidated Bung Apparatus Co.* v. *Schoenhofen Brew. Co.* 28 Fed. Rep. 428; *Kirk* v. *Dubois*, 33 Fed. Rep. 252; *Wire Book Sewing Machine Co.* v. *Stevenson*, 11 Fed. Rep. 155; *Western Electric Mfg. Co.* v. *Chicago Electric Mfg. Co.* 14 Fed. Rep. 691; *Ward* v. *Grand Detour Plow Co.* 14 Fed. Rep. 696.

An equivalent which involves invention, and is patentable, is nevertheless an infringement.

Clough v. *Gilbert & B. Mfg. Co.* 106 U. S. 178 (27: 138); *Tilghman* v. *Proctor*, 102 U. S. 708 (26: 279); *Cochrane* v. *Deener*, 94 U. S. 780 (24: 139); *Potter* v. *Stewart*, 7 Fed. Rep. 218.

The rearrangement or reorganization of old elements, so as to produce a new result or a more effective result, is evidence of invention and patentable.

Clough v. *Gilbert & B. Mfg. Co.* 106 U. S. 166 (27: 134); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 517 (20: 33); *Webster Loom Co.* v. *Higgins*, 105 U. S. 589 (26: 1180).

An invention is in reality a mental result, a conception of the mind, which, however, must be expressed in material embodiment to be patented.

Smith v. *Nichols*, 88 U. S. 21 Wall. 118 (22: 567); *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 815 (19: 830); *Wooster* v. *Blake*, 8 Fed. Rep. 433.

Where the prior art contains nothing suggesting this conception to the skilled mechanic, it does not affect its patentability.

Crandall v. *Parker Carriage Goods Co.* 20 Fed. Rep. 851; *Adams & W. Mfg. Co.* v. *Rathbone*, 26 Fed. Rep. 262; *Bogart* v. *Hinds*, 26 Fed. Rep. 149.

The making of a new device with similar functions, usually requires invention.

Consolidated Bung. Apparatus Co. v. *Woerle*, 29 Fed. Rep. 449; *Wisner* v. *Grant*, 7 Fed. Rep. 485; *Mowry* v. *Whitney*, 81 U. S. 14 Wall. 434 (20: 858); *Robertson* v. *Blake*, 94 U. S. 728 (24: 245).

An experimental device, dug up after some one else has obtained a patent, will not anticipate.

Fay v. *Allen*, 24 Fed. Rep. 804; *Putnam* v. *Hollender*, 6 Fed. Rep. 882; *Many* v. *Jagger*, 1 Blatchf. 383; *Phillips* v. *Carroll*, 23 Fed. Rep. 249; *Hutchinson* v. *Everett*, 26 Fed. Rep. 531; *Wetherell* v. *Keith*, 27 Fed. Rep. 364.

Mr. Justice **Jackson** delivered the opinion of the court:

The appellee, as assignee of letters patent No. 222,767, dated December 16, 1879, and No. 242,497, dated June 7, 1881, issued to Edgar A. Wright, for certain new and useful improvements in wheeled cultivators, brought this suit against the appellants, who were the defendants in the court below, for the alleged infringement thereof.

The defenses made in that court were that Wright was not the first and original inventor of the improvements described in the patents; that the same were shown and described in previous devices and letters patent, set forth in the answer; that the invention shown in each of the patents in suit is identical; that in each the supposed improvements relate to a spring and its attachments; that the function and operation of the parts is exactly the same in each; that one or both of the letters patent in controversy were issued without authority of law, and therefore, void; that in view of the state of the art at the date of the alleged improvements of Wright, the letters patents granted to him did not exhibit any patentable invention, and for that reason are invalid; that the defendants were not engaged in the manufacture **188**]of cultivators, but have *sold cultivators manufactured by P. P. Mast & Co., of Springfield, Ohio, constructed under and in accordance with various letters patent owned by that company; that they sold the cultivators of this company without notice or reason to suppose that they were an infringement of the patents of Wright, and that they do not, in fact, infringe the same.

The class of cultivators to which the Wright patents in question relate are of the ordinary character of wheeled, straddle-row cultivators, having vertical swinging beams, or drag bars, to carry the shovels or plows, suspended from an arch or frame, mounted on two wheels, a tongue fastened to the frame and beams connected with the horizontal portions of the arch, which serves as an axle for the wheels, and surrounding the axle on each side a pipe box, to which the beam is secured, the pipe box revolving on the axle, and the beam carrying the shovels, adjusted so as to swing up or down with the pipe box, according to the direction in which it is turned.

The patented device consists of a round steel rod, or wire spring, having at its fixed end a coil attached to the swinging beam, or plow bars, and extending from the coil a slightly curved arm, the outer end of which terminates in a bend or shoulder, from which the rod continues to form a short arm terminating in a sharp bend, or curl, at the free end of the spring. This spring is so adjusted that the outer or free end thereof bears against the under side of an adjustable grooved roller, fixed upon an outwardly extending arm upon the upright portion of the axle. This spring, with its adjustment, is intended to have a duplex action, covering the double effect, of either raising or depressing the beams carrying the shovels. The curvature of the spring is such that as it moves along the groove of the roller it presses against the latter at different points of its periphery, and thereby the direction of its action is shifted or changed, as the position of the swinging beam is changed. Such changes in the direction of its action will assist in drawing or pulling the beam upwards in a vertical direction, giving it increased leverage as the spring is moved forward in its bearings on the roller.

In his original application, filed May 23, 1879, Wright fully *described his im- [**189** proved device for use in connection with cultivators and claimed for it, not only its lifting and depressing action, but also its lifting power, which increased as the beams were raised.

An interference with other pending applications being anticipated as to the broad claims of the invention, the application was divided, on November 12, 1879, for the purpose of obtaining one patent for the lifting and depressing effect of the spring on the beams, and another for the lifting power of the spring, increasing as the beams rise, the latter being sought upon the original application, while the former was based upon the divisional application of November 12, 1879. Patent No. 222,767, for the double effect or duplex action of the improved spring, was granted on December 16, 1879, and thereafter on June 7, 1881, patent No. 242,497, for the single effect of increased lifting force in raising the plow beams, was granted, after interference had been disposed of.

The court below sustained the validity of both patents, and held that the defendants infringed the first, second, third, fourth, and sixth claims of patent No. 222,767, and the first, second, third, and fourth claims of the patent granted June 7, 1881 (No. 242,497). The complainant waiving an accounting for profits and damages, a final decree was entered, enjoining the defendants from making, using, or selling to others to be used, cultivators constructed and operated in the manner, and upon the principle described in the letters patent in controversy. From this decree the present appeal is prosecuted.

The appellants assign numerous errors, which need not be separately noticed and considered, as they are embraced in the general proposition that the court erred in holding that the patents sued on were valid, and that the cultivators sold by the defendants infringed the same.

In the specification, forming part of the letters patent 222,767, issued December 16, 1879, under the divided application filed November 12, 1879, the patentee states:

"The object of my invention is to give the operator mechanical assistance in raising and lowering the plows without interfering with their usual action and movement, to prevent the *plows from rising out of the ground ac- [**190** cidentally, and to limit their descent; and to this end the invention consists in a spring which serves the double purpose of lifting or holding down the plows at will, as may be required; in so constructing and applying a spring that it

exerts a lifting action on the plow only when the latter is raised above its usual operative position; in so constructing and applying a spring that it limits the descent of the plow; also, in details of minor importance, hereinafter described.

"In carrying out my invention the one spring may be adapted to serve all or either one or more of the offices above enumerated, and may be modified in its form, construction, and arrangement, as desired, provided its mode of action is retained."

It further stated that the improved springs may be attached to either the plows, as shown in figures 1 and 2, or to the axle, as shown in figure 3.

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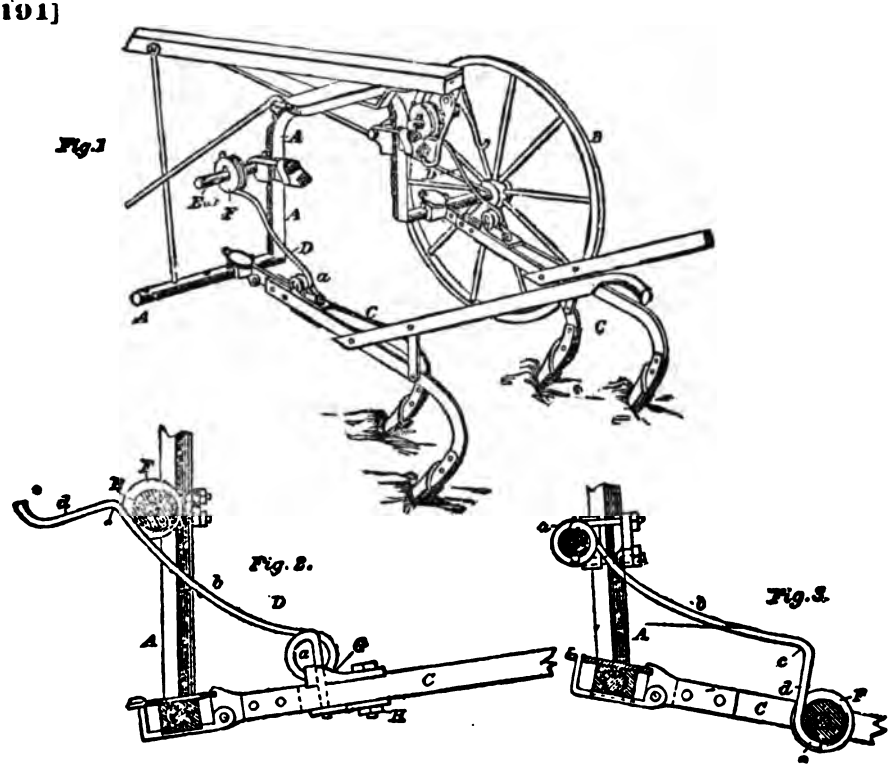

The improvements are described in the specification as follows.

"As shown in Figs. 2 and 3, each spring consists of a round steel rod or wire having at the fixed end a coil, *a*, and extending from the coil a long slightly curved arm, *b*, the outer end of which terminates in a sharp bend or shoulder, *c*, from which the rod continues to form a short arm, *d*, the end of which has a sharp bend or curl, *e*, as represented in Figs. 2 and 3.

"When the spring is to be applied to the plow beam, as shown in Figs. 1 and 2, I first provide the upright portion of the axle with an outwardly extending arm or rod, E, carrying a laterally adjustable grooved roller, F, to serve as a bearing for the free end of the spring. The coiled end of the spring is then seated in a metal bearing plate, G, which is secured rigidly but adjustably to the beam by means of a bolt, H, as shown, the free end of the spring being at the same time seated against the under side of the roller, and the parts so adjusted that when the beam is in its lowermost position the extreme end *e* of the spring will bear against the front of the roller, and the spring be under a strong tension.

"Where the beam and its shovels are down in an operative position, so that the shovels enter the ground, the portion *d* *of the [192 spring bears beneath the roller, as shown in Fig. 1, and serves to hold the beam down, so as to keep the shovels in the ground, but at the same time allows them a limited vertical movement when required.

"Whenever the shovels enter to the full depth desired the end *e* of the spring encounters the roller, and serves to check the descent and to suspend the beams.

"When the beam is raised the spring continues to urge or hold them down until the bend or angle *e* of the spring passes the roller, whereupon the spring instantly changes its action, and tends to lift the beam."

The specification then proceeds to state:

"I am aware that the cultivator plows have heretofore suspended when in action by springs which exerted little or no lifting force when the shovels were lifted above the ground, and which exerted an increasing lifting force as the shovels descended.

"I am also aware that springs actuated by manual devices, and not automatic, have been employed to force cultivator shovels into the ground.

"I am not aware, however, that any one has

hitherto applied a spring in such a manner that it served both to elevate and hold down the beam or shovels, nor that any one has suspended the beams by a spring which would lift the whole or the greatest part of the weight to the highest point required, and still permit an easy motion of the shovels in the ground with little or no tendency to rise therefrom; neither am I aware that any one has ever caused a lifting or depressing spring, which permitted a movement of the beam and shovels to limit their descent.

"I therefore claim to be the inventor of each and all of said features, broadly considered; and it is obvious that they may be changed, modified or altered in the form of embodiment, as desired, it being obvious to the skilled mechanic that there are many equivalent ways of securing the same end without departing from the limits of my invention.

"I do not claim in the present patent the broad idea of a lifting spring which acts with 193] increasing force as the beam *rises, as I have made the same the subject of a separate application bearing date prior hereto; but,

"Having described my invention, what I do claim is—

"1. In combination with a vertically swinging beam or drag bar, a spring, substantially as described and shown, arranged to urge the beam downward when in action and urge it upward when it is lifted above the operative position.

"2. In combination with a vertically swinging beam or drag bar, a double-acting automatic spring, substantially as described, serving the double purpose of holding the beam down to its work and of assisting to lift it when it is thrown out of action.

"3. In combination with a vertically swinging beam or drag bar, a spring, substantially as shown, adapted to exert an automatic spring action upward or downward upon the beam, according to the position of the latter.

"4. In a cultivator, the combination of a frame, a vertically swinging beam or drag bar attached thereto, and an automatic spring, substantially as described, connected with one of said members, and arranged to urge the beam downward while the latter is in an operative position, but not when it is raised above said position. . . .

"6. In a cultivator, the combination of a main frame, a vertically moving beam or drag bar connected therewith, and a spring, substantially as described, interposed between said parts and acting vertically upon the beam, said spring being constructed and arranged to pass a center or dead point as the beam moves vertically, and in passing said point cease or change the direction of its action on the beam."

The second patent, No. 242,497, issued June 7, 1881, while describing in both the specification and the drawings the same invention or device covered by the patent of December 16, 1879, attempts to limit the invention and patent to the lifting operation of the springs, increasing as the beams are raised. The specification, forming a part of this patent, states that—

"The invention relates to that class of machines, generally wheeled, which have vertically swinging beams or drag bars to carry the *shovels or plow points; and the object of 194] the invention is to render the operations of the machine easier and less laborious to the attendants by applying springs thereto in such manner that they will assist the operator in raising the beams and shovels attached thereto from their operative to their inoperative positions, and this without having the springs exert any objectionable lifting strain upon the beams when the latter are in action.

"To this end the invention consists in applying lifting springs in such manner that they exert upon the beams a maximum power or strain when the latter are above an operative position.

"The spring, operating in accordance with my improved plan, may be made and applied in various forms, which will readily suggest themselves to the skilled mechanic without departing from the limits of my invention.

"My springs may be arranged to sustain the whole or any desired portion of the weight of the beams when the latter are raised, and they may be arranged to exert a slight lifting strain when the beams are in action, or, if preferred, arranged to cease their lifting strain entirely at such time.

"The essential feature of my invention consists in applying a lifting spring or springs in such manner that they do not increase their lifting strain as the beam is depressed, the construction preferred being such that the springs exert an increased lifting action as the beams rise from an operative to an inoperative position.

"I am aware that springs have been applied in various ways to assist in lifting the beams in this class of machines; but in all cases their arrangement was such that they acted with an increased lifting strain as the beams were lowered, the consequence of which arrangement was, that the springs exerted their greatest upward strain when the shovels were in the ground, at a time when it was desirable that the shovel should not be lifted, and on the other hand exerted but little force when the beams were elevated, and when it was required that they should be sustained to relieve the operator. This old action, it will be seen, is the reverse of that which is *desired, and the 195] principal object of my invention is to reverse the old mode of action and have the springs act with little or no upward strain when the shovels are in the ground, but with a strong upward pressure when the beams are lifted.

"The accompanying drawings illustrate one manner of embodying my invention. The springs represented in the drawings are adapted to serve the double purpose of holding the beams down, and of lifting them, or assisting to lift them, when they are raised above an operative position. No claim is made in the present case to this duplex action of the springs, nor to the peculiar form or arrangement of the springs, otherwise than as regards the feature of exerting an increasing or a maximum strain on the beams as the latter rise, the peculiar construction of the spring being already covered in a patent hitherto granted to me."

After describing the drawings and the operation of the spring, the specification proceeds as follows:

"While it is believed that the form of spring

represented in the drawings is preferable to all others, the invention includes, as before stated, any spring so combined with the beam or its equivalent that a greater or stronger lifting force or effect is exerted upon the beam when the latter is above the operative position than when it is in use; or, in other words, the invention includes any and all beam lifting springs the effect of which is lessened or avoided when the beam descends to an operative position.

"I believe myself to be the first to apply a spring in such manner as to secure the above mode of action, and the first to so apply a spring in such manner that as it loses tension it acts with an increasing force or effect to lift the beam, or, in other words, with an effect which is not lessened by the decrease in the tension of the spring within the usual limits of operation.

"Among other arrangements which may be substituted for that shown is that of having a radius bar or link introduced between the spring and beam as a substitute for the curved spring and roller."

Having thus described his invention, the patentee claimed—

196] *"1. In a cultivator, the combination of a vertically swinging drag bar or beam and a lifting spring which acts with increasing force or effect on the beam as the latter rises, and vice versa.

"2. In a wheeled cultivator, the combination of a vertically moving beam and a lifting spring, substantially as described, whereby an increasing upward strain is communicated to the beam as the latter rises.

"3. The combination of a wheeled frame, a vertically moving beam or drag bar attached thereto, and a lifting spring, substantially as described, which exerts a greater strain or effect upon the beam when the latter is elevated than when it is depressed.

"4. The combination of a vertically moving beam, a lifting spring, and a shifting or changing bearing or fulcrum, whereby the lifting action or effect of the spring upon the beam is increased as the beam is elevated, substantially as described and shown."

It is not deemed necessary to make a separate analysis of the respective claims alleged to be infringed.

The novelty of Wright's invention consists, as held by the court below, in the application of a double acting spring to assist the operator in either lifting the plow beams, or the plows attached thereto, or in sinking them deeper in the earth, as occasion might require, while the cultivator is in service. The first patent, issued in 1879, covered both the lifting and depressing actions or operations, while the second patent covered only the lifting effect. The spring device which was designed to accomplish these effects, or operations, is the same in both patents. The drawings in each of the patents are identical, and the specification in each is substantially the same. Under these circumstances can it be held that the second patent has any validity, or must it be treated as having been anticipated by the grant of the 1879 patent? If, upon a proper construction of the two patents—which presents a question of law to be determined by the court (*Heald* v. *Rice*, 104 U. S. 749 [26: 914]) and which does not seem to have been passed upon and decided by the court below—they should be *considered as covering the [197 same invention, then the later must be declared void, under the well settled rule that two valid patents for the same invention cannot be granted either to the same or to a different party.

Thus in *Suffolk Mfg. Co.* v. *Hayden*, 70 U. S. 8 Wall. 315 [18: 76], it was held that where two patents, showing the same invention or device, were issued to the same party, the latter one was void, although the application for it was first filed, thereby deciding that it is the issue date and not the filing date which determines priority to patents issued to the same inventor on the same machine.

In *James* v. *Campbell*, 104 U. S. 382 [26: 795], the court say: "It is hardly necessary to remark that a patentee could not include in a subsequent patent any invention embraced or *described* in a prior one, granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well; because he *might* get a patent for an invention before patented to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared. . . . If he was the author of *any other* invention than that which the specification describes and claims, though he might have asked to have it patented at the same time, and in the same patent, yet if he has not done so, and afterwards desires to secure it, he is bound to make a new and distinct specification for that purpose, and make it the subject of a new and different patent." When a patentee anticipates himself, he cannot, in the nature of things, give validity to the second patent.

In *Mosler Safe & L. Co.* v. *Mosler*, 127 U.S. 355 [32: 183], it was held that a patent having issued for a product, as made by a certain process, a later patent could not be granted for the process which results in the product.

In *McCreary* v. *Pennsylvania Canal Co.* 141 U. S. 467 [35: 820], it was held that where a party owned two patents, showing substantially the same improvement, the second was void, the court saying: "It is true that the combination of the earlier patent in this case is substantially contained in the later. *If [198 it be identical with it, or only a colorable variation from it, the second patent would be void, as a patentee cannot take two patents for the same invention."

In *Underwood* v. *Gerber*, 149 U. S. 224 [37: 710], it was ruled that where a patentee obtained two patents on the same day, upon applications filed on the same day, they could not be treated as one patent with two claims, and that the complainant in suing upon the second, or the one having the latest number, could not use the first, or the one with the earlier number, to help sustain the action.

In *Odiorne* v. *Amesbury Nail Factory*, 2 Mason, 28, the reason for the rule since established by the above cited cases was stated to be that the power to create a monopoly is exhausted by the first patent; and for the further reason that a new and later patent for the

same invention would operate to extend or prolong the monopoly beyond the period allowed by law.

The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; that the second patent, although containing a broader claim, more generical in its character, than the specific claims contained in the prior patent, is also void; but that where the second patent covers matter described in the prior patent essentially distinct and separable from the invention covered thereby, and claims made thereunder, its validity may be sustained.

In the last class of cases it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent. If the case comes within the first or second of the above classes, the second patent is absolutely void.

It is insisted on the part of the appellee that "whether this invention shall be protected in 199]part of its *features* by one *patent, and as to the rest by another, or shall be completely protected by a single patent, is a matter which concerns solely the Patent Office and the inventor." Under the rule announced in the foregoing authorities this proposition cannot be sustained.

The second and principal contention of the appellee is that the patent of 1881 covers a distinct and separate invention from the first, and in support of that proposition the appellee relies upon the rule announced in *Garratt* v. *Seibert*, 98 U. S. 77 [25:85]; *Sewall* v. *Jones*, 91 U. S. 190 [23:279], and *Merrill* v. *Yeomans*, 94 U. S. 568 [24:235]. These cases do not, however, establish the appellee's position.

In *Garratt* v. *Seibert* the arrangement for the operation of the device in the second patent was entirely different from the original patent. In *Sewall* v. *Jones* it was held that there might be a patent for the process and one for the product. In *Merrill* v. *Yeomans* it was held that where a patent described an apparatus, a process, and a product, and the claims covered only the apparatus and the process, the law provided a remedy by a surrender of the patent and a reissue, for the purpose of embracing the product.

A single invention may include both the machine and the manufacture it creates, and in such cases, if the inventions are really separable, the inventor may be entitled to a monopoly of each. It is settled also that an inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent, and the cases cited by the appellee come to this point, and to this point only, that a later patent may be granted where the invention is clearly distinct from, and independent of, one previously patented.

It clearly appears from a comparison of the two patents, and their respective specifications and drawings, that the first function or object of the patent of 1879, relating to the lifting power of the spring, is identical with the sole object or function covered by the patent of 1881, and that the improved device and combination for the accomplishment of the lifting operation are identical in both patents.

*The invention covered by the first [200 patent, as stated in the specification, consists in a spring which serves the double purpose of *lifting* or *holding* down the plows at will; and it is further stated that one spring may be adapted to serve all, or either one, or more, of the offices above enumerated.

The patent of 1879 thus embraces both the lifting and the depressing effects or operations of the spring device, while that of 1881 seeks to cover only the increased lifting effect of the same device. The first patent clearly includes the second. No substantial distinction can be drawn between the two, which have the same element in combination, and the same spring arrangement and adjustment to accomplish precisely the same lifting effect, increasing as the beams are raised from their operative positions. The matter sought to be covered by the second patent is inseparably involved in the matter embraced in the former patent, and this, under the authorities, renders the second patent void.

If the two patents in question had been granted to different parties, it admits of no question that the last would have been held an infringement of the first, for the reason that the patent of 1879 just as clearly includes as a part of the invention the increased lifting effect of the spring device, increasing as the beams are raised, as that disclosed in the patent of 1881. It certainly did not involve patentable novelty to drop or omit from the patent a claim for the depressing action of the spring arrangement which might be effected by any mere mechanical contrivance.

This view of the case is sustained by the statement in the specification forming a part of the patent of 1881, in which it is said: "The springs represented in the drawings are adapted to serve the double purpose of holding the beams down, and of lifting them, or assisting to lift them, when they are raised above the operative position. No claim is made in the present case to this duplex action of the springs, nor to the peculiar form or arrangement of the springs otherwise than as regards the feature of exerting or increasing a maximum strain on the beams, as the latter rise, the peculiar construction of the spring being already covered in a patent hitherto granted to me."

*This statement admits that the pecu- [201 liar construction of the spring device, by means of which the lifting effect was to be accomplished, was already covered in a patent previously granted to the patentee—referring to the patent of 1879. In thus admitting the existence of a prior patented device, identical with that described in the second specification and drawings, it is difficult to understand upon what principle the patentee can be allowed to withdraw from the operation of such prior patent, one of its distinct elements, and make it the subject of a second distinct patent. It is not the result, effect, or purpose to be accomplished

which constitutes invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be attained, but a patentee cannot so split up his invention for the purpose of securing additional results, or of extending, or of prolonging the life of any or all of its elemental parts. Patents cover the means employed to effect results. *Rubber Tip Pencil Co.* v. *Howard*, 87 U. S. 20 Wall. 507 [22:414]; *Fuller* v. *Yentzer*, 94 U. S. 288 [24:103].

The prior invention covered the means, and the only means, by which the results sought by the patent of 1881 were to be accomplished, and it is settled that the patentee of such prior device would be entitled to all of its uses, whether described or not. *Roberts* v. *Ryer*, 91 U. S. 150 [23:267]; *Stow* v. *Chicago*, 104 U. S. 547 [26:816]. Under these authorities a single element or function of a patented invention cannot be made the subject of a separate and subsequent patent, and it, therefore, follows that this *increased* lifting effect of the spring device, sought to be covered by the 1881 patent, being clearly shown and described in the specification, drawings, and claims of the 1879 patent, was not the subject-matter of a valid patent.

This conclusion is in no way affected by the reservation attempted to be made in the 1879 patent, of the "broad idea of a lifting spring which acts with increasing force as the beam rises," for the reason that the broad idea sought to be reserved is embodied in identically the same mechanical device constituting the invention and covered by the first patent, which completely occupies all the ground that was reserv-[202] ed. The *spring and its connecting apparatus is the same in each patent, and the claims of the first covered the double automatic action—*upward* or *downward*. There is nothing in the specification or claims to indicate that in the first patent the lifting action is in any degree slighter or weaker as the beam rises than in the second patent. On the contrary, both specifications clearly indicate that the spring device acts with increasing force in each patent as the beam rises.

In addition to this, it distinctly appears that every claim of the 1881 patent could have been properly included and made a part of the claims of the 1879 patent. With the exception of the first broad claim of the 1881 patent, each of the other claims include the spring device with the limiting and qualifying words, "substantially as described," and by virtue of its reference to the specification, the lifting element of the spring device is shown to be the same in each patent. There is nothing in either patent, or the specification or claims thereof, to indicate that there is any greater or stronger lifting action in the one than in the other. It is thus shown that one and the same mechanical device, which covers the entire invention, is described in each of the patents; and the effort to secure a second patent on one part thereof or on its function, after such part or its action had been clearly described and covered by a prior patent, cannot be sustained.

To hold under these circumstances that the first and second patents, in respect to the lifting effect of the same spring device, present distinct inventions, or that both are valid for the same invention, would involve the drawing of distinctions too refined for the practical administration of the patent law.

But aside from this 1879 patent, we think that the broad claim of the 1881 patent is clearly anticipated by the patent of W. P. Brown, No. 190,816, dated May 15, 1877, for an improved coupling for cultivators. The specification, forming a part of this patent, states that to "render the manipulation of the plows or cultivators easy, I provide an arrangement whereby either springs, weights, or the draft bar may be utilized for sustaining a part of the weight of the said cultivators, when they are lifted from the ground to be hung up or shifted laterally. *In accomplishing this I construct the [203 pipe box with a hooked arm *m* to lock the pipe box; and as the cultivator beam in the rear is rigidly attached to the pipe box, by the stirrup or sleeve, the spring has a tendency to rock the pipe box and assist the driver in lifting the cultivators." The flat curved spring device shown in this patent, with the link or arm connecting its free end with the plow beam, exerts little or no force when the drag bars, carrying the plows, are in an operative position; but when the latter are raised above their normal position, and as they are lifted the spring exerts an increased lifting effect, sufficient to suspend the drag bars and attached shovels in the air. While differing in form and mode of attachment, this Brown device clearly anticipates the first broad claim of the patent of 1881.

It admits of little or no question that if this Brown patent was one of later date than the Wright patent of 1881, it would be held to be an infringement thereof, and, under the authorities, "that which infringes if later, anticipates if earlier." *Peters* v. *Active Mfg. Co.* 129 U. S. 530 [32:738]; *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 295 [30:942, 946]; *Grant* v. *Walter*, 148 U. S. 547 [37:552]; *Gordon* v. *Warder*, 150 U. S. 47 [37:992]; *Knapp* v. *Morss*, 150 U. S. 221 [37:1059].

In this view of the case it is not deemed necessary to determine whether the C. A. Hague patent No. 243,123, of June 21, 1881, or the Berlew & Kissell patent, No. 260,447, dated July 4, 1882, anticipated that of Wright. The proofs do not show with sufficient clearness that either of these parties perfected and put in practical operation the spring device incorporated in their patents prior to the date of the invention of Wright. The proofs show, however, that they were experimenting—as was Wright,—in 1876, 1877, and 1878 with springs for cultivators, but the evidence tends strongly to show that they did not perfect any operative device prior to May 1, 1879.

The remaining branch of the case turns upon the proper construction to be placed upon the 1879 patent, in view of the state of the art as illustrated in prior devices and patents.

The Peter Monaghan patent, No. 26,606, dated December *27, 1859, for an im [204 provement in cotton cultivators, contains a bow shaped spring, with deflected ends, one of which is secured to the cross pieces of the shafts, while the other is free, and is in contact with the frame to which are attached the shovels. The spring shown in this patent is of such construction and location as to exert a constant lifting effect on the frame carrying the shovels, and when the operator releases the handles acts

automatically in lifting the frame and in holding the plows above their operative position.

A similar flat or curved spring device is shown in the A. H. Allison patent, No. 61,649, dated January 29, 1867, for corn and cotton cultivators, where one end of the spring is fastened to the cross beam of the main frame, while the free end bears and raises the cross head to which is suspended the shovels. The shovels are made to enter the ground by means of a lever which forces the beam down, and by releasing the lever the springs operate to raise the shovels from the ground, and suspend them above their operative position.

In the H. N. Dalton patent, No. 95,487, dated October 5, 1869, for an improvement in a spring for a gang plow, the spring is coiled around a crank axle upon which the wheels revolve in the ordinary manner. The coiled spring is of such strength that when released by the lever or other appliances governing it, the axle is turned by the force of the spring, thereby raising the frame to which the plow is attached. One of the objects accomplished by the coiled spring is to enable the operator to lift the gang plow entirely from the ground.

Again, a spring device closely resembling that of the Wright invention is shown by the letters patent 154,666, dated September 1, 1874, issued to Marquis L. Gorham, relating to wheeled straddle row cultivators, consisting of an improved device by means of which shovels are held and adjusted on the shovel standards. The device described in the specification and drawings consists of a spiral regulating spring, in connection with suspension rods and drag beams, so constructed as to suspend the drag bars to any height, or regulate the depth at which the shovels or plows shall work. The suspension rods connected with the spiral spring [205] are arranged to assist in *raising the drag bars for the purpose of elevating the plows in a fixed position when turning or moving the machine. This spring device is connected with the beams, and by means of screw nuts may be contracted so as to regulate the height of the drag bars carrying the shovels. The spring device in this patent exerts, automatically, an increased lifting force as the beams are raised, or elevated above their operative position. The second claim of that patent is "the suspension rods *d*, regulating springs *g*, drag bars *i*, in combination with hangers *e*, to which they are attached, substantially as they are described."

In addition to the foregoing spring improvements in cultivators, and like implements, letters patent for door spring devices were issued to H. S. Frost in 1867, and to L. A. Warner in August, 1875, and April, 1879, which have automatic horizontal action in operating or closing the door, corresponding exactly in principle, operation, and function with the vertical action in the Wright spring device. These door springs and their adjustment close or open the door just as the dead center is passed, either in an outward or inward direction. One or more witnesses testified in this case that these door-spring devices could readily be adapted to cultivators by the exercise of ordinary mechanical skill, and be made to perform, by change in position, the lifting and depressing action of the Wright spring. The witness Hague stated that he actually so applied these door springs in 1877 and 1878. We need not determine in this case whether the use of such springs in cultivators is analogous to their original use, so as to form anticipating devices. They show, however, the state of the art in reference to spring devices for producing action in different directions.

It is shown in the testimony that the spring device described in Wright's patent of 1879 interfered with the lateral motion of the beams, and therefore interfered with their successful operation. It also appears that the spring had a constant tendency to fly off the wheel, which compelled the adoption of a loop or bail (not described as a part of his device) to counteract such tendency; and further, that the springs were *subject to frequent breakage, so [206] that their use was discontinued in 1883, about which time the appellee commenced the use of the same spring device as that employed in the cultivators manufactured by P. P. Mast & Company, under the patents issued to Gardiner & Downey, No. 237,740, February 15, 1881; Berlew & Kissell, No. 260,447, July 4, 1882; and to J. M. Elder, No. 222,391, December 9, 1879, and sold by the appellants.

The form of spring as shown in these patents was substantially adopted in 1883 by the appellee, on the theory that the Wright patent comprehended all forms of springs for accomplishing the upward and downward action. The use of this substituted spring for that described in the patent is, to some extent, explained by the fact, which appears in the record, that Wright obtained letters patent 259,656, dated June 13, 1882, for certain improvements in walking straddle-row cultivators, the specification forming part of which states "that the invention relates to an improved manner of constructing the frame and applying the springs for the purpose of raising, or assisting the operator to raise, the beams or drag bars, the springs having, in some cases, the additional function of holding the shovels to their proper place in the ground. The improvement consists mainly in providing the frame with axles capable of rotating independently of the wheels, coupling the wheels directly to the axles, and providing the axles with arms arranged to co operate with a spring, a weight, or draft device to which the team is attached."

The spring in this 1882 patent of Wright's is spiral, encircling a rod, and bears upon collars on the lower ends of the same. This rod is pivoted to another rod which is firmly fastened to the axle. When the shovels are in an operative position the spring performs no function. But when the rod attached to the axle, and pivoted to the rod upon which the spring is mounted, is thrown off its center, then the function of the spring is to depress or elevate the shovels, just as the pivoted rod connected with the spring is thrown backward or forward. The real object of the spring is to raise the shovels, which is accomplished by slightly elevating the handles. This *action deflects [207] the straight downward pressure of the spring to an angle formed by the bent joint between the rigidly attached rod on the axle and rod encircled by the spring, thereby causing the axle to revolve forward. When the spring is straight

and in a vertical line with the axle it performs no function whatever, just precisely the same as with the door spring when the door is in the neutral position, or on the dead center. The form of this spring, and its mode of operation, is identical with that adopted by the appellee in 1883, in place of the original spring device, shown in the patent of 1879.

The taking out of this patent, covering precisely what is now claimed for the patent of 1879, clearly indicates that the latter patent was not supposed to extend to the device covered by the 1882 patent, which is not distinguishable from the prior patents issued to Gardiner & Downey, Berlew & Kissell, and J. M. Elder, under which P. P. Mast & Company construct the cultivators sold by the appellants.

The range of equivalents depends upon the extent and nature of the invention. If the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions. The doctrine is well stated in *Morley Sewing Mach. Co.* v. *Lancaster*, 129 U. S. 263 [32:715], where it is said: "Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanism which go to make up the machine."

Tested by this rule, and in view of the prior devices and the great variety of springs in use previous to the granting of his patent, Wright cannot be treated as a pioneer in the art. Neither can he, nor his assignee, be allowed to invoke the doctrine of equivalents, such as the courts extend to primary inventions, so as to include all forms of spring devices and adjustments which operate to perform the same function, or accomplish the same result.

208] *Again, the issuance of the patents to Gardiner & Downey, Berlew & Kissell, and Elder creates a prima facie presumption of a patentable difference from that of the Wright patent of 1879. *Corning* v. *Burden*, 56 U. S. 15 How. 252 [14:683]; *Duff* v. *Sterling Pump Co.* 107 U. S. 636 [27:517].

We think it manifest, from the prior state of the art, if the invention covered by his patent of 1879 was not anticipated, and if it has any validity, that it must be limited and confined to the specific spring device which is described in the specification and shown in the drawings forming parts of the letters patent. Being thus limited, there is clearly no infringement in the device used by the appellants or their principals, P. P. Mast & Company.

The specific device described in and covered by the Wright patent could not be used in the appellants' combination, nor the appellants' spring in the appellee's combination. This interchangeability, or non-interchangeability, is an important test in determining the question of infringement. *Prouty* v. *Ruggles*, 41 U. S. 16 Pet. 336 [10:985]; *Brooks* v. *Fiske*, 56 U. S. 15 How. 212 [14:665]; *Eames* v. *Godfrey*, 68 U. S. 1 Wall. 78 [17:547].

In respect to the so-called depressing action of the spring, when the drag bars and shovels are lowered to an operative position, it is perfectly manifest that little or no effect is produced in that direction, for the reason that the downward movement of the shovels is limited and more greatly restricted than the upward movement of the beams or drag bars, the range of movement, in other words, not being in the downward line anything like that in the upward direction of the drag bars. Hence, the depressing effect of the claim is of no practical importance. The operator holding the handles of the cultivator is not assisted, to any appreciable extent, in keeping the plows in the ground by the depressing action of the spring. The downward action or position of the shovels is not required to go, and does not in fact go, below their operative position, at which point the spring device becomes practically inoperative.

Our conclusion on the whole case is that the patent of 1881 is anticipated by that of 1879; that the first claim thereof is *anticipated[209 by the Brown patent; that the patent of 1879, in view of the state of the art, is to be limited and restricted, if it has any validity at all, to the specific spring therein described; and, as thus restricted, it is clearly not infringed.

We are, therefore, of opinion that the decree of the court below should be reversed, and the cause remanded, with directions to dismiss the bill; and it is accordingly so ordered.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Plff. in Err.*, *v.* MARTIN LOWELL.

(See S. C. Reporter's ed. 209-221.)

Contributory negligence—custom—disregard of rule—when will not bar recovery.

1. In determining whether the plaintiff in a suit for damages for negligence was so clearly guilty

NOTE.—*As to contributory negligence; imputed negligence; negligence of parent or child or husband or driver; intoxication;* see note to Union Pac. R. Co. v. Botsford, 35: 734.

As to freedom of plaintiff from contributory negligence, necessary to entitle him to recover, see note to Stokes v. Saltonstall, 10: 115.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

As to liability of railroad companies to switchmen or brakemen for injuries while coupling cars; violation of rules, see note to Kohn v. McNulta, 37: 150.

As to care and precautions necessary in crossing a railroad track, see note to Continental Imp. Co. v. Stead, 24: 403.

As to when railroad or other corporations are liable for punitive or exemplary damages, see note to Lake Shore & M. S. R. Co. v. Prentice, 37: 98.

When violation of rules will or will not relieve carrier of passengers or railroad company from liability for damages for injury to the passengers; duty of railroad company to protect passengers or persons on trains; sleeping car.

A rule requiring passengers to remain in the cars provided for them, and prohibiting them to ride in an express car or other place of increased dan-

of contributory negligence as to entitle the defendant to a verdict, the court of review is bound to put upon the testimony the construction most favorable to plaintiff, where the verdict was for him.

2. One has a right to make use of the customary mode of alighting from a train of cars and of reaching his home.

3. A railway company does not discharge its entire obligation to the public by a notice in its cars of a certain rule; if it permit the rule to be generally disregarded, and an accident occur, the company cannot rely exclusively upon a breach of its rule.

4. In an action against a railroad company for damages for negligence, proof that the plaintiff violated the regulations of the company even without the excuse of a cogent necessity, will not as matter of law debar him from a recovery.

[No. 173.]

Argued Dec. 19, 1893. Decided Jan. 8, 1894.

IN ERROR to the Circuit Court of the United States for the District of Minnesota, to review a judgment for the plaintiff, Martin Lowell, against The Chicago, Milwaukee & St. Paul Railway Company, defendant, for damages for personal injuries received by plaintiff through the negligence of the defendant. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was an action at law for personal injuries received by the plaintiff Lowell while crossing the track of the defendant at Ridgeway station, within the limits of the city of St. Paul.

It appears by the bill of exceptions that the following facts were established by the evidence:

The defendant, on the 17th day of March, 1889, was a common carrier of passengers for hire, and was on that day operating a railroad between St. Paul and Minneapolis. One of the stations on the road was Ridgewood Park, within the corporate limits of St. Paul, the general course and direction of the road through such station being east and west.

There was a double track at that point and for some distance both east and west of it, the trains going east, or towards St. Paul, moved on the south track, and the trains going west, or towards Minneapolis, on the north track. There were many unscheduled trains—freight, transfer, and wild trains—moving back and forth on the tracks both day and night.

The tracks at Ridgewood Park station were about nine feet apart; the passenger trains were run on schedule time between the two cities, and passed this station; during the day there were many trains moving on both of these tracks; between the hours of nine and eleven in the evening there were only two passenger trains passing Ridgewood Park station, one going east and the other going west; there were no trains of defendant scheduled to meet at Ridgewood Park station. The west going train, upon which

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ger set apart for another purpose, is reasonable. Florida Southern R. Co. v. Hirst, 16 L. R. A. 631, 30 Fla. 1, 52 Am. & Eng. R. Cas. 409.

A passenger who rides in an express car in violation of a known rule of the carrier, even with the permission, connivance, or knowledge of the conductor of the train, and is there injured through the negligence of the carrier, cannot recover if he would not have been injured had he remained in the passenger car as required by the rules. Florida Southern R. Co. v. Hirst, *supra*.

Passengers on railroad trains are not presumed to know the rules and regulations which are made for the guidance of the conductors and other employés of railroad companies, as to the internal affairs of the company; nor are they required to know them. New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60 (36: 71), 11 Ry. & Corp. L. J. 146.

Although one taking passage upon a freight train assumes the increased risk incident to its operation and management, yet when the company accepts him as a passenger on such train it becomes bound by all the obligations of a common carrier of passengers upon a regular passenger train. Pennsylvania Co. v. Newmeyer, 129 Ind. 401.

A railroad company owes no duty of care, as to the running or management of its engines, to persons having no connection with it, but who have been in the habit of riding simply as trespassers upon its engines without its servants attempting to prevent them from doing so. Barkley v. Chicago, M. & St. P. R. Co. 37 Ill. App. 293.

One who goes upon a train to render necessary assistance to a passenger, in conformity to a practice approved or acquiesced in by the carrier, is entitled to a reasonable time after rendering the assistance to leave the car, if the carrier has notice that he wishes to get off. Little Rock & Ft. S. R. Co. v. Lawton, 15 L. R. A. 434, 55 Ark. 428.

A railroad company has a right to enforce reasonable rules and regulations relating to passengers, and to employ such force as may be necessary for that purpose; and its gatekeeper may seize hold of and detain passengers so far as necessary to prevent their boarding trains in motion. Dickerman v. St. Paul Union Depot Co. 44 Minn. 433, 45 Am. & Eng. R. Cas. 596.

The duty of common carriers with respect to the transportation of persons and property is independent of contract. Delaware, L. & W. R. Co. v. Trautwein, 7 L. R. A. 435, 52 N. J. L. 169, 41 Am. & Eng. R. Cas. 187.

A sleeping car company is liable for injuries to an occupant of a sleeping car by the negligence or willful misconduct of persons placed in charge of the car. Campbell v. Pullman Palace Car Co. 42 Fed. Rep. 484, 8 Ry. & Corp. L. J. 195.

The porter of a sleeping car or drawing room car which forms a part of the train of a railroad company under a contract with its owner, who sells separate tickets for privileges upon such cars, and who furnishes his own servants to collect tickets and assist passengers, is the servant of the railroad company, for whose acts done in the performance of a contract to carry a passenger it is responsible, notwithstanding an agreement which may be made upon the subject between the company and the owner of the car. Dwinelle v. New York Cent. & H. R. R. Co. 8 L. R. A. 224, 120 N. Y. 117.

A railroad company is under a duty to a passenger who was thrown on its track by the fault of its servant, producing mental incapacity, to take steps to prevent injury to him from the danger it knew he was likely to incur from its trains. Cincinnati, I. St. L. & C. R. Co. v. Cooper, 6 L. R. A. 241, 120 Ind. 169, 6 Ry. & Corp. L. J. 491.

The mere fact that a person is intoxicated does not authorize the employés of a railroad company to treat him with personal violence. Illinois Cent. R. Co. v. Sheehan, 29 Ill. App. 90.

The carrier is not liable for the results, where a passenger by his own misbehavior has provoked a

211] plaintiff was a passenger, *reached Ridgewood Park at 10.10 P. M., and the only scheduled train that would pass this station going east was due fifteen minutes later, which fact was well known to the plaintiff.

The railroad company had erected two depots at Ridgewood Park station, one on each side of the tracks—one south of the south track and one north of the north track and opposite to each other; each of these depots was supplied with a platform for the accommodation of passengers getting upon and alighting from the cars, one of which platforms was on the south side of the south track and the other was on the north side of the north track.

The only depot used by the defendant was the one situated on the south side of the tracks; all the tickets were sold in the depot on the south side; telegraph office, baggage room, and waiting room were there, and the station on the north side was closed, and had never been used by the defendant in any way as a depot.

At the east end of each of these depots there was a flight of steps leading down about fifteen or twenty feet to Victoria street, which at that point passed under the two tracks, the tracks passing over the street by means of an iron bridge; and it was possible for the passengers to go from one depot to the other by the way of these steps and Victoria street; but Victoria street on the 17th day of March, 1889, was not graded or in any way improved, but was a natural ravine passing under the tracks at Ridgewood Park station.

Victoria street about the station and underneath the tracks was marshy, muddy, and wet at that time; the steps leading down on the north side from the north depot came down only to within two feet of the ground, and passing in front of the steps at the bottom thereof was a stream of water which ran from there over the surface and in a zigzag direction down Victoria street and under the tracks.

This stream varied in width from two or six feet and in depth from three or four inches to two feet; the ground under the tracks at Victoria street was uneven and irregular, and there were no lights or any illumination whatever along Victoria street at that point and under the tracks, and the *night [212 was dark. It was customary for all persons living on the south side of the tracks at the station to cross over the south-lying tracks in going to their homes, and not under the tracks by Victoria street, which custom was well known to the defendant.

There was no planking between the two depot platforms, except at the easterly end of the platforms across the tracks at Ridgewood Park station, but the surface of the ground was occupied by the tracks and ties as on any other part of the road.

The platform on the north side was lighted by two large kerosene lamps on posts, and

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personal encounter between himself and one of the employés. Scott v. Central Park, N. & E. R. Co. 53 Hun, 414.

A shipper of stock who is riding upon the train to care for the stock, though not paying directly for his passage, is a passenger, to whom there is due all the diligence of the railroad to protect him from harm. Pitcher v. Lake Shore & M. S. R. Co. 98 N. Y. S. R. 647.

A carrier is not relieved from liability to a passenger injured through its negligence, because she has not paid her fare, where it is not shown that she did not intend to pay it. Bartlett v. New York & S. R. F. & S. Transp. Co. 25 Jones & S. 348.

A conductor cannot relax regulations of a railroad company prohibiting passengers from riding on freight trains, without consent of the company, so as to render the latter liable to one injured while riding on a freight train. Gulf, C. & S. F. R. Co. v. Campbell, 76 Tex. 174.

In an action for personal injuries sustained by a passenger while riding on a hand car, evidence that the train master who authorized plaintiff to ride on the car was the representative of the company on that part of the road in respect to all matters connected with the use of the road, cars of all kinds, and the services of its employés, is sufficient to justify a finding that the train master had authority to use the hand car for transporting passengers. International & G. N. R. Co. v. Prince, 77 Tex. 560.

A railroad company is liable to a person assaulted by its employés while sitting in a passenger car waiting for the train to start, although he has purchased no ticket. Illinois Cent. R. Co. v. Sheehan, 29 Ill. App. 90.

Where there is a statute providing that in case a passenger is injured while riding in a baggage car contrary to the rules of the company there can be no recovery, such statute is conclusive and no suit for recovery can prevail. Higgins v. Hannibal & St. J. R. Co. 36 Mo. 434.

Where there are rules of the company which prohibit a passenger from riding in a baggage car, and the passenger with knowledge of such rule deliberately violates it and takes his place in such car, he cannot recover damages if he is injured while there. Pennsylvania R. Co. v. Langdon, 92 Pa. 21, 37 Am. Rep. 651.

Where the passenger knows that the rules of the company prohibit his being in the baggage car and he goes there without necessity, even though with the knowledge of the conductor, and is injured by the wreck of a train, he cannot recover if he would not have been injured had he remained in the passenger car. Houston & T. C. R. Co. v. Clemmons, 55 Tex. 88, 40 Am. Rep. 799.

But being in the baggage car without knowledge of the rule forbidding it is not negligence. Jacobus v. St. Paul & C. R. Co. 20 Minn. 134, 18 Am. Rep. 360.

Where the accident consisted of the overturning of the baggage car the court held that the passenger's going into the baggage car to get some article of baggage was such a plain act of negligence that he could not recover for injuries received while there by reason of such accident. Peoria & R. I. R. Co. v. Lane, 83 Ill. 449.

A railroad company may make reasonable rules and regulations for the management of its business and the conduct of its passengers. Poole v. Northern Pac. R. Co. 16 Or. 261.

A street railway company has the right to carry passengers on the platforms. Topeka City R. Co. v. Higgs, 38 Kan. 375.

It is the duty of a passenger to go inside the car when requested so to do by the conductor, although there may be no unoccupied seats. Graville v. Manhattan R. Co. 105 N. Y. 525, 59 Am. Rep. 516.

It is the duty of a passenger to inform himself of the regulations governing the transit and conduct of the trains. Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507.

the south platform was furnished with the same kind and number of lamps, but there was conflicting evidence as to whether one of these lamps was burning on the night of the accident.

The north side building was closed, but the platform on the north side was in good order for the embarkation and debarkation of passengers, and was of the same size as the one on the south side; the plaintiff was, at the time of the accident, a man about thirty-six years of age, in full possession of all his faculties; he lived in a house situated on the south side of the tracks, about one thousand feet west of the depots and about two hundred and fifty south of the tracks; he had lived there prior to the accident continuously for about six months, and the only way he could reach his home after alighting from defendant's train at the station, was to cross over the south line track of the defendant's road, except through Victoria street; he was in the habit of taking the cars at Ridgewood Park depot for St. Paul about twice each week during his residence at the point mentioned, and would return from St. Paul by the trains of defendant and debark at this station. In so doing, plaintiff had always boarded and departed from the defendant's train on the south side of the same, as he did on the night the accident in question occurred; and he had worked as a laborer on the streets in the neighborhood of the depot, and was familiar with it and its surroundings.

On the afternoon of the 17th day of March, 1889, he purchased a round trip ticket at the [213] Ridgewood Park depot for *St. Paul and return, and went to St. Paul, leaving there on his return home at 10 P. M.; he was with a companion named Fosberg, both plaintiff and Fosberg riding in the smoking car, which was on the rear end of the train, and was a combination car, divided by a partition in the middle, the rear half being for baggage and the front half for passengers desiring to smoke.

The train was composed of an engine, tender, two passenger coaches, and this combination car; in each end of the smoking apartment of the combination car, there were posted up notices or signs in large printed letters as follows, which could be plainly seen and read by all passengers in the car: "Passengers leaving this car at the forward end will turn to the right; if at the rear end, will turn to the left, and avoid danger from trains on the opposite track."

Plaintiff could read English. He testified that he had never seen the sign; that he generally rode in the smoking car; that the train arrived at the Ridgewood Park station at about ten minutes past ten o'clock P. M. and pulled in with the cars opposite the north platform, and two ladies and five or six gentlemen alighted, all on the north side of the train and on the north platform; that there was a conductor, a ticket collector, and a brakeman on the train, and as the train stopped the plaintiff and Mr. Fosberg got up and passed out of the front door of the smoking car, Mr. Fosberg being first, and the plaintiff following.

On the platform they were met by the collector, who was standing in front of and a little to the north side of the door, and who asked for their tickets, which they delivered to him, Fosberg first and plaintiff after him. They immediately left the car on the south side and started across the space between the tracks and the south track towards the south platform, Fosberg being about ten feet in advance of plaintiff. The collector saw them getting off on the south side and said nothing to them, but immediately on receiving their tickets, entered the smoking car.

That before the plaintiff had time to alight from said car the train had begun to move slowly away from the station.

This conductor or ticket collector saw both Fosberg and the *plaintiff turn and [214] step down the steps towards the south side of the car to cross over to the side station, and raised no objection to and did not caution either of them against so doing.

That plaintiff, in stepping down from said car, took hold of the iron railing on the end of the platform on the right hand side, and stepped down with the left foot first and faced toward the west up the south line track.

That plaintiff saw no train coming on the south line track, and Fosberg, who had already crossed over the track ahead of him, saw nor heard any train coming from the west on the south line track; that just as soon as plaintiff stepped from the car he started towards the station across the south line track for the purpose of going to his home; that just as he was crossing the track he was struck by a wild train coming from the west and which was being run backwards on the south line track, and was knocked a distance of thirty feet, falling upon the platform of the station a little to the east of the center thereof.

Several witnesses swore that the train had a headlight burning at both ends, and several witnesses swore that they saw no headlight on the end approaching the east and the depot.

There was conflicting evidence as to the rate of speed at which the engine was moving before and at the time it reached the station, some witnesses putting it as high as twenty miles an hour and some as low as five or six. Several witnesses swore that the engine whistled for the station about a quarter of a mile before reaching it, and that its bell was rung all the way from where it whistled to the station, and several witnesses swore that they heard neither whistle nor bell. The crew of the engine on it at the time was an engineer, fireman, conductor, and brakeman.

Fosberg crossed the south track and got on the platform safely and before the arrival of the engine, and was about ten feet in advance of plaintiff, when he attempted to step across the south rail of the south track, and Fosberg, seeing the engine coming, called out, "Look out, Martin!" to the plaintiff, but plaintiff *was struck by the corner of the ten- [215] der and knocked onto the south platform.

The crew who were on the wild train, consisting of the fireman, brakeman, and conductor, saw the west going passenger train as it came into the station and as it stopped

there to receive and discharge passengers, and knew that it stopped for that purpose. Plaintiff introduced general rule No. 66 of the defendant, in regard to the running of its trains, which was as follows: "When a train is standing on a double track for passengers, trains from the opposite direction will come to a stop with the engines opposite each other, and proceed slowly until trains are past."

The train did not in any way stop until it had run far past the station and until after plaintiff was struck.

The conductor of the passenger train, after seeing his passengers off the train on the north platform, gave the signal to his engineer to go ahead, and got upon the platform of one of the coaches, and, seeing the plaintiff and Fosburg going in the direction of the approaching engine, called to them as loud as he could to look out for themselves. There was an unobstructed view up the tracks to the west from any point at the Ridgewood Park depot of at least 1500 feet, and a train approaching could be seen that distance.

There was conflicting evidence as to whether the passenger train was moving westward or standing still when the engine from the west reached a point opposite the passenger engine.

The plaintiff, who was sworn as a witness in his own behalf, testified that in going in and out of this station he was in the habit of getting off the cars on the south side; that he had seen other people getting on and off in that way, and that no one ever objected to his doing this. He further testified, under objection, that he had seen people getting off upon the south side both before and after the accident, and that he never saw them get off on the north side and go down the steps and under the bridge. His companion that night, Fosberg, also testified that he had seen other people get off upon the south side. Upon the conclusion of the testimony on the part of the plaintiff, counsel for the defendant 216] requested the court to *instruct the jury to find a verdict for the defendant, upon the ground that the plaintiff was proven to have been guilty of contributory negligence in leaving the train upon the south side, in disobedience of the rules and notice of the defendant, and in not looking for, and seeing, the coming engine and avoiding the same. The court denied the motion, and counsel for defendant excepted. There was no evidence from either side showing, or tending to show, that any reason or cause existed for the plaintiff leaving the cars on the south side, instead of the north side, except as above set out. Upon the conclusion of the entire testimony in the case defendant's counsel did not renew his request to direct a verdict in his favor, but took exceptions to such portions of the charge as submitted to the jury the question of the contributory negligence of the plaintiff.

The case was submitted to the jury, who returned a verdict for the plaintiff in the sum of $8500 for which judgment was entered. Upon motion a new trial was ordered unless plaintiff would consent to remit $3000 from his judgment, which was done. The defendant thereupon sued out this writ of error.

Mr. **Charles E. Flandrau,** for plaintiff in error:

The plaintiff could not recover, having violated the reasonable rules of the defendant and alighted from the cars in a manner prohibited by the defendant.

Bancroft v. *Boston & W. R. Corp.* 97 Mass. 275; *Forsyth* v. *Boston & A. R. Co.* 103 Mass. 510; *Gonzales* v. *New York & H. R. Co.* 38 N. Y. 440, 98 Am. Dec. 58; *Pennsylvania R. Co.* v. *Zebe*, 33 Pa. 318.

If the passenger be injured in consequence of his disregard of the necessary regulation of the company in regard to the mode of alighting from the cars, they are not liable, even though the negligence of their servants concurred in causing mischief.

Sullivan v. *Philadelphia & R. R. Co.* 30 Pa. 234, 72 Am. Dec. 698; *Louisville & N. R. Co.* v. *Ricketts*, 14 Ky. L. Rep. 19; *Deselms* v. *Baltimore & O. R. Co.* 149 Pa. 432; *Connolly* v. *New York & N. E. R. Co.* 158 Mass. 8; *Wheelwright* v. *Boston & A. R. Co.* 135 Mass. 225; *Chaffee* v. *Old Colony R. Co.* 17 R. I. 658.

Messrs. **M. D. Munn** and *C. K. Davis*, for defendant in error:

Within the limits in which persons necessarily and ordinarily go to and from trains, it is necessary that the company keep the ground safe.

Hulbert v. *New York Cent. R. Co.* 40 N. Y. 151; *Terry* v. *Jewett*, 78 N. Y. 338-342; *Brassell* v. *New York Cent. & H. R. R. Co.* 84 N. Y. 241; *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Baltimore & O. R. Co.* v. *State*, 60 Md. 447, 12 Am. & Eng. R. Cas. 152; *Klein* v. *Jewett*, 26 N. J. Eq. 474; *Parsons* v. *New York Cent. & H. R. R. Co.* 3 L. R. A. 683, 113 N. Y. 355; *Swift* v. *Staten Island Rapid Transit R. Co.* 123 N. Y. 646.

A passenger when taking or leaving a railway car at a station has a right to assume that the company will not expose him to unnecessary danger, but will provide passengers a safe passage to and from the train, and a passenger is not in all cases liable to be charged with contributory negligence because he attempts to cross an intervening track without looking for an approaching train.

Chaffee v. *Boston & L. R. Corp.* 104 Mass. 108; *Wheelock* v. *Boston & A. R. Co.* 105 Mass. 203; *Pennsylvania R. Co.* v. *White*, 88 Pa. 327; *Philadelphia, W. & B. R. Co.* v. *Anderson*, 8 L. R. A. 673, 72 Md. 519; *Robostelli* v. *New York, N. H. & H. R. Co.* 33 Fed. Rep. 796.

Whether or not a passenger on a railroad train alighting on a track at the side of a train instead of on the platform, with the knowledge of the conductor of the train, and without objection from him, is guilty of negligence, is a question of fact for the jury to determine under all the circumstances.

Keefe v. *Boston & A. R. Co.* 142 Mass. 251; *Baltimore & O. R. Co.* v. *State*, 60 Md. 449, 12 Am. & Eng. R. Cas. 152; *Delaware, L. & W. R. Co.* v. *Trautwein*, 7 L. R. A. 435, 52 N. J. L. 169, 1 Am. R. & Corp. Rep. 688; *Reid* v. *New York, N. H. & H. R. Co.* 44 N. Y. S. R. 688; *Hoffman* v. *New York Cent. & H. R. R. Co.* 75 N. Y. 605; *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43 (37: 642); *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Terry* v. *Jewett*, 78 N. Y. 338.

Under the circumstances of this case the question of defendant in error's contributory negligence was one that should be left to the jury.

Sioux City & P. R. Co. v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745); *Hayes* v. *Michigan Cent. R. Co.* 111 U. S. 228 (28: 410).

Mr. Justice **Brown** delivered the opinion of the court:

Practically the only question in this case is whether the evidence so clearly showed the plaintiff to have been guilty of contributory negligence as to entitle the defendant, as matter of law, to an instruction to the jury to return a verdict in its favor.

It was not seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule, which demanded that "when a train is standing on a double track for passengers, trains from the opposite direction will come to a full stop, with the engines opposite to each other, and proceed slowly until trains are passed." In view of the frequency of accidents occurring to passengers crossing one track at a station, after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening this accident would probably not have occurred. In determining whether the plaintiff was so clearly guilty of **218**] contributory negligence as to *entitle the defendant to a verdict, we are bound to put upon the testimony the construction most favorable to him, and to assume that the eastward bound train did not stop opposite the other engine, but that it was passing at the rate of twenty miles an hour; that it gave no signal by whistle or bell, and carried no headlight upon the rear or east end of the engine. If such were the facts, there could be no doubt of the gross negligence of the defendant.

We are of the opinion that there was no absolute obligation on the part of the plaintiff to cross the track by way of the ravine known as Victoria street. To do this would have required him to descend a flight of steps at the east end of the station, about fifteen feet to the level of the street, which was not graded or in any way improved, but was a natural ravine passing under the tracks at this point. There was a stream of water varying in width from two to six feet, and in depth from two or three inches to two feet, running over the surface of the street under such tracks. The ground beneath the tracks was marshy, muddy, and wet at the time; the street was uneven and irregular, and there were no lights or other illumination along the street at that point, and the night was dark. It seems to have been the universal custom for all persons living on the south side of the tracks to cross over the tracks in going to their homes, and not under the tracks by Victoria street. Under such circumstances, the plaintiff had a right to make use of the customary mode of alighting and reaching his home.

The case resolves itself into the question, then, whether the plaintiff was, as matter of law, guilty of negligence in failing to get off the train on the north side, there being in the opinion of the court no question that if he had alighted upon the platform and waited until the train passed he would not have been injured. There was, it is true, a notice conspicuously posted at each end of the smoking car, in which plaintiff was riding, requiring passengers leaving the car at the forward end to turn to the right and at the rear end to turn to the left, and avoid danger from the trains on the opposite track. There was testimony tending to show that this notice had *never been read by the plaintiff. As [**219** suming, however, that he was bound to read it, and was chargeable with knowledge of its contents, there was other testimony tending to show that it was habitually disregarded by passengers with the acquiescence of the conductor and the servants of the road about the station. There was evidence that plaintiff and his companion Fosberg were met upon the platform of the car by the collector, who asked for their tickets, which were delivered to him; that the collector saw them get off on the south side and said nothing to them, but immediately upon receiving their tickets entered the smoking car; that no objection was raised to their getting off upon the south side, and that other people were in the habit of getting off in the same way. Now if the custom of passengers to disregard the rule was so common as to charge the servants of the road with notice of it, then it was either their duty to take active measures to enforce the rule, or to so manage their trains at this point as to render it safe to disregard it. A railway company does not discharge its entire obligation to the public by a notice of a certain requirement, permitting the requirement to be generally disregarded, and then proceeding upon the theory that every one is bound to comply with it. If, in such case, an accident occur, the defendant should not be allowed to rely exclusively upon a breach of its regulation. In this particular the case resembles that of the *Dublin, W. & W. R. Co.* v. *Slattery*, L. R. 3 App. Cas. 1155, in which the House of Lords held that a notice not to cross the tracks which the company had permitted to fall into desuetude and made no attempt to enforce, did not debar the plaintiff, who had disregarded it, from a recovery. Had the plaintiff complied with the notice and alighted upon the platform, he would still have been obliged to cross the track with the same possibility of being struck by a passing train that confronted him in this instance. There was, in addition to this, some evidence to go to the jury that it was customary for persons living on the south side of the track to get off the train on that side, as the plaintiff did, and none that they were in the habit of crossing by way of Victoria street.

*In his manner of leaving the train [**220** there seems to have been no negligence. He took hold of the iron railing at the end of the platform on the right hand side, stepped down with the left foot first and faced towards the west on the south line track, saw or heard no train coming upon that track, and supposed that he was perfectly safe in crossing, as he knew that no train was then due.

It is in this connection, and under these circumstances, that the question of the necessity was to be considered. While there may have been nothing which the law would recognize as a special necessity that evening for his getting off on the south side, if it were usual and customary for passengers to do so, and it was not manifestly dangerous, and the plaintiff had been in the habit twice each week for six months prior thereto of alighting in the same manner, and in doing this he took the precaution to get off in such a way, that if a train properly lighted had been coming he could not have failed to see it, it would be a question for the jury whether he was guilty of contributory negligence in disregarding the notice. In this view it is possible that the charge of the court to the effect that unless there was some existing necessity established by the testimony authorizing the plaintiff to alight from that side of the train and cross over the tracks, he could not recover, was too favorable to the defendant. But, however that may be, it seems to have been subsequently qualified by the court saying that if passengers embarking upon or alighting from the train at that point went customarily over that route, then the mere fact that the plaintiff did cross there in order to reach his home cannot of itself be considered negligence, and leaving it for the jury to say whether, under the circumstances of this case, the plaintiff should not have obeyed the rules and regulations of the company, and have alighted upon the platform. The charge as a whole was sufficiently favorable to the defendant, and the question of negligence was a proper one for the jury—in other words, proof that the plaintiff violated the regulations of the company even without the excuse of a cogent necessity will not, as matter of law, debar him from a recovery.

The judgment of the court is therefore affirmed.

221] **Mr. Justice* **Gray** and *Mr. Justice* **Shiras** concurred in the result, because the only ruling in matter of law requested or made at the trial on the question whether the defendant was entitled to a verdict, by reason of contributory negligence of the plaintiff, was upon a motion made at the close of the plaintiff's evidence and before the defendant had rested its case, and therefore, by the settled rule, could not be the subject of exceptions or error (*Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202, 206 [36: 405, 406]; *Bogk* v. *Gassert*, 149 U. S. 17 [37: 631]) and because the instructions given and duly excepted to were sufficiently favorable to the defendant.

JOHN F. WOLLENSAK, *Appt.*, *v.* SARGENT & COMPANY.

(See S. C. Reporter's ed. 221-229.)

Construction of patent—common contrivances—patentable novelty—when reissue void—excuse for delay—patent void for want of novelty—void for laches.

1. The court cannot import into the claim of a patent elements that would operate to so enlarge its scope as to cover an invention not indicated upon its face.
2. Common contrivances for opening and closing apertures at a distance from the hand of the operator have no patentable character.
3. A patentable novelty must be a novelty in the means or mechanical device and not in the use to which the combination is put.
4. Where the claim in a reissue is expanded, a delay of over four years after discovering the mistake in applying for the reissue invalidates it, unless excused by special circumstances, which show it reasonable.
5. The excuse for a delay in applying for a reissue of a patent, that the patentee followed the advice of his solicitor and therefore did not apply within due time, will not do.
6. Reissued patent, No. 9307, dated July 20, 1880, to John F. Wollensak for improvement in transom lifters, is void so far as regards the third claim (the only claim sued on) for want of patentable novelty.
7. Reissued patent No. 10,264, dated Dec. 26, 1882, granted to John F. Wollensak, is void as to the claims relied on, for laches apparent on the record and not sufficiently explained.

[No. 150.]

Argued Dec. 7, 1893. Decided Jan. 8, 1894.

NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to notes given for patent rights; purchaser before maturity, see note to Mandeville v. Welch, 5: 87.

That prior use or sale of invention renders patent void, see note to French v. Carter, 34: 664.

As to reissued patents for inventions, when valid; effect of issue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 644.

As to what constitutes infringement of patent; similarity of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

As to patents or designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

APPEAL from a decree of the Circuit Court of the United States for the District of Connecticut, decreeing two patents, issued to John F. Wollensak for improvements in transom lifters, void. *Affirmed.*

See same case below, 33 Fed. Rep. 840, 41 Fed. Rep. 53.

Statement by *Mr. Chief Justice* **Fuller:**

This was a consolidated bill in equity founded on two reissued patents granted to appellant for improvement in transom lifters, as follows: No. 9307, July 20, 1880, original patent No. 136,801, March 11, 1873, and No. 10,264, December 26, 1882, original patent No. 148,538, March 10, 1874. Appellee was charged with the infringement of the third claim of the reissued patent No. 9307, and the third, fourth, fifth, sixth, and ninth claims of reissue No. 10,264.

222] *The circuit court, on pleadings and proofs, held reissue No. 9307 invalid for want of patentable novelty, and, on demurrer, reissue No. 10,264 void as to the claims relied on, for laches apparent on the record and not sufficiently explained by the allegations of the bill.

The opinion of *Judge* Shipman on motion for preliminary injunction is reported in 33 Fed. Rep. 840, and that on final hearing in 41 Fed. Rep. 53.

Messrs. **Ephraim Banning** and *Thomas A. Banning* for appellant.

Mr. **John Kimberly Beach** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

1. The specification and claims of reissue No. 9307 are as follows:

"Transom lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting arm which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod. When thus constructed the upright rod is liable to be bent by the weight of the transom, owing to the want of support at or near the point of junction between the long rod and the lifting arm.

"The object of my invention is to remedy this difficulty; and to such end it consists in providing the proper support or support and guide for the upper end of the lifting rod during its vertical movements and while at rest.

"This may be accomplished in a variety of ways, one of which I will now proceed to describe in detail, although I wish it clearly understood that I do not limit my invention to this construction, but regard it as covering broadly any construction, combination, or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.

*"In the drawings, D is the door; T, [223 the transom sash, pivoted at top, bottom, or middle, as preferred; A, the lifting arm that connects the sash to the upright rod; U, the upright rod, passing through two guides, G G′, one above and one below the point of junction with the lifting arm; R, a friction roller secured to the lifting rod so as to bear against the wall and support said rod at its point of junction with the lifting arm; *n n*, notches cut in the upright rod to receive the end of the set screw; and *s*, a set screw arranged, in connection with

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Patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; change of form; new applications of old devices; designs; anticipation; abandonment.

A valid patent cannot be obtained for the mere placing of an ornament of a particular kind upon an article of manufacture, although it may be obtained either for the article or for the design of the ornament. Bergner v. Kaufmann, 52 Fed. Rep. 818, 62 Pat. Off. Gaz. 1068.

A patent not useful for the purpose for which it is claimed is void. Fox v. Kensington & K. Electric Lighting Co. 3 Ch. 424.

While the fact that a patented article has gone into general use is evidence of its utility, it is not conclusive even of that, much less of its patentable novelty. Lovell Mfg. Co. v. Cary, 147 U. S. 623 (37: 307), 62 Pat. Off. Gaz. 1821; Grant v. Walter, 148 U. S. 547 (37: 552), 63 Pat. Off. Gaz. 910.

The mere carrying forward or extending application of an original device, with a change only in degree, is not patentable. Grant v. Walter, *supra.*

If a new combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention. Krementz v. S. Cottle Co. 148 U. S. 556 (37: 558).

Where the question of patentability is one of doubt, the popularity of the article may turn the scale in favor of the patentee; but where such popularity is not due to any patentable feature, it is an unsafe criterion. Duer v. Corbin Cabinet Lock Co. 149 U. S. 216 (37: 707), 63 Pat. Off. Gaz. 1060.

That a patentable machine is capable of doing more work and at less expense than prior devices is not decisive upon the question whether the machine involves invention, and is only available to turn the scale in cases of grave doubt upon that question. National Hat Pouncing Mach. Co. v. Hedden, 148 U. S. 482 (37: 529), 63 Pat. Off. Gaz. 466.

When the other facts in the case leave the question of invention in doubt, the fact that the device has gone into general use, and has displaced other devices, which had previously been employed for analogous uses, is sufficient to turn the scale in favor of the existence of invention. Krementz v. S. Cottle Co. 148 U. S. 556 (37: 558).

In a doubtful case as to the novelty of a patented invention, the facts that plaintiff's machine was used to a considerable extent by manufacturers; that he sold numerous shop rights for its use and manufactured and sold a number of his machines; that witnesses testify to its novelty and utility; that the devices in use prior to the invention were unsatisfactory, difficult to operate, and noisy in operation; and that a considerable amount of attention was bestowed upon their improvement during several years antedating the patent—may be taken into consideration. Singer Mfg. Co. v. Brill, 54 Fed. Rep. 380.

A combination to be patentable, must produce a new and useful result as the product of the combination, and not a mere aggregate of several results each the complete result of one of the combined elements; but it is not necessary that each element shall modify or change the characteristic action or operation of the others. National Cash Register Co. v. American Cash Register Co. 3 U. S. App. 340, 62 Pat. Off. Gaz. 449, 53 Fed. Rep. 367.

A new combination is patentable, where it accomplishes results that could not have been achieved by the individual or collective elements separately. Edison Electric Light Co. v. Westinghouse, 55 Fed. Rep. 490.

the lower guide and the rod U, so as to be convenient of operation for the purpose of fixing the transom at any required angle. The upright rod is thus supported at three points, to wit, above, below, and at the joint where it sustains the weight of the transom. It can also be adjusted and securely fastened so as to open the sash as much or as little as may be desired, and to lock it in that position.

"Having thus described my invention, what I claim as new is—

"1. The combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, to prevent it from being bent or displaced by the weight of the transom.

"2. The roller R, arranged at the junction of the lifting arm A and upright rod U in a transom lifter, substantially as and for the purpose described.

"3. The guide G′, arranged above the junction of the lifting arm and upright rod, in combination with the prolonged rod U, the guide G, and arm A, substantially as and for the purpose specified."

In the matter of the action of the Patent Office upon this reissue, it appeared from the file wrapper and contents that the claims were rejected by the examiner on reference to the patent of Bayley and McCluskey, No. 79,541, July 7, 1868, and that his decision was reversed on appeal by the examiners-in-chief, who held, among other things, that: "Wollensak's device is, in the first place, a 'lifter' designed for raising against gravity a transom, hinged and swinging horizontally. The improvement covered by the claim consists simply 224 in *furnishing the vertical operating rod with a guide above the lever connection, as well as below, to prevent the rod from being bent and displaced and thus impaired for operating, as occurs with the old form." In the statement of the case and the points relied on in support of the appeal it was said:

"Prior to Wollensak's invention, transom lifters had been composed of a long vertical rod arranged to move through guides on the door casing, its upper end projecting a considerable distance above the upper guide and jointed to the transom by a pivoted connecting rod. An example of the lifter is shown on the transoms of the examiners-in-chief's rooms.

"The upper projecting end of the lifting rod has no lateral support, and being made of a small iron rod, is liable to be easily bent.

"The function of the rod is to sustain the weight of the transom in opening and closing, and as the end of the connecting rod pivoted thereto moves in the arc of a circle while sustaining the weight of the transom, such weight is transmitted to the long upper end of the operating rod in a lateral direction, and has the effect of bending it to such an extent as to prevent it from moving freely through the guide. The bends are either permanent and destroy the rod for practical use, or the rod vibrates above the guide and thus binds therein. To overcome these defects, Wollensak provides a guide for the upper end of the rod, by which its movements are steadied and the lateral bends prevented. Many expedients may be resorted to for guiding the end of the rod, one of which he shows and describes.

"The rejected claims cover this guide in combination with the rod and transom, and the rod, transom, and lifting arm."

The reissue was before this court in *Wollen-*

If a person has invented a combination of three elements, all of which are necessary to the operation of his device, he cannot, by making a claim for two of them, forestall another who has so combined these two elements that they perform the same function that the three elements of the former patent performed. National Hat Pouncing Mach. Co. v. Hedden, 148 U. S. 482 (37: 529), 63 Pat. Off. Gaz. 466.

Broadening the turned-up flange of a mailbag, and constructing it with two rows of rivets instead of one, is not a patentable invention. Thomson v. United States, 27 Ct. Cl. 61.

A discovery of a new use for an old device does not involve patentability. Grant v. Walter, 148 U. S. 547 (37: 552), 63 Pat. Off. Gaz. 910.

It is not a patentable invention to apply old and well known devices and processes to new uses, in other and analogous arts. Lovell Mfg. Co. v. Cary, 147 U. S. 623 (37: 307), 62 Pat. Off. Gaz. 1821.

The mere fact that one who uses a patented process finds it applicable to more extended use than has been perceived by the patentee is not a defense to a charge of infringement. Lovell Mfg. Co. v. Cary, *supra*.

The application of an old machine to an analogous subject, with no result substantially distinct in its nature, by mechanical modifications obvious to any one skilled in building such machines, is not patentable invention. Bromley Bros. Carpet Factory v. Stewart, 61 Pat. Off. Gaz. 1481, 51 Fed. Rep. 912.

A shape produced must, in order to be patentable under U. S. Rev. Stat. § 4929, be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. Smith v. Whitman Saddle Co. 148 U. S. 674 (37: 606), 63 Pat. Off. Gaz. 912.

Where a new and original shape or configuration of an article of manufacture is claimed to be patentable, its utility may be also an element for consideration. Smith v. Whitman Saddle Co. *supra*.

It is not necessary that a patentee of a design patent should do the actual drawing of the design, where he conceives the idea and the manner of carrying it out. Smith v. Stewart, 55 Fed. Rep. 481.

A claim of a patent apparently anticipated by another machine must be held valid in the absence of proof of prior use of such machine. Cutcheon v. Herrick, 52 Fed. Rep. 147.

A patent is not anticipated by a device which has been used only in an experimental way. Municipal Signal Co. v. Gamewell Fire Alarm Teleg. Co. 52 Fed. Rep. 464.

A patent is not anticipated by a patent previously obtained by the same inventor, where the invention is perfected before the first patent is issued, and such patent, though referring to the invention, constitutes an improvement thereon. Pacific Cable R. Co. v. Butte City Street R. Co. 55 Fed. Rep. 760, 64 Pat. Off. Gaz. 1397.

A patent will not be held void on the ground of prior use, upon loose testimony entirely from recollection and not clearly identifying the article actually in use. Thum v. Andrews, 62 Pat. Off. Gaz. 1356, 53 Fed. Rep. 84.

Absolute sales by an inventor of machines which, though differing in some respects from that described in his patent, would be infringements of the patent, when made more than two years before the application for the patent, invalidate the patent. De Lamater v. Deeley, 53 Fed. Rep. 380.

sak v. *Reiher*, 115 U. S. 87, 94 [29: 355, 357], and the case disposed of on the ground of non-infringement. And the court there said: "The specification of the complainant's patent undertakes broadly to describe the invention, intended to be embraced in it, as 'any construction, combination or arrangement of parts which shall support the long or operating rod and prevent it from being bent or displaced by the weight of the transom.' But, having refer-
225] ence *to the state of the art at the date of the alleged invention, and the claims of the patent, the patentee must be limited to the combination, with a transom, its lifting arm and operating rod, of a guide for the upper end of the operating rod, prolonged beyond the junction with the lifting arm so as to prevent the operating rod from being bent or displaced by the weight of the transom. Putting by the question whether this is a patentable invention in view of the existing state of the art, the claim must be regarded as a narrow one, and limited to the particular combination described." After this decision was announced the first claim was disclaimed, and the patent limited to the second and third claims.

The circuit court rightly held that the guide above the junction and the prolongation of the rod constituted the improvement. It is now insisted that the third claim embraced the elements of the transom window T, the lifting arm and bracket A, the upright rod U, the guide G′ near the upper end, the guide G, including set screw *s* near the lower end, and an intermediate guide not lettered. This adds to the specific elements of the claim, the set screw *s*, an intermediate guide and a bracket A. The argument is that the third claim is a specific combination claim and includes the elements, express and implied, of a transom window, swinging vertically; a bracket on the window projecting outwardly; a lifting arm hinged to the bracket; an upright rod jointed to the lifting arm; a guide and support G′; a guide and support G near the lower end of the upright rod and provided with a set screw to lock it; a third guide and support located between G and G′; and it is assigned as error that the circuit court erred "in not disclaiming the third claim of reissue No. 9307 to be for the specific form of transom lifter shown and described; and in not holding that various features were sufficient, separately, or together, to impart novelty and patentability to the construction as a whole." But the reissued patent cannot be treated as covering a claim for the whole transom lifter as improved. What the patentee declared his invention to consist in was in providing "the proper support or support and
226] guide for the upper end of the *lifting rod." And we do not regard ourselves as justified in importing into the claim elements that would operate to so enlarge its scope as to cover an invention not indicated upon its face. *Day* v. *Fair Haven & W. R. Co.* 132 U. S. 98, 102 [33: 265, 267].

The circuit court was of opinion that the inventor naturally extended his rod beyond the junction with the lifting arm, and provided a support for the end of the prolonged rod, and that this did not seem to have a patentable character, but to be the obvious suggestion which would occur to any mechanic. The patent itself declared that "transom lifters have heretofore been constructed with a long upright rod or handle jointed at its upper end to a lifting arm which extends to and is connected with the side or edge of the transom sash, the sash being opened or closed by a vertical movement of the long rod;" and there can be no doubt that they were common contrivances for opening and closing apertures at a distance from the hand of the operator. *Aron* v. *Manhattan R. Co.* 132 U. S. 84 [33: 272]. The conclusion that the prolongation of the rod and its confinement within an additional metallic loop, thereby providing a support where it was needed, lacked patentable novelty appears to us unavoidable on comparison with the Bayley and McCluskey patent of July 7, 1868.

In that patent an invention was described for the opening and closing of a series of passenger car ventilators or transoms, which consisted of a long rod sliding horizontally in a series of guides, past a series of windows, and connected with each window by a separate arm, so that by sliding the rod backward or forward the windows would be opened or shut. If this device were turned into a vertical position, it would present the combination of the third claim under consideration. The parts of the device would co-operate in the same way whether used horizontally or vertically, and the window would swing outward or inward according to whether it was hinged at one end or the other. The complainant's expert testified that it was of the essence of the third claim that it should be used in a vertical position and that if the defendant's transom lifter were used horizontally, so as to open *a transom[227 swung sideways, it would not then be described by the language of the third claim, because it would not be a transom lifter. But if the mechanical identity with the Bailey and McCluskey device be admitted, as it was in substance by complainant's expert, it cannot be distinguished by importing additional elements into the claim not described in the patent as the invention of the patentee, or upon the suggested distinction between a transom lifter and a transom opener. The novelty must be a novelty in the means or mechanical device and not in the use to which the combination is put. *Knapp* v. *Morss*, 150 U. S. 221 [37: 1059].

2. Reissue No. 10,264 was under consideration in *Wollensak* v. *Reiher*, 115 U. S. 96 [29: 350], and it was held that the delay in the application invalidated it in the absence of special circumstances showing that such delay was reasonable. The original of this reissue was dated March 10, 1874, and the application for the reissue was filed May 31, 1882, so that a lapse of eight years was to be accounted for. The bill averred that, upon discovering the mistake in his original patent, complainant wrote to his solicitors, but at what date does not appear. It was further alleged that some considerable delay was occasioned by the illness of his solicitor, but the first date given is April 9, 1878, that of a letter from the solicitor advising him not to apply for a reissue of No. 148,538, but for a reissue of No. 136,801, which he did, and obtained reissue No. 9307. A second period of four years elapsed before the application for reissue 10,264 was filed.

The bill stated that after complainant had obtained his reissue in No. 9307, which was dated July 20, 1880, he filed a bill in equity against Reiher in the Circuit Court for the Northern District of Illinois to restrain him from infringing the same, which suit was decided by *Judge* Drummond on April 25, 1882, against complainant; that he had previously prepared an application for a reissue in No. 148,538, which was executed by him August 21, 1880, but for some reason unknown to complainant was never filed in the Patent Office, and his solicitor, to whom he forwarded it, died about January, 1881; that he afterwards employed other counsel, who advised him that inasmuch **228]** as he had a patent in *terms broad enough to cover the invention, he had better delay the filing of the application until the infringement suit could be heard and determined; "that the delay in applying for a reissue of said patent after your orator became aware of the defect in the original patent, No. 148,538, was because of the advice aforesaid, and that the delay that occurred before that time was due to the fact that your orator was young and inexperienced in such matters, never before having had occasion to take out a reissued patent or otherwise become familiar with the law in relation to reissues, and to the further fact that your orator was then struggling to build up his business and unable to incur or assume any more expense in the obtaining of patents than was considered actually necessary for the protection of his business." The bill then referred to the action of the examiners-in-chief in his favor.

We failed to find in this such excuse or explanation of the lapse of time as can properly be recognized as sufficient. Complainant elected not to apply for a reissue until at least four years after he discovered the alleged mistake and could not retain his right to correct the mistake while he speculated on the chances of including the omitted claims in a reissue of patent No. 136,801. Nor can he be regarded as occupying any different position upon the averment that he would have seasonably applied but for the advice of his counsel.

In *Ives* v. *Sargent*, 119 U. S. 652, 661, 662 [30:544, 547, 548], *Wollensak* v. *Reiher*, 115 U. S. 96 [29:350], and *Mahn* v. *Harwood*, 112 U. S. 354 [28:665], are cited with approval, and it is declared to be settled that while no invariable rule can be laid down as to what is a reasonable time within which the patentee should seek for the correction of a claim which he considers too narrow, a delay of two years, by analogy to the law of public use, before an application for a patent, should be construed equally favorably to the public, and that excuse for any further delay than that should be made manifest by the special circumstances of the case, and it is said: "In the present case no special circumstances in excuse for the delay are alleged. The excuse proffered is simply an attempt to shift the responsibility of the mistake made, from the patentee to his so- **229]** licitor; but no *excuse is offered why the patentee did not discover the negligence and error of his solicitor in due time. On the contrary, he assumed, without examination, that the specification and claims of his patents were just what he had desired and intended they should be, and rested quietly in ignorance of the error and of his rights for nearly three years, and then did not discover them until after others had discovered that he had lost the right to repair his error by his neglect to assert it within a reasonable time."

In the case in hand the excuse put forward is that the patentee followed the advice of his solicitor, and, therefore, did not apply within due time. Manifestly this will not do. *Dobson* v. *Lees*, 137 U. S. 258 [34:652].

As the charge of infringement related to claims which were expansions of the original claims and not covered by them (*Wollensak* v. *Reiher*, 115 U S. 96 [29:350]) the demurrer was properly sustained.

Decree affirmed.

WILLIAM P. HALLIDAY, *Appt.*, *v.* RICHARD H. STUART *et al.*

(See S. C. Reporter's ed. 229-238.)

Agreement between attorneys—estoppel and notice.

1. Where the attorneys for parties in a suit in equity in which lands were ordered to be sold, agreed that the parties would look to the proceeds of the sale of the lands and not to the lands, and the lands are thereupon sold with their assent, and the sale confirmed by the court, such parties cannot thereafter be heard to say that they will look to the lands and not to the proceeds of the sale.
2. Where a purchaser at a judicial sale which was made and deed executed with the consent of the parties to the suit, was not notified of any steps taken to annul his purchase and cancel his deed, such parties cannot afterwards claim the land from such purchaser by virtue of a sale under a subsequent decree of sale setting aside the former sale, and a sale thereunder, of which proceeding he had no notice.

[No. 25.]

Argued Oct. 12, 1893. Decided Jan. 8, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, dismissing a suit in equity brought by William P. Halliday, plaintiff,

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NOTE.—*As to estoppel by judgment*, see note to Aspden v. Nixon, 11: 1059.

As to estoppel in pais, see note to Stowe v. United States, 22: 144.

As to estoppel by recital in deed, or will, or other instrument, see note to Carver v. Astor, 7: 761.

As to estoppel by recitals in negotiable bonds or securities, see note to Mercer County v. Hackett, 17: 548.

As to estoppel as to contracts limiting the time within which action must be brought, see note to Southern Exp. Co. v. Caldwell, 22: 556.

As to when vendee is estopped from disputing title of his vendor, see note to Watkins v. Holman, 10: 873.

As to stranger not bound by, and cannot take advantage of, an estoppel; who are not privies; infants; husband and wife, see note to Deery v. Gray, 18: 653.

As to purchaser at judicial sale, when protected against irregularities in the proceedings or sale, see note to Koontz v. Northern Bank of Kentucky, 21: 465.

against Richard H. Stuart *et al.*, defendants, to restrain them from any attempt to take possession of certain lands, or from obtaining a writ of possession for them. *Reversed.*

See same case in state court, 30 Ark. 44, 35 Ark. 511.

The facts are stated in the opinion.

Messrs. **A. H. Garland,** *D. H. Reynolds* and *H. J. May*, for appellant:

Where a client stands by while the compromise is made, or, not being present, still retains the services of his attorney after a compromise made by him, it is a ratification of the compromise, and the client will not afterwards be heard to complain of it.

Black v. *Rogers*, 75 Mo. 441; *Eggleston* v. *Broadman*, 37 Mich. 14; *Patterson* v. *Read*, 43 N. J. Eq. 18.

When a party employs an attorney at law, he presents him to the opposite party and to the world as his accredited agent, and as such he must be concluded by his acts, or omission, where no fraud, or unfairness is made to appear.

Lawson v. *Bettison*, 12 Ark. 417; *Saleski* v. *Boyd*, 32 Ark. 74; *Rich* v. *State Nat. Bank of Lincoln*, 7 Neb. 201, 29 Am. Rep. 382; *Annely* v. *De Saussure*, 12 S. C. 488.

All stipulations made by parties, are enforced by the courts.

Re New York, L. & W. R. Co. 98 N. Y. 447, 453.

Such stipulations are equally binding when made by counsel in the trial of a cause or the conduct of litigation.

Read v. *French*, 28 N. Y. 285; *People* v. *Stephens*, 52 N. Y. 306; *Arthur* v. *Homestead F. Ins. Co.* 78 N.Y 462, 469, 34 Am. Rep. 550; *Rich* v. *State Nat. Bank of Lincoln*, 7 Neb. 401, 29 Am. Rep. 382; *McLeran* v. *McNamara*, 55 Cal. 508; *Burgess* v. *Stevens*, 76 Me. 559; *Davis* v. *Hall*, 90 Mo. 659.

An attorney at law has authority by virtue of his employment as such to do in behalf of his client all acts in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only and not the cause of the action.

Moulton v. *Bowker*, 115 Mass. 40, 15 Am. Rep. 72; *Hirsch* v. *Fleming*, 77 Ga. 594; *M'Closky* v. *Sutro*, 64 Cal. 485; *Thompson* v. *Pershing*, 86 Ind. 303; *Benson* v. *Carr*, 73 Me. 76; *Ohlquest* v. *Farwell*, 71 Iowa, 231.

Messrs. **Mark Valentine** and **Julian S. Jones** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This case presents a dispute as to the ownership of certain lands in Chicot county, Arkansas. The appellant, who was the plaintiff below, holds a commissioner's deed made by order of the circuit court of that county in a foreclosure suit brought by the personal representative of Junius W. Craig, while the appellees hold a commissioner's deed made by order of the same court, in the same cause, at a subsequent date. The relief sought is a decree restraining the defendants from all attempts to take possession of the lands, or from obtaining a writ of possession for them. The bill having been dismissed, the present appeal has been prosecuted.

The transcript does not contain the pleadings in the suit in which the lands were sold, but from various orders made in that cause, copies of which are made exhibits to the bill in the present suit, the following facts appear:

On the 2d day of February, 1878, the equity suit of *Emma J. Wright, Executrix*, v. *Samuel R. Walker et al.*, came on to be heard in the Chicot circuit court on the answer and cross-bill of John S. Whitaker, executor of the estate of Horace F. Walworth, deceased, the motion to strike out a part of that answer and cross-bill, and a demurrer to the remainder thereof, the petition of Richard H. Stuart, and the motion to strike out the same, and the original pleadings in the cause. These motions and the demurrer were sustained, and it was adjudged that there was a lien on the lands here in question to secure the payment of a certain sum found to be due the plaintiff in that suit. The lands were ordered to be sold at public auction, in satisfaction of that amount, on the notice required in cases of sales of land under execution, the terms being one half cash and the balance in eight months, with a lien retained to secure the deferred payment. James R. Martin was appointed commissioner to make the sale. Whitaker, as executor of Walworth, *excepted to the decree, and [231 prayed an appeal, which was granted.

An order was entered February 5th, 1879, appointing R. M. Gaines commissioner in the place of Martin to make the sale.

On the 27th of February, 1879, a written agreement, signed C. H. Carlton and W. W. Wilshire as "attorneys for Whitaker *et al.*," and by D. H. Reynolds as "att'y for receiver," was filed in the cause, and was as follows: "In the above entitled cause it is hereby agreed that the proceeds of any sale or sales that may be made under any order or orders of sale or decree of the court aforesaid shall be paid into said court by the master or commissioner appointed by said court, sitting in chancery or at chambers, for the sale of the property or any part thereof ordered or decreed to be sold by said court in said cause and held by said court until the disposition of an appeal taken by said John S. Whitaker in said cause to the supreme court of this state and now pending is disposed of, and the mandate of said supreme court therein is filed in the office of the clerk of said circuit court, and then only in pursuance of such mandate in the further proceedings in said circuit court." Commissioner Gaines made his report July 15th, 1879, showing a sale of the lands under the above decree, upon due notice, on the 1st day of May, 1879, at which sale Halliday, being the highest and best bidder, became the purchaser at the price of $1200, one half of which was paid at the time in cash. The commissioner brought the cash payment into court, and reported for examination and approval a deed to Halliday, retaining a lien for the deferred payment. The court confirmed the sale in all things, and approved the deed, directing its approval to be entered of record, indorsed on the deed, and recorded with it.

From the exhibits attached to the answer the following facts appear:

On the 30th day of October, 1880, the supreme court of Arkansas, in the above case, on

the appeal of John S. Whitaker, executor, made the following order: "This cause came on to be heard upon the transcript of the record of the circuit court of Chicot county, in chance-
232] ry, and was argued by *solicitors; on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said circuit court in chancery in this cause, in this, that said circuit court in chancery erred in striking out a part of the answer as stated in the opinion, and also in sustaining the demurrer to the cross bill and in decreeing in favor of the complainant. It is therefore ordered and decreed by the court that the decree of said circuit court in chancery in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled, and set aside, with costs, and that this cause be remanded to said circuit court in chancery for further proceedings to be therein had, according to the principles of equity and not inconsistent with the opinion herein delivered, with instructions that an administrator *de bonis non* of J. W. Craig may be appointed, if there is none, and that he be made a party complainant."

The opinion of the supreme court of Arkansas, referred to in that order, was rendered at the May term, 1880, of that court, and is reported as *Whitaker* v. *Wright*, 35 Ark. 511, 514. That case was first before the court at the May term, 1875 (*Wright* v. *Walker*, 30 Ark. 44, 46) upon the appeal of Emma J. Wright to whom letters of administration upon the estate of Junius W. Craig had been granted, and who had been substituted as plaintiff in place of Joshua M. Craig, former administrator of the same estate. The same opinion states that in Whitaker's cross-bill in the original cause it is averred that Emma J. Wright, the plaintiff therein, "had married and removed from the state, and so had ceased to be executrix; and that she had previously, on the 15th day of December, 1867, entered into an agreement in writing with certain of the principal creditors of the estate, that the whole assets of the estate should be placed in the hands of a receiver, and to retire from the administration; in accordance with which agreement, and upon her application, a receiver was appointed, and he had taken possession and charge of the same, and her connection with the estate, and authority in respect to it, had from that time ceased." The
233] court, among other things, said: "We, there-fore, think the court erred in *sustaining the demurrer to the appellant's cross-bill. It also erred in striking out of his answer the averment that the complainant had married and removed from the state, and so had ceased to be executrix. Neither a married woman nor a non-resident of the state can be an executrix or administratrix. Gantt's Dig. §§ 9, 17, 35. If the averment was true, the complainant had no authority to further prosecute the suit, and though the assets of the estate were in the hands of a receiver, as alleged, there was no representative of the estate who might prosecute it; and it could not be further prosecuted until an administrator, with the will annexed, was appointed." The decree was, therefore, reversed, "and the cause remanded, that an administrator, with the will annexed of Junius W. Craig, may be appointed, if the complainant has ceased to be executrix, and for further proceedings."

On the 30th day of January, 1882, Stuart and Walker, as executors, etc., and as defendants in the cause which was then entitled "*John G. B. Sims, Adm'r de bonis non, etc.* v. *Samuel R. Walker & others*," filed by leave of the court (but, so far as the record discloses, without notice to Halliday) a motion to set aside the decree theretofore rendered, and the sale and order of confirmation made under it. On the same day the cause was heard on that motion, and on the mandate of the supreme court of Arkansas, and it was ordered: "It appearing that the decree of foreclosure and sale was rendered when there was no representative of the estate of Junius W. Craig, deceased, who could prosecute said suit, and that the sale was made and confirmed when the cause was pending in the supreme court on the appeal of John S. Whitaker, as executor of Horace F. Walworth, deceased, and this court had no jurisdiction, etc., on consideration whereof the court doth adjudge, order, and decree that said decree and sale and order of confirmation are null and void, and that the same be set aside." On the same day (Halliday not being before the court in any form) that cause was finally heard, and the lands ordered to be again sold to pay the claim of Craig's estate, which was declared to be a lien on the lands, subject to certain claims of Stuart, and of Whitaker as executor of Walworth. *The last[234 sale occurred on the 10th of July, 1882. Stuart and Whitaker, as agents and attorneys of the heirs of Walworth, becoming the purchasers at the price of $2000. That sum was credited on their respective claims, which exceeded the amount of their bid. The sale was confirmed, and a deed by the commissioner to the purchasers was made, and approved by the court.

Whitaker, as executor of Walworth, prosecuted his appeal from the decree of February 2, 1878, without supersedeas, and the point is much pressed by the present appellant, that, independently of the agreement of February 27, 1879, that appeal did not prevent the sale of May 1, 1879, at which he purchased. This contention is based upon sections 1293, 1294, and 1295 of the statutes of Arkansas, by one of which sections it is provided that "an appeal or writ of error shall not stay proceedings on the judgment or order, unless a supersedeas is issued." Mansfield's Dig. 1884, title, *Court, Supreme*, p. 386. The appellees insist that these sections do not apply to judgments or orders affecting the estates of decedents, and that by section 1387 in the chapter relating to appeals to the circuit courts from the judgments or orders of probate courts, administrators, executors, and guardians are relieved from giving bond, on appeal, and "all orders against them as such shall be superseded by the appeal." Mansfield's Dig. 1884, title, *Courts of Probate*, p. 405.

In the view this court takes of the case it is not necessary to determine this question of statutory construction. In our opinion the appellees are estopped from the agreement of February 27, 1879 from questioning the validity of the sale at which Halliday purchased, upon the ground of its having been made pending the appeal by Whitaker, as ex-

ecutor of Walworth. That agreement is exhibited with the bill, and there is no dispute that it was signed by the attorneys of the appellees after Whitaker had taken his appeal. It is true that, in their answer, appellees "deny that pending said appeal an agreement was entered into between these defendants and the plaintiff in said suit by which these defendants agreed that the proceeds of any sale of property under said 2:35] decree should *be paid into court, and there held in place of the property to abide the decision of the case on appeal." Upon comparing the allegations of the bill and the answer, it is manifest that the defendants purposely restricted their denial to those averments of the bill which stated what the plaintiffs supposed was the legal effect of the agreement. It is not denied that the signatures of Carlton and Wilshire are genuine, or that they were the attorneys of appellees in the foreclosure suit. Nor is it suggested or hinted that they acted, in the matter of that agreement, without the authority, knowledge, or consent of appellees. So that the answer only intended to make the point that appellees themselves did not agree that the proceeds of any sale should be held by the circuit court, "in place of the property, to abide the decision of the case on appeal." That is simply playing upon words. The agreement was made after Whitaker asked and was allowed an appeal. And it was one which the attorneys of appellees might well have made in the exercise of their general authority, and as incidental to the management of the interests entrusted to them. *Sabeski* v. *Boyd*, 32 Ark. 74; *Holker* v. *Parker*, 11 U. S. 7 Cranch, 436, 452 [3:-98, 402]; *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 305, 309 [28:156, 157]; *Moulton* v. *Bowker*, 115 Mass. 36, 40; *Cox* v. *New York Cent. & H. R. R. Co.* 63 N. Y. 414, 419. It was not, to use the words of *Chief Justice* Marshall, in *Holker* v. *Parker*, "so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on or not fairly exercised in the case." It was simply an arrangement by which a sale that all the parties desired to take place at some time, should not be delayed by the pendency of Whitaker's appeal. And those who were parties to it, directly or indirectly, should not be permitted to disregard it to the injury of one, who purchased, in good faith, at a judicial sale.

If, as appellees now insist, the appeal itself, without supersedeas bond, stopped all proceedings under the decree, until it was disposed of in the supreme court, the only possible object of an agreement, declaring that the proceeds of any sale or sales made under any order of the 2:36] court "shall be paid into *court," and held there until Whitaker's appeal was determined, was to enable a sale—a real, effective sale—to take place notwithstanding the appeal, leaving the parties to continue their contest over the proceeds of sale, rather than over the lands in suit. And if a sale took place under the decree pursuant to that agreement, it was intended, so far at least as the parties to the agreement were concerned, that the purchaser should take title *to the lands* if the sale was in conformity with the decree, and was approved by the court. Under all the circumstances, it must be taken that the sale, at which Halliday purchased, occurred with the assent of the appellees. Any other interpretation of the agreement would impute bad faith to the parties by whom it was executed.

It is said the agreement was not effectual for any purpose, because the only parties to it were the receiver of Craig's estate and the counsel for Stuart and Whitaker. But it was assumed by the parties to the agreement that if signed by those attorneys and by the attorney of the receiver, it would be sufficient for all the purposes therein expressed. If Craig's estate was not then before the court, by a personal representative, competent to bind it, that fact was known to those who were parties to the agreement. Appellees, in effect, said, by the agreement, to all who might attend a sale under the decree of 1878, that so far as they were concerned, and notwithstanding Whitaker's appeal, they would look to the proceeds of the sale of the lands, and not to the lands. Halliday having purchased at a sale that took place with their assent, if not by their procurement, and his purchase having been confirmed by the court, the appellees ought not be heard now to say that they will look to the lands and not to the proceeds of sale.

The argument, in support of the opposite view, assumes that it must be taken as true, as against Halliday, that Emma J. Wright married and removed from Arkansas before the first decree of sale was rendered, and, therefore, had ceased to be the personal representative of Craig's estate. But no such fact is established against Halliday in this case. It is true that the order of January 30th, 1882, recites that when the original decree of foreclosure and sale was rendered "there *was no [2:37 representative of the estate of Junius W. Craig, deceased, who could prosecute the suit," and that the Chicot circuit court, at that date, "had no jurisdiction." But the want of jurisdiction does not appear on the face of that decree. Nor does the answer in the present case allege that, at the date of the original decree of foreclosure, the estate of Craig was without a personal representative to prosecute the suit by reason of the executrix having married and removed from the state. Upon this point the answer only says that the supreme court of Arkansas reversed the decree for the reason, among others, that "there was no party plaintiff to said suit." But the supreme court did not say, in its opinion or mandate, that such was the fact. It sent the cause back with instructions "that an administrator *de bonis non* of J. W. Craig may be appointed, if there is none, and that he be made a party complainant." If the appellees desired to make the point, as against Halliday, that Emma J. Wright, executrix of Craig's estate, had married and removed from the state, before the decree, under which he purchased, was rendered, they should have alleged that fact in their answer in this case, and established it by evidence, if it was not admitted. But they did not adopt that course. They have proceeded upon the ground that the mere recitals in the orders of the Chicot circuit court, made long after Halliday received his deed, and without notice to him, would establish, in this case, the fact that the original decree of sale, which shows no want of jurisdiction as to

parties or subject-matter, was passed when there was no personal representative of Craig's estate entitled to prosecute the suit. But, as against Halliday, they can take nothing under the proceedings in the Chicot circuit court after the return of the original cause from the supreme court of the state, and in virtue of which the second sale took place. Of those proceedings, as already suggested, he had no notice. No direct issue was made with him as to the validity of the sale at which he purchased. Not even a rule was taken against him to show cause why his deed should not be annulled. The title he acquired was of record in the very cause in which appellees obtained the order 238] setting aside the decree under *which he bought and the confirmation of his purchase, as well as the order directing another sale of the lands. And yet he was not notified that any steps were being taken to annul his purchase and to cancel his deed. When appellees present a decree of sale under which they purchased the lands, and, in virtue of that decree and the sale had under it, claim the lands, Halliday may well say, "Whatever may be the rights of Craig's estate in respect to the lands, and whatever may be your right to the proceeds of the sale at which I purchased, you cannot claim the lands purchased by me under a former decree, which sale occurred with your consent, and which purchase was confirmed and a deed made to me without objection from you." And this position is consistent with the principles of equity.

As the decree of sale under which Halliday bought does not appear to be void for want of jurisdiction in the court which rendered it, and as, pending Whitaker's appeal, the sale at which Halliday purchased took place with the assent of the present appellees, and was confirmed by the court without objection from them, the appellant should have been awarded, as against them, the relief asked by him.

The decree is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed.

THE STATE OF IOWA
v.
STATE OF ILLINOIS.

(See S. C. Reporter's ed. 238-242.)

Boundary line between states—order of confirmation.

1. In the determination of the boundary line between sovereign states this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded.
2. Where the report of the commissioners to fix the boundary line between the states has been, as to a portion of the boundary, confirmed by this court, the order of confirmation will be vacated, if it was made without notice to one of the states, and if the consent of the state to such boundary was signified to this court through mistake and inadvertence, such order being interlocutory only, may be set aside at a term of court subsequent to that at which it was entered.

[No. 5, original.]

Submitted Oct. 10, 1893. Decided Jan. 15, 1894.

ON motion founded on petition of the state of Illinois to set aside the order confirming the report of the Commissioners heretofore appointed in this cause, to ascertain and mark the boundary line between the state of Illinois and the state of Iowa, wherein said commissioners ascertained and marked such boundary line at the Keokuk and Hamilton Bridge at Keokuk, Iowa.

The facts are stated in the opinion.

The following are the application, etc., and petition of the state of Illinois:

In the Supreme Court of the United States.

THE STATE OF IOWA
v.
STATE OF INDIANA.

Now comes the defendant, the state of Illinois, and makes application to the court for leave to move the court to set aside the order entered herein on the tenth day of April, 1893, confirming the report of the commissioners appointed to ascertain and mark the boundary line between the state of Illinois and the state of Iowa, as is more fully stated in the annexed motion. Said application is based upon the petition filed herewith, and the affidavits attached thereto, and the brief filed herewith.

M. T. Moloney,
Attorney General, state of Illinois.
A. W. Green, Henry S. Robbins, of counsel.

THE STATE OF IOWA
v.
STATE OF INDIANA.

Now comes the defendant, the state of Illinois, and moves, the court to set aside the order entered herein on the tenth day of April, 1893, confirming the report of the commissioners filed on the thirtieth day of March, 1893, wherein said commissioners ascertained and marked the boundary line between the state of Illiniois and the state of Iowa, at the Keokuk and Hamilton bridge, at Keokuk, Iowa, and in support of said motion said defendant, the state of Illinois, files the petition and affidavits hereto annexed, and also the brief filed herewith.

M. T. Moloney,
Attorney General of the state of Illinois.
A. W. Green, Henry S. Robbins, of counsel.

THE STATE OF IOWA
v.
STATE OF INDIANA.

The defendant, the state of Illinois, respectfully represents to this court that the subject matter of this suit was the ascertainment of the boundary line between the states of Iowa and Illinois; that on January 3, 1893, an interlocutory decree was entered herein, wherein it is ordered, adjudged and declared by this court that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of

NOTE.—*As to judicial settlement of state boundaries*, see note to Nebraska v. Iowa, 36:798.

the Mississippi river at the places where the nine bridges mentioned in the pleadings cross said river; and it is further ordered that commissioners be appointed to ascertain and designate at such places the boundary line between the two states, such commissioners consisting of three persons to be named by the court on the suggestion of counsel, and to be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and to report the same to the court for its further action.

This petitioner further shows that on March 6, 1893, a joint request for the appointment of commissioners to fix the boundary line on the Keokuk and Hamilton bridge was presented to this court asking for the appointment of Montgomery Meggs, John R. Carpenter and Albert Wempner as such commissioners; that in pursuance of such joint request an order was entered on March 7, 1893, appointing the above named persons commissioners to locate and mark the boundary line between the said states at the Keokuk and Hamiltion bridge, and report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said state line at the other eight bridges, as requested by either party, and report the same. That on March 30, 1893, the said commissioners filed their report in writing in this court, wherein they reported that they had fixed the boundary line between Iowa and Illinois on the Keokuk and Hamilton bridge at Keokuk, Iowa, and that they find that said boundary line is situated one thousand and forty-one and 65-100 feet east of the center of the draw span, and submitted with their report a plat showing their measurements along the bridge; that on April 10, 1893, upon the application of the state of Iowa, an order was entered by this court confirming said report.

Your petitioner further shows that at the time that the joint request for the appointment of commissioners was signed by the attorney general of Illinois, a change of state officers had just taken place in the state of Illinois, and the said attorney general, who signed said joint request and who also signs this petition on behalf of the state of Illinois, had been but a few days in office, and was not at all familiar with the proceedings in this cause; that said joint request was presented to him by Mr. George Edmonds, a practicing lawyer of the state of Illinois.

Your petitioner further shows that no notice was ever given to its attorney general, or in any way to the state of Illinois, that the said commissioners had made their said report, or that an application would be made to this court to confirm any report of said commissioners; that not until after the final adjournment of this court at its last term did the attorney general of the state learn that a report has been made by the said commissioners, and that said report had been confirmed.

Your petitioner further represents that the said commissioners either must have willfully disregarded the decision and the interlocutory decree of this court, or have totally misunderstood the same. That by their report the commissioners marked the boundary line between the two states at a point midway between the west bank of the river and the east bank of the river; that this fixes the boundary line substantially at the place contended for by the state of Iowa; that the state of Iowa claimed that the middle of the main body of water of said river was the boundary line irrespective of where the navigable channel or channel of commerce might be; that the state of Illinois claimed that the boundary line was the middle of the main navigable channel, which was and is the channel of commerce. The decision of this court, after considering both contentions, decided that the controlling consideration is that which preserves to each state the right of navigation on the river, and that therefore the boundary line is the middle of the main navigable channel and in its interlocutory decree declared that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi river.

This petitioner further states that the main navigable channel of the Mississippi river, as appears from the affidavits hereto attached, is near the Iowa shore; that the west line of such channel is near where the pivot pier of said Keokuk and Hamilton bridge now stands, and the said channel extends eastward a distance of about four hundred feet; and that the middle of that channel is, under the decision of this court, the boundary line between the two states; that this line is at least eight hundred feet west of the line as fixed by the said commissioners; that at the point fixed by said commissioners the river is not navigable, and never has been navigable in the ordinary stage of water for vessels engaged in the carrying trade upon said river, nor in fact has the portion of said river, east of the portion of the said river above mentioned as the navigable channel thereof, been a part of the navigable channel of the river nor used by said vessels for the purposes of navigation, as more fully appears by the affidavits hereto annexed.

Wherefore your petitioner, the state of Illinois, prays that the said order of April 10, 1893, confirming the report of said commissioners, may be set aside, and that new commissioners may be appointed to mark said boundary line in accordance with the decision of this court, or, that this cause be referred to some circuit court of the United States or a master in chancery thereof to take proof in regard to the main navigable channel of the Mississippi river and the middle line thereof, and report the same to this court.

And your petitioner will ever pray, etc.

M. T. Moloney,
Attorney General of state of Illinois.

A. W. Green, Henry S. Robbins, of counsel.

Messrs. **M. T. Moloney**, *Atty. Gen.*, of the state of Illinois, **A. W. Green** and **Henry S. Robbins**, for state of Illinois, in favor of motion:

The affidavits filed with the petition fully sustain this claim. It appears from these

affidavits that prior to the building of the Keokuk and Hamilton bridge the navigable channel of the river at this point extended from a point near the Iowa shore a distance of from four to six hundred feet east; that blasting of rock in or near the channel and the building of the bridge has somewhat changed the location of the channel, but that east of a point six hundred feet east of the Iowa shore the river is not and never has been, at an ordinary stage of water, navigable, nor has any part of it ever been used as a channel by vessels engaged in the carrying trade.

In *Dunleith & D. Bridge Co.* v. *Dubuque County*, 55 Iowa, 558, it is said that "the word channel, when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow."

Buttenuth v. *St. Louis Bridge Co.* 123 Ill. 547, 548.

It is quite clear that these commissioners either did not read the decision of this court or the interlocutory decree, or willfully disregarded them. They were directed to fix the boundary line in the middle of the main navigable channel.

Instead of doing that, they located the east and west shore of the river and fixed the boundary line midway between the two shores, entirely disregarding the decision of the court.

This report was presented to this court and application was made by the state of Iowa for its confirmation. No notice was ever given to the state of Illinois that any such application would be made, or that the commissioners had made any report.

The order, of course, is interlocutory. It may be modified or entirely set aside, as the court may see fit.

The boundary line at the place where the Keokuk and Hamilton bridge crosses the Mississippi river as fixed by the commissioners in their report is not in the middle of the main navigable channel, and therefore does not correctly fix the boundary line at that place. It follows that it should be set aside.

This order has none of the elements of a final decree.

Central Trust Co. v. *Grant Locomotive Works*, 135 U. S. 207 (34: 97); *Fosdick* v. *Schall*, 99 U. S. 235 (25: 339); *International Imp. Fund Trustees* v. *Greenough*, 105 U. S. 527 (26: 1157); *Williams* v. *Morgan*, 111 U. S. 684 (28: 559); *Beebe* v. *Russell*, 60 U. S. 19 How. 285 (15: 668); *Kingsbury* v. *Kingsbury*, 20 Mich. 212; *Adkisson* v. *Dent*, 88 Ky. 628; *North Carolina R. Co.* v. *Swasey*, 90 U. S. 23 Wall. 405 (23: 136); *Parsons* v. *Robinson*, 122 U. S. 112 (30: 1122); *Burlington, C. R. & N. R. Co.* v. *Simmons*, 123 U. S. 52 (31: 73).

Messrs. **John Y. Stone**, *Atty. Gen.*, of the state of Iowa, **John F. Lacey, Felix T. Hughes** and **James C. Davis**, for state of Iowa, in opposition to motion:

This court has no jurisdiction in this proceeding to grant the relief asked by the state of Illinois.

The decree entered in this cause confirming the report of the commissioners was in its nature a final judgment; said decree was final in its character, and this court has no power to change, alter or modify same after the final adjournment of the court at the term at which said judgment or decree was entered.

The commissioners had located and marked the boundary line as between said states on the Keokuk and Hamilton bridge. So far as this particular bridge was concerned after their report was confirmed they had no further duties to perform. Their report having been duly filed with the clerk was, with the consent of the interested parties, duly confirmed by judgment of this court.

So as far as the controversy concerning the boundary line at the Keokuk and Hamilton bridge is concerned, it was definitely and finally determined by the report of said commissioners.

There was therefore, a final, definite, and complete determination of said boundary line at the said Keokuk and Hamilton bridge.

This finding and decree was final, and of such a character that same could not be changed, modified or set aside upon motion, unless the motion was filed or determined during the term of court at which said judgment was rendered.

Beebe v. *Russell*, 60 U. S. 19 How. 285 (15: 668); *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207 (34: 97); *McMicken* v. *Perin*, 59 U. S. 18 How. 507-511 (15: 504-506); *International Imp. Fund Trustees* v. *Greenough*, 105 U. S. 527 (26: 1157); *Hinckley* v. *Gilman, C. & S. R. Co.* 94 U. S. 467 (24: 166); *Williams* v. *Morgan*, 111 U. S. 684 (28: 559); *Fosdick* v. *Schall*, 99 U. S. 235 (25: 339); *Re Farmers Loan & T. Co.* 129 U. S. 206-213 (32: 656, 657); *Bronson* v. *Schulten*, 104 U. S. 411 (26: 797).

After the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them.

Brooks v. *Washington & S. W. R. Co.* 102 U. S. 107 (26: 91); *St. Louis Public School Directors* v. *Walker*, 76 U. S. 9 Wall. 603 (19: 650); *Brown* v. *Aspden*, 55 U. S. 14 How. 25 (14: 311); *Cameron* v. *McRoberts*, 16 U. S. 3 Wheat. 591 (4: 467); *Sibbald* v. *United States*, 37 U. S. 12 Pet. 488 (9: 1167); *United States* v. *The Glamorgan*, 2 Curt. 236; *Bradford* v. *Patterson*, 1 A. K. Marsh. 464; *Magwire* v. *Tyler*, 84 U. S. 17 Wall. 283 (21: 583); *Ballard* v. *Davis*, 3 J. J. Marsh. 656.

The boundary line as between the state of Illinois and the state of Iowa is not to be determined by the condition of the bed of the Mississippi river at the present time, especially, as within the memory of many living witnesses substantial changes have been made in the bed of said river by artificial means; but said boundary line remains as same was fixed either in the treaty of 1763, 1783, or by Act of Congress of date 1818.

Missouri v. *Kentucky*, 78 U. S. 11 Wall. 401 (20: 118); *Nebraska* v. *Iowa*, 145 U. S. 519 (36: 798).

The test of the boundary line as indicated by this court seems to be navigability, and this main arm of the Mississippi river west

of the shore of Island No. 4, was, prior to the artificial obstructions placed in same, navigable, and navigated, from shore to shore.

Said boundary line was located entirely with reference to the navigability of the stream.

The location of this boundary line has been in the nature of an arbitration in which the arbitrators have made their award.

Keokuk v. *Arms*, 129 U. S. 512 (32: 764).

The record as disclosed in this proceeding establishes beyond controversy that the main channel of the Mississippi river at the point where crossed by the Keokuk and Hamilton bridge is substantially from the west bank of Island No. 4 to the Iowa shore, and was navigable from bank to bank.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an original suit in equity instituted in this court to determine the boundary line between the states of Iowa and Illinois, and considered upon submission on the pleadings and the briefs of counsel.

On the third of January, 1893, the question at issue was decided (*Iowa* v. *Illinois*, 147 U. S. 1 [37: 55]) and an interlocutory decree entered, whereby it was "ordered, adjudged and declared by this court that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi river at the places where the [240] nine bridges mentioned in the pleadings cross said river; and it is further ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two states, said commission consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make a proper examination, and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action."

March 6, 1893, a joint request was filed in this court, dated January 19, 1893, signed by the attorneys general of the two states concerned, requesting the appointment of certain persons therein suggested as commissioners to fix the boundary line, and that the line be located at once at the Keokuk and Hamilton bridge, and on the next day an order was entered in accordance with this request, as follows: "It is ordered that said Montgomery Meigs, John R. Carpenter, and Albert Wempner be, and they are hereby, appointed commissioners to locate and mark the state line between the states of Iowa and Illinois, pursuant to the opinion of this court in this cause, at each of the nine bridges across the Mississippi river between these states. And inasmuch as there is an emergency existing therefor, it is ordered that said commissioners proceed at once to ascertain and mark the boundary line between said states at the Keokuk and Hamilton bridge, and report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said state line at the other eight bridges when requested by either party, and report the same. That before entering upon their duties they take and forward to the clerk of this court, to be filed, an oath that they will faithfully perform their duties as such commissioners, under the decision rendered in this cause, to the best of their ability. That the clerk of this court furnish to said commissioners a copy of this order, and the opinion of the court in this cause."

The commissioners filed their report March 30, 1893, as to the boundary line at the bridge mentioned, and on the same day the state of Iowa moved for an order confirming the report, *counsel making the application being [241] advised that it was consented to on behalf of the state of Illinois. On April 10, 1893, an order was entered in these words: "This cause coming on to be heard upon the application of the state of Iowa for an order confirming the report of the commissioners, presented herein, ascertaining and marking the boundary line between the state of Illinois and the state of Iowa, at the Keokuk and Hamilton bridge, at Keokuk, Iowa, it is ordered that the said report be, and the same is hereby, confirmed; and it is further ordered that said commissioners proceed to determine and mark the boundary line between said states throughout its extent, and report thereon to this court, with all convenient speed, and that the order herein entered on March 7, 1893, be, and it is hereby, modified in accordance herewith."

As will be seen, these proceedings were had at October term, 1892. The state of Illinois on October 11, 1893, one of the first days of October term, 1893, by leave of court, moved to set aside the order confirming the report of the commissioners filed as before stated, upon the ground that notice was not given of the application for the confirmation of said report, and that the consent of the state was signified to the court through mistake and inadvertence. This motion was resisted by the state of Iowa, and numerous affidavits have been filed on both sides.

We are satisfied, upon a careful examination of the papers, that counsel were laboring under misapprehension in the matter of the application for the confirmation, and that the order of the tenth of April was improvidently entered in that the state of Illinois had not received due notice of the application and had not consented to the order. It is unnecessary to rehearse the facts and circumstances which led to the misapprehension. It is objected by the state of Iowa that the order of April 10 was a final finding and decree, and that it cannot be changed or set aside upon motion at a term of court subsequent to that at which it was entered; but we regard the order as interlocutory merely. The confirmation of the report was but a step in the cause and not a final decree *deciding and disposing of the whole [242] merits of the cause, and discharging the parties from further attendance. We cannot dispose of the case by piecemeal, and until the boundary line throughout its extent is determined, all orders in the case will be interlocutory.

In the exercise of original jurisdiction in the determination of the boundary line between sovereign states, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which

full opportunity to be heard has not been afforded. Without intimating any opinion on the controversy raised as to the action of the commissioners, the order of April 10, 1893, so far as it confirms the report in question, will be vacated.

Ordered accordingly.

In Re JOHN BONNER,
On Petition for writ of Habeas Corpus.

(See S. C. Reporter's ed. 242-262.)

Imprisonment in penitentiary—limits of jurisdiction—place of imprisonment—habeas corpus.

1. Under U. S. Rev. Stat. §§ 5541, 5542, 5546, the U. S. court of the Indian territory cannot order one convicted of crime to be imprisoned in a state penitentiary unless the imprisonment is ordered for a period longer than one year or at hard labor.
2. In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment.
3. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character.
4. Where one convicted of a crime has been sentenced to a penitentiary not authorized by law and is there imprisoned, he is entitled to a writ of habeas corpus to relieve him from imprisonment at that place, but without prejudice to his being sentenced in accordance with law upon the verdict against him.

[No. 8 original.]

Argued Nov. 27, 28, 1893. Decided Jan. 8, 1894.

ON PETITION of John Bonner for writ of habeas corpus to P. W. Madden, warden of the penitentiary of Iowa, to be released from imprisonment and for his discharge. *Habeas corpus issued.*

Statement by *Mr. Justice* **Field:**

243] *The petitioner, John Bonner, a citizen of the United States, represents that he is now and has been since the 23d of May, 1893, unlawfully deprived of his liberty by one P. W. Madden, as warden of the penitentiary of Iowa, situated in Anamosa in that state. He sets forth, as the cause of his restraint and detention, that at the October term, 1892, of the United States Court for the Third Judicial Division of the Indian Territory, he was indicted for the larceny, in May previous, in the Chickasaw Nation, within the Indian territory, of four head of cattle of the value of fifty dollars, the property of one Robert Williams, who was not a member of any Indian tribe; that during that month he was arraigned before the same court and pleaded not guilty to the indictment and was tried and found guilty. The statute under which the indictment was found is contained in section 5356 of the Revised Statutes, and is as follows: "Every person who, upon the high seas, or in any place under the exclusive jurisdiction of the United States, takes and carries away, with intent to steal or purloin, the personal goods of another, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment." The court by its judgment sentenced the petitioner to imprisonment in the penitentiary at Anamosa in the state of Iowa for the term of one year, and to the payment of a fine of one thousand dollars. It also added that the marshal of the court, to whose custody he was then committed, should safely keep and convey the petitioner and deliver him to the custody of the warden of the penitentiary, who would receive and keep him in prison for the period of one year in execution of the sentence. The petitioner also sets forth that the warden of the penitentiary has no other authority to hold him than the said judgment and order of commitment.

The petitioner alleges that the said sentence and order of commitment are void; that the court was without power or jurisdiction, under the law, to render the judgment; and that he had applied to the United States judge of the northern district of Iowa for a writ of habeas corpus to be released from confinement, and that the writ was denied to him. He, *therefore, prays, that this court [244 will issue the writ of habeas corpus to the said warden to appear before this court and show what authority, if any, he has for restraining the petitioner of his liberty, and that upon final hearing he may be discharged.

An order was issued from this court in October last to the warden to show cause why the writ should not be granted as prayed. The warden returns answer that he holds the prisoner by virtue of a warrant of commitment issued upon the judgment and sentence of the United States court, as above stated, of which a copy is annexed to the petition, and that at the time of the petitioner's conviction, and of the judgment and sentence, there was no penitentiary or jail suitable for the confinement of convicts or available therefor in the Indian Territory, and that the state penitentiary at Anamosa had been duly designated by the Attorney General, under section 5546 of the Revised Statutes of the United States, as the place of confinement for prisoners convicted of crime by that court, and that the order of the court for the confinement of the petitioner in that penitentiary under its sentence of imprisonment was in pursuance of that designation.

So much of section 5546 of the Revised Statutes as bears upon the question under consideration in this case is as follows: "All persons who have been or who may hereafter be convicted of crime by any court of the United States, whose punishment is imprisonment, in

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NOTE.—*As to criminal law; correction of sentence of one convicted; resentence*, see note to Ex parte Cross, 36: 969.

As to when person is in jeopardy; when jury may be discharged without a verdict; former acquittal or conviction, see notes to Ex parte Lange, 21: 879, and to United States v. Perez, 6: 165.

As to what questions may be considered on habeas corpus, see note to Ex parte Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

a district or territory where, at the time of conviction, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced in some suitable jail or penitentiary in a convenient state or territory, to be designated by the Attorney General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred."

Messrs. **John C. Chaney** and *William J. Rannells*, for petitioner:

The law authorizes the thousand dollar fine, and also the one year's imprisonment, but it does not authorize imprisonment in a penitentiary.

Ex parte Mills, 135 U. S. 263–271 (34: 107–110); *United States* v. *Cobb*, 43 Fed. Rep. 570; *Ex parte Friday*, 43 Fed. Rep. 916; *Re Johnson*, 46 Fed. Rep. 477.

Where a judgment is unauthorized, and therefore void, the prisoner will be discharged on habeas corpus without a reversal of the judgment.

Church, Habeas Corpus, 479; *Ex parte Lange*, 85 U. S. 18 Wall. 163 (21: 872).

The petitioner could not be again arraigned and tried. Neither could the sentence be modified, nor another substituted in its stead. Such action would be a putting in jeopardy again for the same offense.

Re Johnson, 46 Fed. Rep. 477–481.

When a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed in whole or in part, it has no jurisdiction to impose another, either in addition to or as a substitute for it.

Feeley's Case, 12 Cush. 598; *Ex parte Mason*, 8 Mich. 70; *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344.

The right of habeas corpus is the "bill of rights" to the citizen deprived of his liberty, and is his just and proper right.

Ex parte Frederich, 149 U. S. 70 (37: 653); *Re Nielsen*, 131 U. S. 176–191 (33: 118–123); *Ex parte Siebold*, 100 U. S. 371 (25:717); *Ex parte Royall*, 117 U. S. 241 (29: 868); *Wood* v. *Brush*, 140 U. S. 278 (35: 505); *Tweed* v. *Liscomb*, 60 N. Y. 592, 19 Am. Rep. 211.

U. S. Rev. Stat. §§ 751–763, authorize the issuance of a writ of habeas corpus in such case.

A subject can apply for a writ of habeas corpus whenever he is unlawfully restrained of his liberty.

Hamilton's Case, 51 Mich. 174; *Herrick* v. *Smith*, 1 Gray, 1–49, 61 Am. Dec. 381; *Ex parte Kearny*, 55 Cal. 212; *Re Jackson*, 3 McArth. 24; *Re Sweatman*, 1 Cow. 144; *Ex parte Mason*, 8 Mich. 70; *Feeley's Case*. 12 Cush. 598.

The doctrine of *res judicata* does not apply to an order remanding a prisoner.

Church, Habeas Corpus, 570, 571, note 1; *Ex parte Kaine*, 3 Blatchf. 1; *Ex parte Cuddy*, 40 Fed. Rep. 62.

This court has recognized the right of a petitioner for a writ of habeas corpus on original application.

Ex parte Mills, 135 U. S. 263 (34: 107); *Ex parte Lane*, 135 U. S. 443 (34: 219.

Mr. **Lawrence Maxwell, Jr.**, *Solicitor Gen.*, for respondent:

An excessive sentence upon a lawful conviction is not absolutely void, so as to entitle the prisoner to be discharged on habeas corpus.

Ex parte Lange, 85 U. S. 18 Wall. 163, 176 (21: 872, 878); *Ex parte Parks*, 93 U. S. 18, 23 (23: 787, 788); *Ex parte Virginia*, 100 U. S. 339 (25: 676); *Ex parte Rowland*, 104 U. S. 604 (26: 861); *Re Coy*, 127 U. S. 731, 738 (32: 274, 275); *Re Nielsen*, 131 U. S. 176, 182 (33: 118, 120); *Sennott's Case*, 146 Mass. 489; *Ross's Case*, 2 Pick. 165; *Feeley's Case*, 12 Cush. 598; *Re Semler*, 41 Wis. 517; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *Phinney's App.* 32 Me. 440; *Kirby* v. *State*, 62 Ala. 51; *Lark* v. *State*, 55 Ga. 435.

The petitioner should not be released on habeas corpus, even if he is entitled to be discharged on writ of error.

Ex parte Kearney, 20 U. S. 7 Wheat. 38 (5: 391); *Ex parte Watkins*, 28 U. S. 3 Pet. 193 (7: 650); *Re Schneider* (*No. 2*) 148 U. S. 162 (37: 406); *Ex parte Frederich*, 149 U. S. 70, 75 (37: 653, 656); *Riley's Case*, 2 Pick. 172; *Ex parte Lees*, El. Bl. & El. 828.

The erroneous sentence can be corrected in the circuit court of appeals, the conviction being valid, and the petitioner should not therefore be discharged absolutely.

Re Medley, 134 U. S. 160 (33: 835); *Beale* v. *Com.* 25 Pa. 11; *Kelly* v. *State*, 3 Smedes & M. 518; *Oliver* v. *State*, 5 How. (Miss.) 14.

Mr. Justice **Field** delivered the opinion of the court:

The petitioner asks for the issue of the writ of habeas corpus in order that he may be thereby set at liberty, on the ground that his imprisonment in the penitentiary at Anamosa in Iowa is in pursuance of a judgment of a court which possessed no authority under the law to pass sentence upon him of imprisonment in the state penitentiary, upon his conviction of the offense for which he was indicted and tried. That is a sentence which can only be imposed where it is specifically prescribed, or where the imprisonment ordered is for a period longer than one year, or at hard labor. To an imprisonment for that period or at hard labor in a state penitentiary infamy is attached, and a taint of that character can be cast only in the cases mentioned.

Section 5356 of the Revised Statutes of the United States, under which the defendant was indicted and convicted, prescribes as a punishment for the offenses designated fine or imprisonment—the fine not to exceed one thousand dollars and the imprisonment not more than one year, or by both such fine and imprisonment. Such imprisonment cannot be enforced in a state penitentiary. Its limitation being to one year, must be enforced elsewhere. Section 5541 of the Revised Statutes provides that: "In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by

the legislature of the state for that purpose." And section 5542 provides for a similar imprisonment in a state jail or penitentiary where the person has been convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor. It 255] follows *that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part of the court to direct that imprisonment be executed in a penitentiary in any cases other than those specified. Whatever discretion therefore the court may possess, in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot, in specifying the place of imprisonment, name one of these institutions. This has been expressly adjudged in *Ex parte Mills*, 135 U. S. 263, 270 [34: 107, 110], which in one part of it presents features in all respects similar to those of the present case.

There the petitioner, Mills, was detained by the warden of the state penitentiary in Columbus, Ohio, pursuant to two judgments of the District Court of the United States for the Western District of Arkansas sentencing him in each case to confinement in the penitentiary of that state. Application was made by the prisoner for a writ of habeas corpus on the ground that the court by which he was tried had no jurisdiction of the offenses with which he was charged, and on the further ground that his detention in the penitentiary under the sentences, neither of which was for a longer period than one year, was contrary to the laws of the United States. The first position was not considered tenable, but the second was deemed sufficient to authorize the issue of the writ. The court held that, apart from any question as to whether the court below had jurisdiction to try the offense charged, the detention of the petitioner in the penitentiary upon sentences, neither of which was for imprisonment longer than one year, was in violation of the laws of the United States, and that he was, therefore, entitled to be discharged from the custody of the warden of the institution. "A sentence simply of 'imprisonment'" said the court, "in the case of a person convicted of an offense against the United States —where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary—cannot be executed by confinement in that institution, except in cases 256] where the *sentence is for a period *longer* than one year.' There is consequently no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void." The court added: "This is not a case of mere error, but one in which the court below transcended its powers," citing *Ex parte Lange*, 85 U. S. 18 Wall. 163, 176 [21: 872, 878]; *Ex parte Parks*, 93 U. S. 18, 23 [23: 787, 788]; *Ex parte Virginia*, 100 U. S. 339, 343 [25: 676, 678]; *Ex parte Rowland*, 104 U. S. 604, 612 [26: 861, 864]; *Re Coy*, 127 U. S. 731, 738 [32: 274, 275] and *Re Nielsen*, 131 U. S. 176, 182 [33: 118, 120].

Counsel for the government admits that, upon the authority of that case construing the Revised Statutes, the petitioner should not have been sentenced to imprisonment in the penitentiary; but he claims that the judgment and sentence are not for that cause void so as to entitle the petitioner to a writ of habeas corpus for his discharge, and he asks the court to reconsider the doctrine announced, contending that neither the reason of the law nor the authorities sustain the position. According to his argument, it would seem that the court does not exceed its jurisdiction when it directs imprisonment in a penitentiary to which place it is expressly forbidden to order it. It would be as well, and be equally within its authority, for the court to order the imprisonment to be in the guardhouse of a fort, or the hulks of a prison ship, or in any other place not specified in the law.

We are unable to agree with the learned counsel, but are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said *and written, in many cases with embar- [257 rassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offenses within which the one presented is embraced. Then comes the mode of the presentation of the offense to the court. That is specifically prescribed. If the offense be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all.

If the offense be only a misdemeanor, not punishable by imprisonment in the penitentiary: (*Mackin* v. *United States*, 117 U. S. 348 [29, 909]) the accusation may be made by indictment of the grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offense, with such particulars as to time, place and attendant circumstances as will apprise him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that 258] purpose is made, to the end, in *either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way. When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict—and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. If the law prescribes a place of imprisonment, the court cannot direct a different place not authorized; it cannot direct imprisonment in a penitentiary when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. The proposition put forward by counsel that if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend itself to its discretion, is certainly not to be tolerated. Imprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character or other attending circumstances. Death might be inflicted by torture, or by starvation, or by drawing and quartering. All these modes, or any of them, would be permissible, if the doctrine asserted by him can be maintained.

A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges —perhaps with the majority—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that, therefore, the writ of habeas 259] corpus cannot be *invoked for the relief of a party until the time has expired to which the judgment should have been limited. But that question is only of speculative interest here, for there is here no question of excess of punishment. The prisoner is ordered to be confined in the penitentiary, where the law does not allow the court to send him for a single hour. To deny the writ of habeas corpus in such a case is a virtual suspension of it; and it should be constantly borne in mind that the writ was intended as a protection of the citizen from encroachment upon his liberty from any source—equally as well from the unauthorized acts of courts and judges as the unauthorized acts of individuals.

The laws of our country take care, or should take care, that not the weight of a judge's finger shall fall upon any one except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief. In the case before us had an appeal been taken from the judgment of the United States court of the Indian territory it would hardly have reached a determination before the period of the sentence would have expired, and the wrong caused by the imprisonment in the penitentiary have been inflicted.

Much complaint is made that persons are often discharged from arrest and imprisonment when their conviction, upon which such imprisonment was ordered, is perfectly correct, the excess of jurisdiction on the part of the court being in enlarging the punishment or in enforcing it in a different mode or place than that provided by the law. But in such cases there need not be any failure of justice, for where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be *corrected. [260 The judges of all courts of record are magistrates, and their object should be not to turn loose upon society persons who have been justly convicted of criminal offenses, but, where the punishment imposed, in the mode, extent, or place of its execution, has exceeded the law, to have it corrected by calling the attention of the court to such excess. We do not perceive any departure from principle or any denial of the petitioner's right in adopting such a course. He complains of the unlawfulness of his place of imprisonment. He is only entitled to relief from that unlawful feature, and that he would obtain if opportunity be given to that court for correction in that particular. It is true where there are also errors on the trial of the case affecting the judgment, not trenching upon its jurisdiction, the mere remanding the prisoner to the original court that imposed the sentence, to correct the judgment in those particulars for which the writ is issued, would not answer, for his relief would only come upon a new trial; and his remedy for such errors must be sought by appeal or writ of error. But in a vast majority of cases the extent and mode and place of punishment may be corrected by the original court without a new trial, and the party punished as he should be whilst relieved from any excess

committed by the court of which he complains. In such case the original court would only set aside what it had no authority to do and substitute directions required by the law to be done upon the conviction of the offender.

Some of the state courts have expressed themselves strongly in favor of the adoption of this course, where the defects complained of consist only in the judgment—in its extent or mode, or place of punishment—the conviction being in all respects regular. In *Beale* v. *Com.* 25 Pa. 11, 22, the supreme court of Pennsylvania said: "The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed error in passing the sentence. If this court sanctioned such a rule it would fail to perform the chief duty for which it was established."

261] *It is true that this language was used in a case pending in the supreme court of a state on writ of error, but if then the court would send the case back to have the error, not touching the verdict, corrected and justice enforced, there is the same reason why such correction should be made when the prisoner is discharged on habeas corpus for alleged defects of jurisdiction in the rendition of the judgment under which he is held. The end sought by him—to be relieved from the defects in the judgment rendered to his injury—is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him.

The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus. Section 761 of the Revised Statutes on this subject provides that: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." It would seem that, in the interest of justice and to prevent its defeat, this court might well delay the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered that the defects for want of jurisdiction which are the subject of complaint in that judgment may be corrected. *Re Medley*, 134 U. S. 160-174 [33: 835-841].

In the case of *Coleman* v. *Tennessee*, 97 U. S. 509 [24: 1118], a party who had been convicted of a capital offense, and the judgment had been confirmed by the supreme court of that state, was discharged by judgment of this court because it was held that the state court had no jurisdiction to try a soldier of the army of the United States for a military offense committed by him whilst in the military service and subject to the articles of war. But as it appeared that the prisoner had been tried by a court-martial regularly convened in the army for the same offense and sentenced to be shot, and had afterwards escaped, this court, in reversing the judgment of the supreme court of Tennessee, stated that that court could turn the prisoner over to the military authorities of the United States. He was so turned

*over, and the punishment was com- [262
muted to life imprisonment, and he was sent to Fort Leavenworth to serve it out.

In some cases, it is true that no correction can be made of the judgment, as where the court had under the law no jurisdiction of the case—that is, no right to take cognizance of the offense alleged, and the prisoner must then be entirely discharged; but those cases will be rare, and much of the complaint that is made for discharging on habeas corpus persons who have been duly convicted will be thus removed.

Ordered, that the writ of habeas corpus issue, and that the petitioner be discharged from the custody of the warden of the penitentiary at Anamosa in the state of Iowa; but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him.

Writ issued.

ENOCH DAVIS, *Plff. in Err.*,
v.
UTAH TERRITORY.

(See S. C. Reporter's ed. 262-271.)

Sufficiency of indictment in Utah—not necessary to use the words of the statute—indictment for murder—judgment.

1. In respect to the description of the offense, an indictment is sufficient, under the laws of Utah, if the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended, and to pronounce judgment upon conviction according to the right of the case.
2. In Utah, in an indictment for murder, it is not necessary to use the very words of the statute defining the offense. It is sufficient if those used convey the same meaning.
3. An indictment which clearly and distinctly alleges the facts, showing a murder by the unlawful killing of a human being with malice aforethought, is good as an indictment for murder under the Utah statutes, although it may not indicate, upon its face, in terms, the degree of that crime.
4. Where the court in Utah announced to the defendant that he had been duly convicted of the crime of murder in the first degree, and therefore it was "ordered, adjudged and decreed" that he be taken, etc., and shot until he was dead, this was in effect a judicial determination that the defendant had been duly convicted of the offense named, and was the only judgment it was necessary to render.

[No. 961.]

Submitted Nov. 15, 1893. Decided Jan. 8, 1894.

NOTE.—*For what purposes evidence of intoxication may be given by one accused of crime*, see note to Hopt v. Utah, 27: 873.

As to when confessions of accused are evidence against him, see note to Hopt v. Utah, 28: 262.

As to homicide by officers in making an arrest; when justifiable, see note to Tennessee v. Davis, 25: 648.

As to officers de facto; indictment for murder; sufficiency of statement of time and place of death, see note to Ball v. United States, 35: 377.

IN ERROR to the Supreme Court of the Territory of Utah, to review a judgment of that court affirming the judgment of the First Judicial District Court of the Territory of Utah, convicting Enoch Davis of the murder of Louisa Davis. *Affirmed.*

The facts are stated in the opinion.

Mr. **Warren N. Dusenberry,** for plaintiff in error:

The indictment was insufficient.

1 Bishop, New Crim. Law, § 797; *State* v. *Brown*, 21 Kan. 38; *Fouts* v. *State*, 8 Ohio St. 109; *Kain* v. *State*, 8 Ohio St. 306; *Keenan* v. *Com.* 44 Pa. 55, 84 Am. Dec. 414; *Snyder* v. *State*, 59 Ind. 105; *Hogan* v. *State*, 30 Wis. 428, 11 Am. Rep. 575; *State* v. *Jones*, 20 Mo. 58; *State* v. *McCormick*, 27 Iowa, 402; *State* v. *Boyle*, 28 Iowa, 522; *State* v. *Knouse*, 29 Iowa, 118; *State* v. *Thompson*, 31 Iowa, 393; *People* v. *Halliday*, 5 Utah, 467; *Fields* v. *State*, 52 Ala. 348; *Wellar* v. *People*, 30 Mich. 16; *Johnson* v. *Com.* 24 Pa. 387; 2 Bishop, Crim. Proc. §§ 161–595.

The verdict of the jury was repugnant to the offense charged in the indictment, and was absolutely void.

Fouts v. *State*, 8 Ohio St. 98; *State* v. *Scannell*, 39 Me. 68; *State* v. *Brown*, 21 Kan. 38; *McCormick* v. *State*, 27 Iowa, 408; *State* v. *White*, 41 Iowa, 316, 20 Am. Rep. 602; *Wright* v. *People*, 33 Mich. 300; *Gibbs* v. *State*, 34 Tex. 134; *Riflemaker* v. *State*, 25 Ohio St. 395; *O'Connell* v. *State*, 55 Ga. 191; *State* v. *Brown*, 2 N. C. 100, 1 Am. Dec. 548; *State* v. *Rollins*, 8 N. H. 550; *Com.* v. *Adams*, 127 Mass. 15.

There being no legal verdict rendered against defendant by the jury, and there being no legal nor any judgment against him, rendered by the court, the court had no legal right to sentence the defendant.

Com. v. *Call*, 21 Pick. 509, 32 Am. Dec. 284; *Reg.* v. *York*, 1 Den. C. C. 335; *Dyer* v. *Com.* 40 Mass. 402.

Mr. **Lawrence Maxwell, Jr.,** *Solicitor Gen.*, for defendant in error:

The averments are sufficient under the criminal code of Utah to show that the killing was premeditated.

State v. *Smith*, 38 Kan. 199; *People* v. *Davis*, 78 Cal. 355.

In Utah an indictment which avers murder generally, as known at the common law and as defined by section 4452 (Utah Crim. Laws, 1888) is sufficient to support a verdict of murder in the first degree.

2 Whart. Crim. Law (7th ed.) § 1115; *White* v. *Com.* 6 Binn. 179, 6 Am. Dec. 443; *Com.* v. *Flannagan*, 7 Watts & S. 415; *Com.* v. *Gardner*, 11 Gray, 444; *Com.* v. *Desmarteau*, 16 Gray, 1; *Green* v. *Com.* 12 Allen, 155, 170; *State* v. *Pike*, 49 N. H. 399; *Fitzgerrold* v. *People*, 37 N. Y. 413; *People* v. *Willett*, 102 N. Y. 264; *State* v. *Verrill*, 54 Me. 408; *People* v. *Murray*, 10 Cal. 309; *Davis* v. *State*, 39 Md. 355; *Wicks* v. *Com.* 2 Va. Cas. 387; *Livingston* v. *Com.* 14 Gratt. 592; *Gehrke* v. *State*, 13 Tex. 568; *Mitchell* v. *State*, 5 Yerg. 340, 8 Yerg. 514; *McAdams* v. *State*, 25 Ark. 405; *Leschi* v. *Territory*, 1 Wash. Ter. 14; *State* v. *Lessing*, 16 Minn. 75; *State* v. *Millain*, 3 Nev. 409; *Hogan* v. *State*, 30 Wis. 428, 11 Am. Rep. 575; *Territory* v. *Stears*, 2 Mont. 326; *Graves* v. *State*, 45 N. J. L. 203; *Conroy* v. *People*, 97 N. Y. 62.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error, Enoch Davis, was indicted in the First Judicial District Court of the Territory of Utah for murder, alleged to have been committed as follows:

"The said Enoch Davis, on the sixth day of June, A. D. eighteen hundred and ninety-two, at the county of Uintah, in said territory of Utah, in and upon one Louisa Davis, there being, willfully, feloniously, and of his deliberately premeditated malice aforethought, did make an assault with a certain revolver by him, the said Enoch Davis, then and there had and held, with which said revolver he, the said Enoch Davis, her, the said Louisa Davis, upon the head did then and there willfully, feloniously, and of his deliberately premeditated malice aforethought, beat, bruise, and wound, thereby then and there inflicting upon the head of her, the said Louisa Davis, one mortal wound, of which the said Louisa Davis then and there instantly died, and so the grand jurors aforesaid so say that in manner aforesaid, he, he said Enoch Davis, her, the said Louisa Davis, then and there did kill and murder, contrary to the form of the statutes of said territory, in such cases made and provided, and against the peace and dignity of the people aforesaid."

The defendant demurred to the indictment on the ground that it did not state facts sufficient to constitute a public offense. The demurrer was overuled, and he excepted. The defendant then pleaded not guilty. After trial, the jury returned the following verdict: "We, the jury, impaneled in the above entitled cause, find the defendant, Enoch Davis, guilty of murder in the first degree as charged in the indictment. Newell Brown, foreman."

There was a motion for a new trial upon various grounds. And defendant also moved in arrest of judgment upon the following grounds: first, the indictment does not charge murder in the first degree; second, the verdict against the *defendant of murder in the [264 first degree was in excess of the offense charged in the indictment.

Under date of November 3, 1892, appears the following order of the court:

"The defendant being present in court, the motions for a new trial and in arrest of judgment having been separately argued by respective counsel, and the court now being fully advised therein, orders that said motions be overruled; to which order the defendant excepts. Defendant being present in court and being asked by the court if he had anything to say why sentence should not be now pronounced against him, and he answering in the negative, and said defendant having chosen to be shot instead of hanging:

"Thereupon the court rendered its judgment: Whereas you, the said Enoch Davis, having been duly convicted of the crime of murder in the first degree, without any recommendations whatever; it is therefore ordered, adjudged, and decreed that you, the said Enoch Davis, be taken hence to the penitentiary of the territory of Utah, where you shall be safely kept until Friday, December 30th, 1892, and that between the hours of ten in the forenoon and four in the afternoon on said day

you be taken from your place of confinement to the jail or jail yard of the county jail of the county of Uintah, or some other private and convenient place in said county of Uintah, and that you then be shot till you are dead. You are hereby remanded into the custody of the U. S. marshal of Utah, who will see that this judgment and sentence of the court are carried out and executed. To which orders defendant excepts."

An appeal was taken to the supreme court of the territory, and the judgment was affirmed.

Murder is declared by the statutes of Utah to be "the unlawful killing of a human being with malice aforethought." This is substantially murder as defined at common law. 4 Bl. Com. 195; 3 Coke, Inst. 47. And such malice may be expressed or implied; express, when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature; implied, when no considerable prov-[265] ocation appears, or when *the circumstances attending the killing show an abandoned or malignant heart. 2 Utah Comp. Laws, p. 578, §§ 4452, 4453.

It is also provided that "every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate malice and permeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being, other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree;" further, that "every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned, at hard labor in the penitentiary for life, at the discretion of the court, and every person guilty of murder in the second degree shall be imprisoned, at hard labor, in the penitentiary for a term not less than five or more than fifteen years." 2 Utah Comp. Laws, p. 578, §§ 4454, 4455.

In respect to the forms of pleadings in criminal actions and the rules by which their sufficiency is to be determined, it is provided that the indictment must contain a clear and concise statement of the acts or omissions constituting the offense, with such particulars as to time, place, person, and property, as will enable the defendant to understand distinctly the character of the offense charged, and to answer the indictment; and must be direct and certain as regards the party and the offense charged, and the particular circumstances of the offense. The words used in the indictment are to be construed according to their usual acceptance in common language, except such words and phrases as are defined by law, and they are to be construed according to their legal meaning. Words in the statute defining a public offense need not be strictly pursued in the indictment, but other words conveying the same meaning may be used. 2 Utah Comp. Laws, pp. 687, 688, §§ 4928-4931, 4986, 4987.

*In respect to the description of the [*266 offense, an indictment is sufficient, under the laws of Utah, if the act or omission charged as the offense is clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended, and to pronounce judgment upon conviction according to the right of the case. 2 Utah Comp. Laws, § 4938.

The first assignment of error relates to the overruling of the demurrer to the indictment. The point here made is that as murder is defined by the statute to be the unlawful killing of a human being with malice aforethought, it was necessary to charge, in words, that the killing was "unlawful." This position cannot be sustained; for the facts alleged present, in clear and distinct language, a case of unlawful killing. It is not necessary, as we have seen, to use the very words of the statute defining the offense. It is sufficient if those used convey the same meaning. The indictment sets forth the case of an assault and battery, committed by the defendant willfully, feloniously, and with deliberately premeditated malice aforethought, and resulting in instant death, whereby the defendant did kill and murder, contrary to the statute, etc. Such facts plainly import an unlawful killing.

Other assignments of error present the objection that the indictment is so framed that it will not support a verdict of guilty of murder in the first degree. This objection is based, in part, upon the theory that murder in the first degree and murder in the second degree are made distinct, separate offenses. But this is an erroneous interpretation of the statute. The crime defined is that of murder. The statute divides that crime into two classes in order that the punishment may be adjusted with reference to the presence or absence of circumstances of aggravation. And, therefore, "whenever a crime is distinguished into degrees," it is left to the jury, if they convict the defendant, "to find the degree of the crime of which he is guilty." 2 Utah, Comp. Laws p. 715, § 5076. If the defendant pleads guilty "of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." 2 Utah, Comp. Laws, § 5101. An *indictment which clearly [267 and distinctly alleges facts showing a murder by the unlawful killing of a human being with malice aforethought is good as an indictment for murder under the Utah statutes, although it may not indicate, upon its face, in terms, the degree of that crime, and thereby the nature of the punishment that may be inflicted. Of course, if an indictment is so framed as to clearly show that the crime charged is not of the class designated as murder in the first degree, the jury could not find a verdict of guilty of murder in that degree. But, as already suggested, the pleader need not indicate the degree, but may restrict the averments to such facts, as in law, show a murder, that is to say, an unlawful killing with malice aforethought, leaving the ascertainment of the degree to the jury, or, in case of confession, to the court. As the acts which, under the Utah statute,

constitute murder, whether of the highest or lowest degree, constituted murder at common law, it is clear that an indictment good at common law as an indictment for murder, in whatever mode or under whatever circumstances of atrocity the crime may have been committed, is sufficient for any degree of the crime of murder under a statute relating to murder as defined at common law, and establishing degrees of that crime in order that the punishment may be adapted to the special circumstances of each case.

These views are abundantly sustained by authority. The earliest legislative enactment in this country by which degrees of murder were established was the Pennsylvania statute of April 22, 1794, "for the better preventing of crimes," etc. That statute recites as the reason for its passage that the several offenses, which were included in the general denomination of murder, differed greatly in the degree of their atrocity, and that it was unjust to involve them in the same punishment. It was consequently enacted that all murder perpetrated by means of poison, etc., should be deemed murder of the first degree, and all other kinds of murder should be deemed murder of the second degree, leaving the jury, if there was a trial, or the court, if the prisoner pleaded guilty, to ascertain from evidence the [268] degree of the crime. In the *supreme court of Pennsylvania, *Chief Justice* Tilghman said: "Now this act does not define the crime of murder, but refers to it as a known offense; nor so far as it concerns murder in the first degree does it alter the punishment, which was always death. All that it does is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments. It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself that it was not supposed any alteration would be made. It seems taken for granted that it would not always appear on the face of the indictment of what degree the murder was, because *the jury are to ascertain the degree* by their verdict, or, in case of confession, *the court are to ascertain it* by examination of witnesses. But if the indictments were so drawn as plainly to show that the murder was of the first or second degree, all that the jury need do would be to find the prisoner *guilty* in manner and form as he stands indicted." Yeates and Brackenridge, *JJ.*, concurred in these views, the former observing: "Different degrees of guilt exist under the general crime of murder, which is, therefore, arranged under two classes of murder of the first and second degree. The uniform practice since the act was passed has been to lay the offense as at common law." *White* v. *Com.* 6 Binn. 179, 182, 6 Am. Dec. 443. The same principle was announced in *Com.* v. *Flanagan*, 7 Watts. & S. 415, 418.

So in *Wicks* v. *Com.* 2 Va. Cas. 387, 391, decided in 1824, in Virginia, where the statute dividing the crime of murder into degrees was like that of Pennsylvania, it was said that the legislature did not intend to change, much less to divide, the common law crime of murder into two separate offenses to be prosecuted and punished under two distinct indictments, but intended to graduate the punishment of each murder according to the circumstances under which it should be committed.

In *Green* v. *Com.* 12 Allen, 155, 170, the supreme judicial court of Massachusetts, referring to the previous *cases of *Com.* v [269] *Gardner*, 11 Gray, 438, and *Com.* v. *Desmarteau*, 16 Gray, 1, said: "The reason on which these decisions were founded was this: that the statute establishing degrees of murder did not create any new offense or change the definition of murder as it was understood at common law; that the forms of indictment previously in use descriptive of murder embodied every shade or degree of the crime, from that which was most aggravated, malicious, and premeditated down to that which had only the element of implied malice in its most mitigated form; and that as the offense was not changed, but only its punishment mitigated in certain cases, the indictment was sufficient to embrace every species of murder, whether it fell within one or the other of the degrees of homicide as defined by the statute. The logical and necessary conclusion from these discussions is, that an indictment for murder at common law does charge murder in the first degree." To the same effect are many other adjudged cases, among which are *Graves* v. *State*, 45 N. J. L. 203, 206; *Mitchell* v. *State*, 8 Yerg. 514, 526; *People* v. *Murray*, 10 Cal. 309, 310; *People* v. *Dolan*, 9 Cal. 576, 584; *Kennedy* v. *People*, 39 N. Y. 245, 250; *People* v. *Conroy*, 97 N. Y. 62, 70; *State* v. *Lessing*, 16 Minn. 75; *State* v. *Verrill*, 54 Me. 408, 415; *Gehrke* v. *State*, 13 Tex. 573, 574; *McAdams* v. *State*, 25 Ark. 405, 416.

We are of opinion that the indictment in this case sufficiently charged the crime of murder. The acts constituting the crime are set forth with such clearness and distinctness that both the defendant and the court understood the character of the offense charged, and the court was enabled to pronounce judgment according to the right of the case. The defendant was charged with having willfully, feloniously, and of his deliberately premeditated malice aforethought, assaulted the deceased with a revolver, with which he beat, bruised, and wounded her upon the head, inflicting a mortal wound, from which death instantly resulted, whereby, in the manner stated, the defendant killed and murdered the person so assaulted. The indictment alleges an unlawful killing with *malice aforethought [270] and thereby a murder. It was not necessary to allege, in express words, an intent to kill, because murder, as defined by the statute, may be committed if the killing be unlawful, and if no considerable provocation appears or the circumstances attending the killing show an abandoned or malignant heart. Under the charge made in this case it was competent to show by evidence, under section 4454 of the Compiled Laws of Utah, that the killing was with willful, deliberate malice, and was premeditated, and it was perhaps, competent to show that the killing, in the mode charged, was by an act greatly dangerous to the life of the decedent, and "evidencing a depraved mind, regardless of human life." In either case, a verdict of murder in the first degree would have been proper. If the evidence showed a

case of homicide that under the statute was not murder in the first degree, but was nevertheless committed under such circumstances as would have constituted murder at common law, then the verdict should have been that the defendant was guilty of murder in the second degree. But as the evidence was not preserved in a bill of exceptions, we cannot say that the verdict of guilty of murder in the first degree was unauthorized by the facts adduced at the trial. It certainly was within the scope of the indictment.

Another assignment of error is that the court failed to adjudge that the defendant was guilty of some offense. This objection is supposed to be sustained by section 5100 of the Compiled Laws of Utah, which provides: "After a plea or verdict of guilty, or after a verdict against the defendant, on a plea of a former conviction or acquittal, if the judgment is not arrested, or a new trial granted, the court must appoint a time for pronouncing judgment, which must be at least two days after the verdict, if the court intend to remain in session so long; or, if not, as remote a time as can reasonably be allowed, but in no case can the judgment be rendered in less than six hours after the verdict."

There is nothing in the record upon which this assignment can be based. The motions for new trial and in arrest of judgment having been overruled, and the defendant having been 271] *asked, as required by the statute (§ 5108) if he had anything to say why sentence should not be pronounced, and having answered that inquiry in the negative, the court proceeded to judgment. The appellant insists that it was necessary that the court itself, in the exercise of its independent judgment upon the facts, and as a condition of its authority to sentence, should have adjudged that he was guilty of the crime charged before imposing the sentence prescribed by the statute. The court, the defendant being present, announced that he had been duly convicted of the crime of murder in the first degree, without any recommendation, and, therefore, it was "ordered, adjudged, and decreed" that he be taken, etc., and shot until he was dead. What the court said, on the occasion of the sentence was, in effect, a judicial determination that the defendant had been duly convicted of the offense named. That was the only judgment it was necessary to render, and the sentence which followed gave legal effect to that adjudication. The statutes of Utah required nothing more.

There are no other assignments of error which require notice at our hands.

The judgment of the supreme court of the territory is affirmed.

JOSEPH GOTTLIEB, *Appt.*, *v.* LEWIS C. THATCHER.

(See S. C. Reporter's ed. 271-281.)

Proof of fraud—failure to establish fraud.

The relationship of the parties to a deed does not, in and of itself, create such a prima facie presumption against its validity on the ground of fraud as requires the court to hold it to be invalid, without proof that there was fraud on the part of the grantor, participated in by the grantee. By the Colorado statute, on the filing and recording of a judgment, the lien on the real estate of the debtor at once attaches.

[No. 192.]

Argued Jan. 4, 5, 1894. Decided Jan. 15, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Colorado, dismissing a suit brought by Joseph Gottlieb, plaintiff, against Lewis C. Thatcher, defendant, to set aside conveyances made by the latter, of certain land in the city of Denver. *Affirmed.*

See same case below, 34 Fed. Rep. 435.

The facts are stated in the opinion.

Messrs. **R. T. McNeal** and *E. T. Wells*, for appellant:

The conveyance of November 13, 1876, of the property in question in this suit, to the appellee, was without consideration, fraudulent and void, as to creditors.

2 Bigelow, Fr. 82-84; Bump, Fraud. Conv. 594-598; *Kaine* v. *Weigley*, 22 Pa. 179; *Kirkpatrick* v. *Clark*, 8 L. R. A. 511, 132 Ill. 343; *Clements* v. *Nicholson*, 73 U. S. 6 Wall. 299 (18:786); *Mason* v. *Vestal*, 88 Cal. 396; *Helms* v. *Green*, 105 N. C. 251; *Rea* v. *Missouri*, 84 U. S. 17 Wall. 532 (21: 707); *Blennerhassett* v. *Sherman*, 105 U. S. 117 (26: 1080).

The transactions under investigation being between brothers, much less proof is required to establish fraud than if they were between strangers. Indeed, where the relationship is intimate the burden is cast upon the party setting up such title as appellee here relies on, to show affirmatively that it was acquired in good faith and for a valuable consideration.

Klein v. *Hoffheimer*, 152 U. S. 367 (38: 373); *Venable* v. *Bank of United States*, 27 U. S. 2 Pet. 107 (7: 364).

When the jurisdiction of a court of limited and special authority appears upon the face of the proceedings, its action cannot be collaterally attacked for mere error or irregularity.

Comstock v. *Crawford*, 70 U. S. 3 Wall. 396 (18: 34); *Chapman* v. *Brewer*, 114 U. S. 158 (29: 83); *Arcgno* v. *Schmidt*, 113 U. S. 293 (28: 976); *Herron* v. *Dater*, 120 U. S. 464 (30: 748); *Tilton* v. *Cofield*, 93 U. S. 163 (23: 858); *Grimwold* v. *Hazard*, 141 U. S. 260 (35: 678); *Buckmaster* v. *Carlin*, 4 Ill. 104; *Hoffman* v. *Coe*-

NOTE.—*As to deed, when void for fraud, insanity, drunkenness, duress, undue influence, imbecility, infancy, or fraud on marriage, from ward to guardian, to trustee from cestui que trust, to executor from heir*, see note to Harding v. Handy, 6: 429.

As to cancellation of a deed or a contract, in equity, for fraud, concealment or misrepresentation, see note to Neblett v. Macfarland, 23: 471.

ter, 2 Wharf. 471, 472; approved in *Otterson* v. *Middleton*, 102 Pa. 86; *McAlpine* v. *Sweetser*, 76 Ind. 78; *Hislop* v. *Hoover*, 68 N. C. 141, 147.

Judgment liens being the creature of statute, they exist only where the statute has been strictly complied with.

Isaac v. *Swift*, 10 Cal. 71, 70 Am. Dec. 698; *Brown* v. *Clarke*, 45 U. S. 4 How. 4 (11: 850); *Rogers* v. *Druffel*, 46 Cal. 654; *Re Boyd*, 4 Sawy. 268, 270, 271; *Buchan* v. *Sumner*, 2 Barb. Ch. 193–197.

Any proceeding which secures the payment of a judgment discharges its lien.

Campbell v. *Spence*, 4 Ala. 543, 39 Am. Dec. 301; *Bartlett* v. *Doe*, 6 Ala. 605; *Conway* v. *Jett*, 8 Yerg. 481, 24 Am. Dec. 590; *Mitchell* v. *Anderson*, 1 Hill, L. 69, 26 Am. Dec 158; *Russell* v. *McCampbell*, 29 Tex. 38.

Messrs. **J. Warner Mills** and *Henry C. Dillon*, for appellee:

Defendant's deed to the land in controversy made to him by his brother, Samuel, dated November 13, 1876, is not fraudulent and there is no fraud in this case on the side of the Thatchers.

A subsequent creditor can only avail himself of the fraud which is practiced against him.

Harlan v. *Maglaughlin*, 90 Pa. 293; *Sheppard* v. *Thomas*, 24 Kan. 780; *Carr* v. *Breese*, 81 N. Y. 584.

To render a sale or conveyance void as to vendor's creditors, there must be mutuality or participation in the fraudulent intent of both vendor and vendee.

Schroeder v. *Walsh*, 120 Ill. 407; *Hanchett* v. *Kimbark*, 118 Ill. 126.

Fraud is not presumed; it must be proved.

McCarthy v. *White*, 21 Cal. 495, 32 Am Dec. 754, and note; *Chicago Stamping Co* v. *Hanchett*, 25 Ill. App. 198; *Hempstead* v. *Johnston*, 18 Ark. 123, 65 Am. Dec. 458; *Burch* v. *Smith*, 15 Tex. 219, 65 Am. Dec. 157.

Fraud is not to be presumed when the transaction can be fairly reconciled with honesty.

Dempsey v. *Bowen*, 25 Ill. App. 192; *Hardin* v. *Crate*, 60 Ill. 221; *Lake Shore & M. S. R. Co.* v. *Pittsburg, Ft. W. & C. R. Co.* 71 Ill. 40; *Coon* v. *Rigden*, 4 Colo. 275; *Bradley* v. *Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Cipperly* v. *Rhodes*, 53 Ill. 346.

As between the parties thereto, a fraudulent conveyance passes title.

Hallorn v. *Trum*, 125 Ill. 250.

A fraudulent conveyance as to a creditor, is not void, but voidable.

Rappleye v. *International Bank*, 93 Ill. 396; *Gould* v. *Steinberg*, 84 Ill. 170.

A bona fide purchaser without notice of the fraudulent intent of the vendor, and for a valuable and good consideration, no matter what relationship existed between them, is entitled to hold as against all creditors and other persons.

Thorpe v. *Thorpe*, 12 S. C. 154; *Schwabacker* v. *Rush*, 81 Ill. 311; *Erb* v. *Cole*, 31 Ark. 554; *Grant* v. *Ward*, 64 Me. 240; *Thornton* v. *Tandy*, 39 Tex. 544; *Doe* v. *Davis*, 64 N. C. 500; *Knight* v. *Forward*, 63 Barb. 311; 1 Story, Eq. Jur. § 190.

Retention of property by a former owner is not an index of fraud.

Maynes v. *Atwater*, 88 Pa. 496; *Towne* v. *Fiske*, 127 Mass. 125, 127, 34 Am. Rep. 353; *Palmer* v. *Mangham*, 31 La. Ann. 348.

Complainant's hands are unclean; and his sheriff's deed is void, because his judgment for $3171, against Samuel H. Thatcher was erroneous and fraudulent.

When a third person, neither a party nor a privy to a judgment, so that he can take an appeal or a writ of error thereto, is affected by the judgment, he may avoid it in a collateral proceeding not only on ground of want of jurisdiction, but also on the ground of errors or defects which make the judgment erroneous.

Downs v. *Fuller*, 2 Met. 135, 35 Am. Dec. 398; *Laflin* v. *Field*, 6 Met. 287; *Leonard* v. *Bryant*, 11 Met. 370; *Vose* v. *Martin*, 4 Cush. 27, 50 Am. Dec. 750; *Tarbell* v. *Jewett*, 129 Mass. 457; *Safford* v. *Weare*, 142 Mass. 231; *Granger* v. *Clark*, 22 Me. 128; *Miller* v. *Miller*, 23 Me. 22, 39 Am. Dec. 597.

Third parties, creditors, or prior grantees, who, if a judgment were given full force and effect, would be prejudiced thereby in regard to some pre-existing right, may impeach the judgment on the ground that the plaintiff had fraudulently obtained it.

Bandon v. *Becher*, 3 Clark & F. 479; *Webster* v. *Reid*, 52 U. S. 11 How. 437 [13: 761]; *Michaels* v. *Post*, 88 U. S. 21 Wall. 398 [22: 520]; *Gottlieb* v. *Thatcher*, 34 Fed. Rep. 435; *Hackett* v. *Manlove*, 14 Cal. 85; *Hammock* v. *McBride*, 6 Ga. 178; *Williams* v. *Martin*, 7 Ga. 377; *Freydendall* v. *Baldwin*, 103 Ill. 325; *De Armond* v. *Adams*, 25 Ind. 455; *Pierce* v. *Jackson*, 6 Mass. 242; *People* v. *Townsend*, 37 Barb. 520; *Bergman* v. *Hutcheson*, 60 Miss. 872; *Richardson* v. *Trimble*, 38 Hun. 409.

Mr. Justice **Jackson** delivered the opinion of the court:

This suit was brought by the appellant, who was the complainant below, against the appellee to set aside conveyances made to him by Samuel H. Thatcher, and the sheriff of Arapahoe county, in the territory of Colorado, of certain lots and parcels of land, lying and being in that county, and in the eastern division of the city of Denver, on the ground that the lands were conveyed, and caused to be conveyed, to the appellee for the purpose of hindering, delaying, and defrauding the complainant, and other creditors of Samuel H. Thatcher.

The case made by the pleadings and proofs, so far as need be noticed, is this: On May 7, 1874, one Samuel Kaucher recovered a judgment in the district court of Arapahoe county, Colorado, against Samuel H. Thatcher for $2710.40. A certified copy or abstract of this judgment was duly filed for record, and was recorded in the office of the clerk and recorder of the county on June 18, 1874. From this judgment Thatcher prosecuted a writ of error to the supreme court of the territory, and executed a supersedeas bond, with sureties, in the sum of $3500. That judgment was affirmed by the supreme court of the territory. Thereupon Thatcher *prosecuted a writ of error to [273 the Supreme Court of the United States, and, as appears from the record of the case in this court, executed a supersedeas bond with sureties, which suspended the execution of the judgment of the court below. It is shown that

the sureties on the supersedeas bond or bonds were protected by securities placed in their hands by Thatcher. The case was heard in this court at the October term, 1877, and on December 17, 1877, the judgment of the territorial supreme court was affirmed, and a mandate issued for the execution of the judgment. On January 29, 1878, execution issued on this judgment against Thatcher, and was levied upon the lands in controversy in the present case, as the property of the defendant, and pursuant to that levy the premises were sold by the sheriff of Arapahoe county, and were purchased by the appellee, Lewis C. Thatcher, for the debt and interest, amounting to about $3850. A certificate of purchase was given to the appellee, and thereafter, on November 25, 1878, a sheriff's deed was made to him for the premises.

Prior to the affirmance of the Kaucher judgment in this court, Samuel H. Thatcher, by warranty deed dated November 13, 1876, conveyed the premises in question to his brother, Lewis C. Thatcher, who was then a resident of the city of St. Louis, Missouri, the consideration for the conveyance being the sum of $4000, for which the grantee executed to the grantor his two notes for $2000 each, payable two and three years from date of the sale. The deed was duly recorded November 18, 1876, in the register's office of the county.

On November 18, 1875, the complainant loaned to Zella Glenmore the sum of $2700 for one year, with interest at the rate of five per cent per month, payable monthly, for which she executed a note with Samuel H. Thatcher as her surety. This note was secured by a chattel mortgage on the household furniture of Zella Glenmore, worth from five to six thousand dollars, and by a deed of trust executed by Samuel H. Thatcher on 320 acres of land in Douglass county, Colorado, of the value of about $3000. The interest on this note appears to have been paid, except a portion of the last month of the year during which the note had to run. At the maturity of the [274] note *the complainant seized the furniture covered by the chattel mortgage executed by Zella Glenmore, for default in payment, and caused the same to be sold at auction, realizing therefrom the net proceeds of $1519.43, which were applied upon the note. The complainant on November 30, 1876, also caused the Douglass county lands owned by Thatcher to be advertised and sold under the deed of trust, and the same were bid in by the appellant for $320, and on December 27, 1877, he received a deed from the trustee conveying to him the lands thus sold.

On November 25, 1876, the complainant commenced an action in attachment against Thatcher and Zella Glenmore on the note, and on July 23, 1877, he obtained judgment against Thatcher for the sum of $2170. The ground of this attachment was that Samuel H. Thatcher had disposed of his property to defraud his creditors. The attachment was levied upon the same property covered by the conveyance of November 13, 1876, to the appellee, and, after recovery of judgment in the attachment proceedings, it was sold under special execution and bid in by the appellant for the sum of $1300, of which sum $1694.10 was paid over to or applied on the complainant's debt. Thereafter, on July 19, 1878, a sheriff's deed was duly executed to complainant for the premises thus sold.

The complainant alleges in his bill that at the time he conveyed the premises to his brother, Lewis C. Thatcher, Samuel H. Thatcher was insolvent; that said conveyance was made for the purpose of hindering, delaying, and defrauding his creditors, and that it was without consideration, and therefore void as against the complainant.

He further alleges that the purchase made of the property in the name of Lewis C. Thatcher, under the Kaucher execution in January, 1878, was collusive and fraudulent as between Samuel H. and Lewis C. Thatcher; that the $3850 paid to the sheriff at that sale, and in satisfaction of the judgment, was the money of Samuel H. Thatcher; and that the conveyance made by the sheriff to Lewis C. Thatcher was a part of the fraudulent scheme on the part of Samuel H. Thatcher *to hinder, [275] delay, and defraud the complainant in the collection of his debt.

The answer denies all of these allegations of fraud, and states that the purchase of the property by Lewis C. from his brother was in good faith, without any knowledge or notice on the part of the appellee that any fraud was intended; that the consideration was a fair and reasonable one for the property, and that it was duly paid; and that the notes executed for the purchase money were paid and were taken up by him. The answer also alleges that the defendant furnished the money with which to purchase the property when sold under execution issued in the Kaucher judgment.

Upon these questions testimony was taken on both sides. Among other proofs introduced, the complainant examined the appellee in his own behalf, or as his own witness, touching the transactions and conveyances called in question. In this examination, as a witness for the complainant, the appellee stated that the purchase was made without notice of any fraud on the part of his brother; that the negotiation leading to the purchase was made partly through an attorney (H. R. Hunt) and that the notes given for the consideration had been duly paid by him; that in purchasing the property from his brother it was to be free and clear from all incumbrances, and the deeds contained such warranty; that he knew of the existence of the Kaucher judgment before making the purchase and taking the conveyance; that he was advised that that judgment, if affirmed, would not be a lien upon the property, but it was understood and agreed between his brother and himself that if the judgment should be affirmed, and thereby become a lien on the property, then some provision should be made for his protection against the lien. The question of the lien of that judgment, in case of its affirmance in the appellate courts, was a matter upon which there was a difference of opinion, and the appellee testifies that, in view of that uncertainty he forwarded money to his brother from time to time, while the Kaucher suit was pending, for the purpose of having it in readiness to meet the judgment if it was a lien, and in the event it was not a lien upon *the property, the money could be [276]

used for the payment of the two notes which Samuel H. Thatcher held against the appellee for the original purchase money of the property.

When the Kaucher judgment was affirmed, and the execution issued thereunder was levied upon the property, the appellee directed that it be purchased in his name and for his account, and the money which he had from time to time placed in the hands of his brother for that purpose, amounting to about $4000, was applied in that way, to the extent of $3850, and credited on his notes—the first one being surrendered by his brother, and the second, which had been transferred by Samuel H. Thatcher to A. Jacobs & Company, on which a partial payment had been credited, was taken up and paid by the appellee.

It was clearly stated by the appellee that the money he placed in the hands of his brother, Samuel H. Thatcher, to be used to satisfy the Kaucher judgment, or to purchase the property sold under the execution of that judgment, was to be indorsed on the appellee's notes executed for the price of land, if the funds were required to be paid and were so used.

It is further shown by the deputy sheriff who levied upon and sold the lands in controversy, under the Kaucher judgment, that Samuel H. Thatcher informed him, before the sale under the execution took place, that his brother, the appellee, would buy the property, and that Samuel H. Thatcher would bid for the property for and in the name of his brother.

There is no testimony going to show that the value of the property at the time of its purchase in November, 1876, exceeded to any great extent the sum of $4000. There was testimony taken to show that six or eight years later the value exceeded $4000, but that during that period, prices of real estate in and around Denver had greatly advanced. It does not appear, therefore, that there was any gross inadequacy in the price of the property.

It further appears that the appellee took possession of the property, through his agents, soon after its purchase, and continuously thereafter paid taxes on the same.

The allegation of insolvency on the part of [277] Samuel H. *Thatcher at the time of the conveyance of the property to his brother is not established by the proofs. The only indebtedness of Samuel H. (aside from that of the complainant's and of the Kaucher judgments) which is shown to have been in existence in November, 1876, was a note for the sum of $1000, with a small amount of interest thereon, which he owed to Gray & Eicholtz, of Denver, amounting in all to about $1015. This indebtedness was protected by a note of $1350, made by Anna C. McCormick, secured by a deed of trust upon twenty acres of valuable land owned by her, and lying near the city of Denver. On his indebtedness to Gray & Eicholtz, Samuel H. Thatcher, on November 15, 1876, paid the sum of $1000, leaving but $15 due. Subject to that balance of $15 this note for $1350, owned by Samuel H. Thatcher, was attached by the complainant under the attachment proceedings above referred to, and was sold thereunder to the complainant for the sum of $80, who, after paying Gray & Eicholtz the balance of $15, enforced the deed of trust covering the twenty acres of land which secured the note, and, under the trustee's sale, purchased the same on January 10, 1879, for $1600.

The appellant credited Samuel H. Thatcher in this transaction with only the sum of $80, which he bid for the note of Anna C. McCormick, and it is exceedingly doubtful whether the proceeding to subject this note was sufficiently valid to have divested Samuel H. Thatcher of his title thereto, or to confer a title on the complainant, who credited the indebtedness of Samuel H. Thatcher with only the sum of $80. It admits of a very grave question whether the complainant should not have credited Samuel H. Thatcher with the sum of $1600, for which the land securing the note was sold. If the complainant is chargeable with that amount, and with the sum of $1694.10 for which the property in controversy was sold under his execution sale, then the judgment of $2170 has been more than satisfied, so that he would have no equity in this case. But, without going into that question, it is shown that every debt that Samuel H. Thatcher owed at the time of the conveyance of the property to his brother in November, 1876, was well secured. The complainant's debt of $2700, for *which [278] Samuel H. Thatcher was security, was secured by property reasonably worth $8000, while the debt to Kaucher, for about the same amount, was secured by collaterals placed in the hands of the sureties on the supersedeas bonds; and the remaining debt to Gray & Eicholtz of $1015 was protected by ample collateral in the shape of the Anna C. McCormick's note of $1350, bearing interest at the rate of twenty per cent per annum (which was lawful under the laws of the territory of Colorado) secured by a deed of trust on twenty acres of valuable land, which at the trustee's sale, the complainant bid in for $1600.

The appellant claims as a badge of fraud that on January 11, 1878, Lewis C. Thatcher appointed his brother Samuel H. Thatcher, his attorney in fact. This instrument was duly recorded January 29, 1878, and empowered Samuel H. to bargain, sell convey, or exchange for other lands and property all his (Louis C. Thatcher's) lands in the state of Colorado, and to execute all deeds or other instruments in writing therefor; and also to purchase and acquire by exchange other lands in that state—such other lands to be acquired in the name of Lewis C. Thatcher, and the title to be vested in him.

The proofs establish that Lewis C. Thatcher held other lands in the state of Colorado to which this power of attorney had application, as well as to the lands described in the deed of November 13, 1876, from Samuel H. Thatcher to his brother, the appellee. There is nothing in the fact of the execution of this power of attorney or in its provisions to raise any presumption of fraud in the original purchase.

The only proof introduced by the complainant tending in the slightest degree to contradict the testimony of the appellee was a loose conversation held between the appellant and the appellee in February, 1879. This conversa-

tion, as stated by the appellant in his testimony, in no way tends to establish fraud in connection with the conveyance of November 13, 1876, as alleged in the bill, and besides it is positively contradicted by the appellee. The statements made by Samuel H. Thatcher in in 1878 to his sureties on the supersedeas bonds, 279] *and to the deputy sheriff of Arapahoe county, tending to show that he entertained a strong dislike for the appellant, and was disposed to obstruct the collection of his judgment, are not sufficient to show fraud, even on the part of Samuel H. Thatcher, but having been made in the absence of Lewis C. Thatcher, and long after the date of the conveyance, they were clearly incompetent as against the appellee.

It is claimed for the appellee that as the appellant called and examined him as a witness touching the conveyance of November, 1876, and the consideration therefor, and of the payment of that consideration, he thereby represented him as worthy of belief, and cannot impeach or impugn his credit or his general character for truth under the authorities. 1 Greenl. Ev. § 442; *Jones* v. *People*, 2 Colo. 356. Without going into the question as to how far, or to what extent, if any, the appellant was concluded from impeaching the credit of the appellee, after having introduced and examined him as a witness touching the matters in question, it is sufficient to say, in this case, that the testimony of the appellee has not been contradicted in any substantial or material respect, and treating it as worthy of belief and uncontradicted by any independent proof, it establishes that the purchase from his brother of the lands in question was free from fraud. The testimony, taken as a whole, falls far short of establishing the allegation of the bill that the conveyance of November 13, 1876, was made for the purpose of hindering, delaying, or defrauding the complainant or the creditors of the grantor.

The relationship of the parties does not, of and in itself, cast suspicion upon the transaction, or create such a prima facie presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantor, participated in by the grantee. This proposition is so well settled that authorities need not be cited in its support.

But, again, the statute of Colorado on the subject of liens (1862) in force at the time of these transactions provided that judgments should be a lien on the judgment creditor's real estate, not exempt from execution, owned by 280] him at the time, *until the lien expires; and "the lien shall continue for six years from the entry of the judgment, unless the judgment shall be previously satisfied: *Provided*, that execution be issued at any time within one year on such judgment; and from and after the said six years the same shall cease to be a lien on any real estate as against a bona fide purchaser, or subsequent incumbrance by mortgage, judgment, or otherwise: *Provided*, that in case the party in whose favor any such judgment shall have been entered shall be restrained by injunction out of chancery or order of any judge or court, either from issuing execution or selling thereon, the time which he shall be so restrained shall not be deemed or considered as any part of said six years."

By the first section of the Act of February 13, 1874, it is provided that "when a judgment shall be rendered in any district or probate court of this territory, the clerk of such district court, or the probate judge, shall, upon demand, give to the plaintiff, his agent or attorney, an abstract thereof, setting forth the name or names of plaintiff or plaintiffs, and defendant or defendants, in full, the title of the court, the date when the judgment was rendered, and the amount of the same, with damages and costs, which shall be signed by such clerk or probate judge, and attested by the seal of the court; and when so executed, such abstract may be filed for record in the office of the clerk and recorder of the county where such judgment is rendered, or in any county in the territory, and from the date of such filing, and not before, such judgment shall become a lien upon all the real estate of defendant in the county where such abstract may be recorded, and not until such abstract shall be so filed, nor in any county other than the one in which so filed."

The Kaucher judgment having been filed for record, and having been recorded, as required by this section, the lien upon the real estate of Samuel H. Thatcher, in controversy in this suit, attached at once, as held in *McFarran* v. *Knox*, 5 Colo. 220.

But the execution was not issued within a year from the rendition of the judgment, for the reason that it was superseded *by the [281 order of the district court and of the supreme court, by the allowance of the supersedeas bonds, which suspended all proceedings under the judgment. This suspension of the proceedings comes fairly within the proviso of the Act of 1862, above quoted, and the execution, after the affirmance of the Kaucher judgment by this court, having been issued within a year from the date of its affirmance and within six years from the date of the judgment, gives the lien of that judgment priority over the complainant's attachment and judgment, so that the sale made under the Kaucher execution conveyed a superior title to that which the complainant acquired either by his attachment or by his execution, levy, and sale.

It is clearly established, as we think, that Lewis C. Thatcher furnished the money to pay off the Kaucher judgment, or to purchase the property sold under the execution issued thereon; that Samuel H. Thatcher acted only as his agent in making the purchase, and in paying over the money to the sheriff; and that the sheriff of Arapahoe county was so informed before that execution sale was made. Under these circumstances, and in the absence of any fraudulent collusion on the part of Samuel H. Thatcher and Lewis C. Thatcher in the transaction, we think that Lewis C. acquired a title to the property superior to that which complainant acquired under his attachment and execution sale; and that the complainant cannot, even as an unsatisfied creditor of Samuel H. Thatcher, successfully attack this purchase of Lewis C. Thatcher on the ground of fraud or of bad faith on the part of the appellee.

Now, without going into the equitable considerations set up in the second amended answer, which induced the court below to consider that the complainant could not enforce his judgment against the appellee (34 Fed. Rep. 435) we are satisfied that the proofs fail to establish that the transactions by which Lewis C. acquired the property in controversy were fraudulent as alleged, and that the complainant is not entitled to have the conveyances made to the appellee, either by Samuel H. Thatcher or by the sheriff of Arapahoe county, set aside.

The judgment of the court below is, therefore, affirmed.

282] MICHAEL HAUGHEY, *Appt.*, *v.* JESSE LEE ET AL.

(See S. C. Reporter's ed. 282-285.)

Void patent for interfering devices for horses—estoppel.

1. The patent granted to Michael Haughey on March 20, 1888, for an improvement in interfering devices for horses, is void for want of patentable novelty.
2. Defendants are not estopped from asserting that there is no patentable novelty in plaintiff's invention, by their seeking to procure a patent for substantially the same invention.

[No. 189.]

Argued Jan. 3, 1894. Decided Jan. 15, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, dismissing a suit for the infringement of the patent to Michael Haughey for an improvement in interfering devices for horses, and for an injunction and account. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

On October 24, 1889, Michael Haughey filed a bill of complaint against Jesse Lee, Lewis S. Lee, and Walter Lee, as partners, under the style of Jesse Lee & Sons, alleging that the United States had, on March 20, 1888, granted him letters patent for an improvement in interfering devices for horses; that the defendants were infringing complainant's rights as such patentee; and praying for an injunction and account. On January 21, 1890, the defendants filed an answer, denying infringement, and alleging the invalidity of complainant's patent, because of certain specified anticipations and because, under the condition of the art, of want of invention. Replication was duly filed, evidence was taken, and, on May 13, 1890, after argument, the court below decreed the dismissal of the bill. From this decree an appeal was duly taken and allowed to this court.

Mr. **E. J. O'Brien,** for appellant:

A subject-matter to be patentable must require invention, but it is not necessarily the result of long and painful study, or embodied alone in complex mechanism.

Carr v. *Rice*, 1 Fish. Pat. Cas. 198, 206; *Matthews* v. *Skates*, 1 Fish. Pat. Cas. 602; *Many* v. *Sizer*, 1 Fish. Pat. Cas. 17; *Blake* v. *Stafford*, 3 Fish. Pat. Cas. 294; *Crandall* v. *Waters*, 9 Fed. Rep. 659.

The statutes do not require inventions to be superior to, or better than, all other things known, in order to be patentable. It is sufficient if they are useful in themselves and new.

Shaw v. *Colwell Lead Co.* 11 Fed. Rep. 711.

To change the form of an existing machine and by means of such change to introduce and employ other mechanical powers, or, as it is termed, a new mode of operation, and thus attain a new and useful result, is the subject of a patent.

Winans v. *Denmead*, 56 U. S. 15 How. 330-341 [14: 717-721]; *Eppinger* v. *Richey*, 14 Blatchf, 307; *Calhoon* v. *Ring*, 1 Fish. Pat. Cas. 397; *Palmer* v. *Johnston*, 34 Fed. Rep. 336.

The fact that the device has gone into general use, is sufficient to turn the scale in favor of invention.

Krements v. *S. Cottle Co.* 148 U. S. 556 (37: 558).

A combination is sufficiently described, if the devices of which it is composed are named, their mode of operation given, and the new and useful result to be accomplished pointed out.

Parks v. *Booth*, 102 U. S. 96-102 (26: 54-56); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Andrews* v. *Cross*, 19 Blatchf. 294; *Blessing* v. *Trageser Steam Copper Works*, 34 Fed. Rep. 753.

The burden of proof is on the defendants to establish the defense of want of novelty.

Cantrell v. *Wallick*, 117 U. S. 689, 695 (29: 1017, 1019); *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 (23: 952); *Lehnbeuter* v. *Holthaus*, 105 U. S. 94 (26: 939); *Alden* v. *Dewey*, 1 Story, 336.

When one, with a knowledge of the state of the art, surreptitiously attempts to appropriate

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NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 827.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to assignments of patents; prior patents and publications; application and issue; claims and specifications, see note to Leggett v. Standard Oil Co. 37: 737.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

to himself, by obtaining a patent therefor, an invention which he knows does not belong to him, he should be estopped in a suit for infringement from interposing the defense of want of novelty against a person whom the patent office has decided, as against his claim, to be the original and first inventor.

Greenwood v. *Bracher*, 5 Bann. & Ard. 302.

If the peculiar invention of the patentee is embodied in the defendants' device, however it may be combined with other things, it is appropriated, the same as if it were without such other parts or connections.

Flint v. *Roberts*, 4 Bann. & Ard. 165; *Winans* v. *Denmead*, 56 U. S. 15 How. 330 (14: 717).

Mr. **Ernest Howard Hunter**, for appellees:

The patentee's device differs from these interfering devices of the prior art merely in the degree of flexibility of the connection between the leg strap and striker. These differences in degree are not patentable.

Crouch v. *Roemer*, 103 U. S. 797 (26: 426); *Smith* v. *Nichols*, 88 U. S. 21 Wall. 112 (22: 566); *Milligan & H. Glue Co.* v. *Upton*, 97 U. S. 3 (24: 985); *Union Paper Bag Mach. Co.* v. *Murphy*, 97 U. S. 120 (24: 935); *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 433); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 76); *Gardiner* v. *Herz*, 118 U. S. 180 (30: 158); *Burt* v. *Evory*, 133 U. S. 349 (33: 617); *McClain* v. *Ortmayer*, 141 U. S. 419 (35: 800); *Duer* v. *Corbin Cabinet Lock Co.* 149 U. S. 216 (37: 707).

The patent is clearly void for lack of invention in view of the prior existing "kicking chain" for horses.

Double use is not invention.

Blake v. *San Francisco*, 113 U. S. 679 (28: 1070); *Roberts* v. *Ryer*, 91 U. S. 150 (23: 267); *Pennsylvania R. Co.* v. *Locomotive Engine Safety Truck Co.* 110 U. S. 490 (28: 222); *Miller* v. *Foree*, 116 U. S. 22, 27 (29: 552, 554); *Western Electric Mfg. Co.* v. *Ansonia Brass & C. Co.* 114 U. S. 447 (29: 210); *Lovell Mfg. Co.* v. *Cary*, 147 U. S. 623 (37: 307); *Grant* v. *Walter*, 148 U. S. 547 (37: 552).

Mere substitution is not invention.

St. Germain v. *Brunswick*, 135 U. S. 227 (34: 122).

A patent can be measured only by the means by which the idea is carried into effect.

Rubber Tip Pencil Co. v. *Howard*, 87 U. S. 20 Wall. 498 (22: 410).

Mere theories of counsel cannot supersede the terms of the patent.

Hicks v. *Kelsey*, 85 U. S. 18 Wall. 670, 674 (21: 852, 853); *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554 (29: 952); *Marchand* v. *Emken*, 132 U. S. 195 (33: 332).

Commercial success is evidence only of utility and never of patentable novelty.

Hollister v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Grant* v. *Walter*, 148 U. S. 547 (37: 552).

The terms of the complainant's patent cannot be expanded to include the complainant's device.

White v. *Dunbar*, 119 U. S. 47 (30: 303); *Howe Mach. Co.* v. *National Needle Co.* 134 U. S. 388 (33: 963); *Keystone Bridge Co.* v. *Phœnix Iron Co.* 95 U. S. 274 (24: 344); *James* v. *Campbell*, 104 U. S. 356 (26: 786); *Masten* v. *Hunt*, 55 Fed. Rep. 78.

And if it were so expanded it would be clearly anticipated.

Mr. Justice **Shiras** delivered the opinion of the court:

The bill of complaint alleged infringement of the complainant's rights as grantee of letters patent, and the court below, upon issue joined and evidence taken, dismissed the bill for want of patentable novelty in the complainant's invention.

*The question thus presented for our [283 consideration is the frequent and troublesome one, whether a given patented device evinces novelty or invention, within the meaning of the law of patents, or is merely an improvement, useful perhaps, but so obviously a mere conclusion from what has gone before as not to be entitled to protection as an invention.

In the history of most of the arts, the first invention is of a striking and undeniable character; and the earlier improvements likewise usually display an unmistakable power of invention. But, after the field of invention has been mainly occupied, its becomes difficult to distinguish between improvements that involve patentable invention and those that are the result of the exercise of ordinary mechanical knowledge and skill.

The object of the invention in the present case is to provide a remedy for preventing or curing the habit of interfering in horses. This habit of interfering is the striking of one leg by the other during motion, causing injury of the part struck, and impeding the movement. Many trotting horses carry their feet closely together, and during rapid motion are liable to strike one leg with the hoof of the other, often causing a serious injury. The complainant's design is to fasten a strap on one of the legs of the horse, to which strap shall be attached a pendant that will move or swing freely between the legs, and strike the leg opposite to the one provided with the strap. The effect upon the horse is to lead him to strive to avoid the touch of the swinging pendulum. This he can only do by moving with his legs sufficiently apart to avoid it, and in this way, it is claimed, he soon loses the habit of striking.

Assuming that the complainant's device really operates so as to educate the horse to correct a habit of striking, it would certainly be a useful invention, and, if novel, would be entitled to the protection of letters patent.

It, however, appears from the evidence that interfering devices are old and of various forms, all having the same object—protection of the leg and spreading or widening the *stride. [284 The earlier devices were chiefly to protect the leg, and were in the nature of boots or bandages. However, it was soon perceived that, owing to the docile character of the horse, the interfering apparatus might be made to operate not merely as a protection to the legs when they came in contact, but to train the horse to widen his stride, so as to prevent such contact. Thus we find it stated in letters patent to John J. Davy, granted January 29, 1867, that the patentee sought to cure horses of the vice of intervention by interposing a strap upon one

of the legs to which was attached a boot with radiating bristles. The pricking of the bristles led the horse to widen his stride, and thus to effect a cure.

Charles B. Dickinson, in letters patent granted to him on October 14, 1879, claims that by the use of interfering straps to which soft and yielding loops are attached, which strike the horse's leg, he is taught to spread his gait. In the patent granted to Jefferson Young, Jr., on December 13, 1881, it is proposed to cure the habit of interference by a leather boot, which, being attached to one foot, shall lightly touch the other when the two are brought too near each other.

The complainant points to the fact that the pendant swings or moves freely from a loose joint as a feature distinguishing his invention from the preceding ones. As a matter of fact, there is evidence in the record tending to show that just such a pendant, loosely hung, was in use in Norristown, Pa., and in Philadelphia years before the date of the patent in suit. There is likewise evidence that in all the prior devices the stiff projecting striker would, in time, sag or hang down more or less, thus practically exemplifying the same method of operation as that of the complainant. It likewise appears that the idea of employing a dependent striker, loosely jointed to a leg strap, was not original with the patentee. Such a pendant was used in devices to prevent kicking, and no invention would seem to be exercised in adapting the device to the new purpose of curing interference.

The further contention, that the plaintiff's striker taps the leg to which it is attached as well as the opposite leg, presents no substantial difference. As observed by the court below, 285] *every such device used strikes and rubs the leg to which it is attached, as whenever the projecting striker is hit by the opposing leg the blow is communicated to the other. Nor is such supposed function described or referred to in the specification or claim of the plaintiff's patent.

In view, then, of the state of the art, as shown to exist by the defendants' evidence, the court below was right in finding that the complainant's device exhibits no patentable novelty.

There is no merit in the proposition made in the second assignment of error, that defendants are estopped from asserting that there is no patentable novelty in plaintiff's invention, by their conduct in seeking to procure, through one of their employés, a patent for substantially the same invention. Whether or not there is any inconsistency in trying, at one time, to get a patent for a supposed invention, and in afterwards alleging, as against a rival successful in obtaining a patent, that there is no novelty in the invention, it certainly cannot be said to constitute an estoppel. Besides, the defense of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly, and the court cannot be prevented from so declaring by the fact that the defendant had ineffectually sought to secure the monopoly for himself.

The decree of the court below is accordingly affirmed.

THE SHEFFIELD & BIRMINGHAM COAL, IRON & RAILWAY COMPANY, *Appellant*, *v.* FREDERICK W. GORDON ET AL.

(See S. C. Reporter's ed. 285-294.)

Exceptions to master's report—specific errors—correction of report—acceptance of work—entire evidence.

1. Exceptions to a master's report, which amount simply to a general denial of the facts and conclusions of the master, are too broad.
2. Exceptions to the report of a master should point out specifically the errors upon which the party relies.
3. If the report of the master is clearly erroneous in any particular, it is within the discretion of the court to correct the error.
4. Where, in a contract for the construction by plaintiff of furnaces for a company there is a stipulation that the superintendent of the company shall pass upon the work every two weeks, and if to his satisfaction, it shall be a final acceptance by the company, such acceptance in the absence of fraud or mistake by the superintendent, is conclusive upon the company.
5. In the absence of any certificate that the entire evidence taken by the master was sent up with his report, his conclusion that the defense set up by defendants is not sustained by the evidence, cannot be impeached.

[No. 176.]

Argued Dec. 20, 1893. Decided Jan. 15, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Alabama, upon an intervening petition filed by the firm of Gordon, Strobel & Laureau, in a case pending in said circuit court for the foreclosure of a deed of trust, setting up and claiming a mechanics' lien on certain furnace property to secure the payment of a large balance due to them as builders; said decree being in favor of said intervenors for the amount reported by the master. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was an intervening petition filed by the firm of Gordon, Strobel & Laureau, in a case pending in the Circuit Court for the Northern District of Alabama, for the foreclosure of a deed of trust, setting up and claiming a mechanic's lien on certain furnace property described in the petition, to secure the payment of a large balance due to them as builders. The Central Trust Company of New York, trustee under the deed of trust, and plaintiff in the foreclosure suit; the Sheffield & Birmingham Coal, Iron & Railway Company, the mortgagor; Jacob G. Chamber-

NOTE.—*As to exception, when must be taken, to be available on review*, see note to Phelps v. Mayer, 14: 643.

As to what particularity in exceptions is necessary in order to a review in appellate court, see note to Moore v. Bank of the Metropolis, 10: 172.

That, in equity cases, admission of illegal evidence is not, of itself, ground of reversal or of bill of exception, see note to Field v. United States, 9: 94.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, see note to Parks v. Turner, 13: 883.

lain, who was receiver in the foreclosure suit, and one Charles D. Woodson, as holder of certain bonds of the company, were made defendants to the petition. Petitioners' claim arose under a contract whereby they agreed to construct for the Alabama & Tennessee Coal & Iron Company, the predecessor of the appellant corporation, three iron blast furnaces at Sheffield, in Colbert county, Alabama, for $564,000, ninety per cent of which amount was to be paid from time to time during the construction of the furnaces, and which ninety per cent had been practically paid as agreed between the parties, the claim of the appellees being the balance, together with some amounts alleged to have been paid out for excessive freight charges, and upon material furnished to repair and reconstruct one of the furnaces.

287] *Joint and several answers were filed by the defendants, setting forth certain defenses to the petition, and demanding proof of each allegation thereof. It was admitted that the defendant company had become liable for whatever amount was due the petitioners by the orginal Alabama & Tennessee Coal & Iron Company. The main defense was that Gordon, one of the intervenors, had undertaken to supervise the blowing in of one of the three furnaces, in which operation the furnace was ruined and subsequently abandoned; that in the blowing in of a second furnace, it suffered such damage that it required about six months to put it in good condition; that the furnaces were not built according to the plans, specifications, and agreements of the contract, but were constructed in so faulty and inadequate a manner that their daily expense for coal was much larger than it would have been had they been properly constructed.

A decree was entered by consent referring the case to a special master to examine and report the facts as to the existence of the contract, the construction of the furnaces, the payments made therefor, the amount due the petitioners, the existence of their lien, and also to report upon all matters of defense stated in the answer.

In pursuance of this order the master took the depositions of a number of witnesses, found the facts, and reported a balance due of $57,808.12, with interest from September 18, 1888. Exceptions were filed to this report by the defendants, which upon argument were overruled by the court, and a final decree entered in favor of the intervenors for the amount reported by the master. From this decree an appeal was taken to this court.

Mr. **Henry Tompkins** for appellant.

Messrs. **W. A. Gunter** and **R. C. Brickell** for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

An interlocutory decree was entered in this case by consent, and the questions in issue **289**] arise upon exceptions to the report *of the special master, to whom the case was referred to take proofs, and to report the amount found by him to be due. He was not, however, required to report the testimony. Defendants excepted to so much of said report and the findings of the master in reference thereto as determined—

"1. That the defenses set up by the defendants are not sustained by the evidence;

"2. That the petitioners, Gordon, Strobel & Laureau, are entitled to be paid the contract price for their work and material;

"3. That the sum of $57,808.12, with interest from the 18th day of September, 1888, is the amount due the intervenors; and

"4. That the intervenors have a lien upon the property described in their petition; and for grounds and reasons for such exceptions they assign the following:

"1st. Because the evidence in the case sustained the defenses set up by the defendants; and showed, 2d, that the work and materials done and furnished by intervenors were not up to the requirement and guaranty of their contract, by which the value of the plant, as built and equipped, was worth sixty or seventy-five thousand dollars less than the contract price; and, 3d, because such report is contrary to the weight of testimony on each of the matters so reported."

There are two difficulties in the way of considering the case upon these exceptions.

(1) The exceptions themselves are too broad, and amount simply to a general denial of the facts and conclusions of the master. The first three are to the finding of the master that the defenses are not sustained, that the petitioners are entitled to the contract price, and that the sum awarded is the amount due. In other words, they are general denials of the merits of the claim. The fourth is a denial of petitioners' lien because the evidence sustained the defenses, because the work was not up to the requirements of the contract, and because the report was against the weight of testimony. This exception is scarcely more definite than the other. There are no exceptions here to the findings of the master, now assigned *as error, that the intervenors did not [290] guarantee that the work or plant, *as a whole*, should be adequate in design, strength, and capacity for the purposes intended and specified; or to the finding that the petitioners were entitled to be paid the freight excess payments and extra material furnished for the construction of the furnaces, or that the furnaces had attained the product in the making of pig iron, as specified in the contract.

Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions. The court, too, ought not to be obliged to rehear the whole case upon the evidence, as the main object of a reference to a master is to lighten its labors in this particular. In the case of *Dexter* v. *Arnold*, 2 Sumn. 108, an exception to a report of a master that he had stated and certified that there was due on a certain mortgage a certain sum when he ought to have reported that there was nothing due, was held by *Mr. Justice* Story to be quite untenable. "It is too loose and general in its terms," said he, "and points to no particulars. It comes to nothing, unless specific errors are shown in the report; and

those errors, if they exist, should have been brought directly to the view of the court in the form of the exception itself. At present it amounts only to a general assignment of errors, and the argument on this exception has shown none."

The same rule was laid down in *Story* v. *Livingston*, 38 U. S. 13 Pet. 359 [10: 200], wherein the exceptions to the report of a master were held to be too general, indicating nothing but dissatisfaction with the entire report; and furnishing no specific grounds, as they should have done, wherein the defendant had suffered any wrong, or as to which of his rights had been disregarded. The court observed that "exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to." 291] The court cited with *approval the case of *Wilkes* v. *Rogers*, 6 Johns. 566, wherein it was said that exceptions to reports of masters in chancery are in the nature of a special demurrer; and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted.

So in *Greene* v. *Bishop*, 1 Cliff. 186, 191, *Mr. Justice* Clifford held that "general allegations of error, without pointing to any particulars, are clearly insufficient, for the reason that, if allowable, the losing party might always compel the court to hear the cause anew, and should that practice prevail, references such as are made in this case would become both useless and burdensome, as they would only operate to promote delay and increase the expenses of litigation, without relieving the court from any of the labor of the trial or ever accomplishing anything of value to either party." See also *Stanton* v. *Alabama & C. R. Co.* 2 Woods, 506, 518.

That this is not a novel practice in Alabama is evident from a number of decisions of the supreme court of that state affirming the general doctrine in the most specific terms. *Alexander* v. *Alexander*, 8 Ala. 796; *Royall* v. *McKenzie*, 25 Ala. 363; *O'Reilly* v. *Brady*, 28 Ala. 530; *Mahone* v. *Williams*, 39 Ala. 203. See also *White* v. *Hampton*, 10 Iowa, 238; *Reed* v. *Jones*, 15 Wis. 44; *Smalley* v. *Corliss*, 37 Vt. 486, 492. Cases are referred to a master, not on account of his presumed superior wisdom, but to economize the time and labor of the court, and as exceptions are usually filed to his report, if they are so general as to require a rehearing of the entire case, there is really nothing saved by a reference.

It is true that if the report of the master is clearly erroneous in any particular, it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case. It would appear from the report and the recital in the final decree of the court that the main contest was over the construction of a certain guaranty in the contract that "all the work" was "to be done in good and workmanlike manner and of suitable material, and each part to be adequate in de- 292]sign, strength, capacity, and *workmanship for the purposes for which it is intended, for the sum of $564,000." Immediately following this is a stipulation that the "superintendent shall pass upon the work every two weeks, and if to his satisfaction it shall be a final acceptance by" the company "so far as done. But if not in compliance with the contract, and to his satisfaction as to the quality of material or character of workmanship" petitioners agreed "to make it so as rapidly as possible." The evidence showed without contradiction that one Doud, who was the superintendent of the Coal & Iron Company, made inspections and supervised the work from time to time, and accepted it when, in his judgment, it was in compliance with the contract. The contractors claimed to have finished the work on the 8th of August, 1888, and requested its final acceptance. The president of the Sheffield & Birmingham Coal, Iron & Railroad Company, which had become, by consolidation with the Alabama & Tennessee Coal & Iron Company, responsible on this contract, referred the matter of final acceptance to Mr. Doud, the superintendent, who on the 18th of August accepted, in writing, the plant as completed according to the terms of the contract.

The master and the court agreed in holding that the intervenors did not guarantee in their contract that the work or plant *as a whole* should be adequate in design, strength, capacity, and workmanship for the purposes intended and specified, and that, as an acceptance of the work bi-weekly as it progressed was shown, and a further acceptance of the whole on completion of the contract was made by the superintendent in compliance with the terms of the contract, such acceptance in the absence of fraud or mistake on the part of the superintendent was conclusive upon the company. We see no reason to question the correctness of this conclusion. It is difficult to see what effect should be given the acceptance of the work by the superintendent, if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms. *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549 [29: 255]. There was, it is true, a proposal for an additional remuneration of $20,000 to guarantee a *certain pro- 293 duct, with an additional proposal that neither the ten per cent reserved in the hands of the company, nor the $20,000, should become due until the specified product had been attained; but it does not appear that this proposal had ever been accepted, nor any agreement made to pay the extra $20,000 for the attainment of this product. The only guaranty in the proposal as accepted was that each part—by which we understand each part as related to every other part—should be adequate in design, strength, capacity, and workmanship for the purpose to which it was intended. In view of the other provisions, we think the court was correct in holding that there was no guaranty intended of the plant as a whole.

(2) There is another objection, however, to our examination of the facts in this case. The order referring the case to the special master, though minute in its details, did not require him to send up the testimony; neither does he purport to do this in his report; and while a number of depositions taken before him are filed, there is nothing to indicate that these were all the testimony in the case. He finds in this connection that the defenses set up by the defendants are not sustained by the evidence, and that the petitioners, Gordon, Strobel &

Laureau, are entitled to be paid the contract price for the material.

In the absence of any certificate that the entire evidence taken by the master was sent up with his report, it is impossible to impeach his conclusion in this particular. *Scotten* v. *Sutter*, 37 Mich. 526; *Nay* v. *Byers*, 13 Ind. 412; *Fellenzer* v. *Van Vulcah*, 95 Ind. 128. There is no presumption that all the testimony was sent up.

(3) A further objection is made that the proofs contained in the record do not disclose the filing of the claim of lien in the office of the judge of probate of Colbert county, as required by the statute. The master, however, finds that on the 18th of January, 1889, a verified statement of the amount claimed to be due on this contract was filed with the judge of probate of Colbert county in substantial conformity with section 3022 of the Code of Alabama of 1886, and there is no evidence to im-294]peach *his finding in that particular, and no objection or exception taken to the want of proof upon this point. There would appear to have been, from a memorandum we find in the testimony, a mechanics' lien introduced in evidence as an exhibit; but as it is not attached to the record, it is impossible to say that it does not bear out the finding of the master. The statute of Alabama requires a statement in writing, claiming a lien, to be filed in the office of the judge of probate within six months after the indebtedness to the lien holder has accrued, and as it appears that the work in this case was finished on August 8, 1888, and accepted August 18, that the unpaid residue of the consideration was not due for several months thereafter, and that suit was begun on February 11, 1889, there seems to be nothing in the objection that proceedings were not taken within the time required by law.

Upon the whole, we think the decree of the court below was correct, and it is, therefore, affirmed.

THE FORT WORTH CITY COMPANY,
Plff. in Err.,
v.
THE SMITH BRIDGE COMPANY.

(See S. C. Reporter's ed. 294-302.)

Case tried by the court—stipulation of counsel—powers of corporations—power to build bridge—estoppel—liability on contract.

1. Where a case has been tried by the court without a jury, this court can only inquire whether the facts found in the special findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon rulings on matters of law properly preserved by bill of exceptions.
2. Where the trial was by the court without a jury this court cannot take notice of a stipulation of counsel as to the evidence bearing on a finding of the court.
3. Corporations have only such powers as are granted and the powers incidental thereto.
4. A corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, and to sell, and to make any contract essential to the transaction of its business, are expressly granted, possesses the incidental power to incur liability for building a bridge to secure better facilities for transit to and from the lots or lands, which it is its business to acquire and dispose of.
5. Where a corporation has power to enter into a contract, and the contract has been fully performed by the other party, and the corporation has had the full benefit thereof, the latter cannot be allowed to say that the power was not properly exercised.
6. A corporation having received benefits at the expense of the other contracting party, cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform, and would still remain liable on its contract, otherwise within its lawful powers.

[No. 565.]

Submitted Jan. 3, 1894. Decided Jan. 15, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of plaintiff, the Smith Bridge Company against the Fort Worth City Company, for the amount due from the latter company for the building of a bridge for the former company across the Trinity river near Fort Worth. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

The Smith Bridge Company, a private corporation, incorporated under the laws of Ohio and having its domicil in the city of Toledo in that state, brought this action against the Fort Worth City Company, incorporated under the laws of, and having its domicil in the city of Fort Worth, in the state of Texas, in the Circuit Court of the United States for the Northern District of Texas, and alleged that on May 19, 1888, the parties entered into a certain contract whereby the bridge company, for the consideration of $8166.66 to be paid to it by the defendant company, agreed to build for the latter a bridge across the Trinity river near Fort Worth, at a point just north of the public square in that city to be designated by the city engineer, and in accordance with specifications furnished by him. It was further averred that the contract price of the bridge was $24,500, and that the city of Fort Worth and the county of Tarrant had agreed with the bridge company, each to pay one third of the cost, and had done so; that the bridge company constructed the bridge according to the contract; that the consideration to be paid by the Fort Worth City Company was contracted to be paid in the first mortgage bonds of that company and the North Side Street

NOTE.—*As to construction of grants to corporations; corporations have only powers granted or those necessary to carry into effect powers granted; can act only in the mode prescribed by the law creating*, see note to Charles River Bridge Proprs. v. Warren Bridge Proprs. 9: 773, and to Beaty v. Knowler, 71: 813.

As to mode of executing powers conferred; what powers are not implied, see note to Beaty v. Knowler, 7: 813.

As to powers of a corporation beyond the territorial limits of the sovereignty which created it, see note to Runyan v. Coster, 10: 382.

As to citizenship of corporation, with reference to jurisdiction of courts over them, see note to National SS. Co. v. Tugman, 27: 87, and to Hope Ins. Co. v. Boardman, 3: 38.

Railway Company, and that the defendant had failed and refused to deliver the bonds, which were of the face value of $8166.66.

The defendant company answered by way of demurrer and special exception that the petition did not disclose the purposes for which the two corporations were incorporated; nor any power or authority in the defendant to use its funds and property for the purpose of constructing the bridge; general denial; and also that the contract sued on was without authority on the part of the board of directors and officers of the Forth Worth City Company, which was organized "for the purchase, subdivision, and sale of land in cities, towns, and villages," under the provisions of title twenty 296] of the Revised *Statutes of Texas; that the bridge was to be and was built for the use and benefit of the general public on one of the public streets of the city; and was not under defendant's control or owned by it; that defendant company was not to have and did not have any property in the same or other right to use the same than such as the public in general had; that, therefore, the contract was illegal and unauthorized; and that the contract was also void in providing that the defendant should deliver to the plaintiff bonds executed by itself and by the North Side Street Railway Company, the latter being a separate and independent corporation; and that it could not and did not obligate itself to deliver any bonds executed by any other corporation, and was not authorized to legally acquire the bonds of any other corporation. Defendant further stated "that the sole and only benefit it ever expected to derive from the construction of said bridge was the enhancement of its property by making it more convenient of access and so more readily salable; that the contract made by the plaintiff with the city of Fort Worth required the completion of the bridge by the first day of November, 1888, and with reference to this stipulation, the contract here sued on was entered into; that the value of the bridge to the defendant depended on its early completion;" that the bridge was not completed until at least six months after the time stated in the contract with the city, and defendant had been greatly damaged by the failure to complete it, "for that at the time the said contract was made there was an active demand for real estate in Forth Worth and its suburbs, which defendant expected would continue to the time, and for a long time after the date when the bridge was to be completed;" and that had the bridge been completed a considerable amount of its property could have been sold at a profit.

Plaintiff thereupon filed its supplemental petition in reply, excepting to the special answers of the defendant, and alleging that, at the time of making the contract with the defendant, the latter owned a large tract of land lying on the north side of the Trinity river, over which river the bridge was built, which land it had subdivided into lots, and was offer 297] ing them *for sale; that the river separated the land from the city of Fort Worth; that it was necessary, in order to accomplish a ready sale of the lands, that the company have a ready means of access from the city thereto, and that the company had this object in view when it made the contract sued on with the plaintiff; that the erection of the bridge afforded such means of access from the city to the lands, and immediately upon the completion of the bridge the North Side Street Railway Company constructed across the bridge a railway connecting the city of Fort Worth with the lands. It was further alleged that the latter company was organized in the interest of the defendant for the purpose of bringing its lots into the market; that the stockholders of both companies were for the most part the same; that by reason of the erection of the bridge and the operation of the street railway the value of the lots was greatly enhanced and the sale thereof was promoted; and that the defendant made this contract for the purpose of promoting its business, and expected to use the same in the transaction thereof after its construction by the plaintiff under the contract; and that the defendant, having contracted with plaintiff to construct the bridge, and having accepted and used it, was estopped from denying the validity of the contract on the ground of want of power in the defendant to make the same.

The case coming on to be tried, the exceptions to plaintiff's petition and to defendant's answer were overruled, and a jury having been waived by written stipulation, the cause was submitted to the court for trial, whereupon it found the law and facts for the plaintiff and entered judgment in its favor for the sum of $9633.02, with interest and costs; and findings of fact and conclusions of law were made and filed as follows:

"The court makes the following special findings of fact on the issues made in the case:

"1. The defendant, the Fort Worth City Company, was at the time of making the contract with the plaintiff here sued on and is now a private corporation created and organized for the purchase, subdivision, and sale of land in cities, towns, and villages under the general laws of the state of Texas relating to private corporations.

*"2. That on the 16th day of May, [298 1888, the city of Fort Worth, a municipal corporation of the state of Texas, entered into a contract with the plaintiff herein, for the construction of a certain bridge on one of the streets of said city where it crosses the Trinity river in said city, it being provided in the said contract that one third of the contract price of said bridge—that is, eight thousand one hundred and sixty-six dollars and sixty-six and two thirds cents—should be paid by the defendant herein, and a like amount by Tarrant county, which is also a municipal corporation of said state, the bridge to be completed on or before the first day of November, 1888, the plaintiff being required to give a bond within twenty days from the 16th day of May, 1888, payable to said city, in the sum of ten thousand dollars, for the completion of said bridge on or before November 1, 1888, in accordance with certain specifications, said bond to be made part of the contract with the said city.

"3. That on the 19th day of May, 1888, the president and secretary of the defendant corporation, owning together eighty eight per cent of its stock, executed a contract in its name, obligating it to pay said sum of $8166.66⅔ cents in the joint first mortgage bonds of the

defendant and the North Side Railway Company, another separate and distinct corporation, in which said president and secretary owned likewise said per cent of stock, said bonds secured on the lands, franchises, and possessions of both corporations, the said bonds to be delivered on the building of said bridge according to the terms of said contract between plaintiff and defendant and the said contract between plaintiff and the city of Fort Worth to the acceptance of the street and alley committee and the city engineer of said city, and the turning of the same over to said city completed in accordance with the above mentioned contracts and the contract between plaintiff and Tarrant county.

"4. That the bridge was not completed and and turned over to the city of Fort Worth until the 19th day of March, 1889, but the delay was caused neither by the plaintiff nor the defendant herein, but altogether by the city of Fort Worth, and time was not of the essence of the contract.

299| *"5. That the said bridge was to be and is a part of a public street of the incorporated city of Fort Worth, and the defendant was not to have nor has it ever had any property interest in or control over the same or use of it, except as a part of the general public.

"6. The defendant was not damaged by the delay in the completion of the bridge.

"7. That the bridge when completed and turned over to the said city was in substantial compliance with the contracts mentioned herein.

"8. That a proper demand was made by the plaintiff on the defendant for the delivery of the said bonds, and the defendant refused to deliver the same on said demand.

"9. That Tarrant county and Fort Worth paid their proportional part of the sum of

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"10. That the bridge was expected to enhance the value of the property owned by the defendant by furnishing another mode of access thereto from the city of Fort Worth.

"And on the findings of fact the conclusions of law are as follows:

"1. That the defendant had the power to make the contract here sued on, and that the same is therefore legal, valid, and binding upon it.

"2. That the plaintiff is entitled to judgment in this court for the sum of eight thousand one hundred and sixty-six dollars and sixty-six and two thirds cents, with eight per cent interest from the 19th day of March, 1889."

Thereupon this writ of error was brought.

Mr. **Thos. P. Martin** for plaintiff in error.

Mr. **M. L. Crawford** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This case having been tried by the court under the statute, we can only inquire whether the 300|facts found in the special *findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon rulings on matters of law properly preserved by bill of exceptions. Two bills of exception were taken, but they simply present the same questions as the special findings of fact and the conclusions of law deduced therefrom. A stipulation of counsel as to the evidence bearing on the tenth finding appears in the record; but of that we cannot take notice. *Chicago Tyre & S. Works* v. *Spalding*, 116 U. S. 541 [29: 720].

Of the five errors assigned in the brief of the counsel, the first, second, fourth and fifth present the question in various aspects of the power of the Fort Worth City Company to make the contract sued on, or incur the liability for which recovery was had, and the third relates to the failure of the bridge company to complete the bridge within the time stipulated in its contract with the city of Fort Worth.

The court found that the bridge was to be completed on or before November 1, 1888, and that bond was required to be given to the city to secure that result; that it was not completed and turned over until March 19, 1889, but that the delay was caused not by the plaintiff or defendant, but altogether by the city; that time was not of the essence of the contract, and that the defendant was not damaged by the delay. The contract between these parties is attached to the petition, and refers to the contracts by the bridge company with the city and the county, the defendant agreeing to pay the stipulated sum in consideration of the building and construction of the bridge in accordance with the specifications and to the acceptance of the city engineer and the city, and the turning of the bridge over to the city, completed in accordance with this and the other contracts; but as we agree with the court that time was not of the essence, and as the court has found as matter of fact that plaintiff was not in default, and that the defendant was not injured by the delay, the result necessarily follows that the third error assigned is not well taken.

The Fort Worth City Company was organized under the provisions of title twenty of the Revised Statutes of the state of Texas relating to private corporations and the amendments *thereto, "for the purchase, subdivision |301 and sale of land in cities, towns, and villages," as authorized by article 566 of those statutes (one of the articles under title 20) as amended by chapter 61 of the Laws of 1885. Sayles, Tex. Civ. Stat. 212; Tex. Laws 1885, 59.

The general rule is that corporations have only such powers as are granted and the powers incidental thereto, and in arriving at a conclusion as to the powers of this corporation the applicable provisions of the title under which it was organized must be considered; legislation which will be found to be in harmony with the common law.

Article 575 provided that every private corporation as such has power "to enter into any obligation or contract essential to the transaction of its authorized business;" and article 589, that "no corporation created under the provisions of this title shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation." Sayles, Tex. Civ. Stat. 217, 219.

In *Green Bay & M. R. Co.* v. *Union Steamboat Co.* 107 U. S. 98, 100 [27: 414], it was said: "The charter of a corporation, read in connection with the general laws applicable to

it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

This corporation was formed under a general law containing, in addition to the provision for the creation of such a corporation, the other provisions we have quoted.

The question of power is reduced, therefore, to this: Whether a corporation created for the purpose of dealing in lands, and to which the powers to purchase, to subdivide, and to sell, and to make any contract essential to the transaction of its business, are expressly granted, possesses as fairly incidental, the power to incur liability in respect of securing better facilities for transit to and from the lots or lands, which 302] it is its business *to acquire and dispose of? We entertain no doubt that under these findings the defendant company possessed the power to enter into the contract in question, and that the contract having been fully performed by the bridge company, and the defendant company having the full benefit thereof, the latter cannot now be allowed to say that the power was not properly exercised.

The object of the creation of the corporation was the acquisition and sale of lands on subdivision, and it cannot successfully be denied that that object would be directly promoted by the use of legitimate business methods to render the lands accessible. This involved the expenditure of money or the assumption of liability, but there is no element in this case of any unreasonable excess in that regard, or of the pursuit of any abnormal and extraordinary method. The result sought was in accomplishment of the legitimate objects of the corporation and essential to the transaction of its authorized business, and the power to make the contract was fairly incidental if not expressly granted.

Reference is made to section 6 of article 12 of the Constitution of Texas, which provides: "No corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." But if this section be in any way applicable and could be regarded as invalidating so much of the contract as provided that the consideration should be paid in bonds, which is not to be conceded, the company "having received benefits at the expense of the other contracting party, cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform," and would still remain liable on its contract, otherwise within its lawful powers. *Hitchcock* v. *Galveston*, 96 U. S. 341, 351 [24: 659, 662]; *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24, 58 [35: 55, 68].

Judgment affirmed

*SAM HICKORY, *Plf. in Err.*, [303
v.
UNITED STATES.

(See S. C. Reporter's ed. 303-317.)

Comparison of handwriting—writings specially prepared for comparison—objection waived—disputing one's own witness—contradictory statement—charge to jury—self-defense—erroneous instruction—exceptions.

1. According to the rule of the common law, the genuineness of disputed handwriting could not be determined by the court and jury by comparing it with other handwriting of the party, but an exception to the rule was that if the paper admitted to be in handwriting of the party or to have been subscribed by him was in evidence for some other purpose in the cause, the paper in question might be compared with it by the jury.
2. Writings specially prepared for comparison are not admissible; a witness cannot corroborate his own testimony by a preparation of specimens of his writing for the purposes of comparison.
3. On the trial of a criminal case, the objection to a witness that his name was not on the indictment, if not made until the examination in chief of the witness was concluded, is waived.
4. When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony, and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness.
5. As to witnesses of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown, but proof of the contradictory statements of one's own witness, voluntarily called and not a party, are generally not admissible.
6. A criticism of the court, in the charge to the jury, against the declaration that it is cruel and criminal to convict upon circumstantial evidence, although made with great vigor, is not reversible error.
7. Whether or not a particular homicide is committed in repulsion of an attack, and, if so, justifiably, are questions of fact, not necessarily dependent upon the duration or quality of the

NOTE.—*As to evidence of contradictory statements made by witnesses to impeach; in regard to what facts, inquired of on cross-examination, the witness may be contradicted*, see note to Ellicott v. Pearl, 9: 475.

As to when proof can be introduced, after impeachment of witness by contradictory statement made out of court, that he has made statements consistent with his evidence, see note to Conrad v. Griffey, 13: 779.

As to the scope and limits of a cross-examination, see note to Rea v. Missouri, 21: 707.

As to use of memoranda to refresh memory of witness, see note to Republic F. Ins. Co. v. Weide, 20: 894.

As to signature, what is sufficient; signature by mark, see note to Zacharie v. Franklin, 9: 1035.

As to proof of handwriting or signature, see note to Rogers v. Ritter, 20: 417.

As to effect of refusal to produce, or destruction of paper, see note to Hanson v. Eustace, 11: 416.

For what purposes evidence of intoxication may be given by one accused of crime, see note to Hopt v. Utah, 26: 873.

As to when confessions of accused are evidence against him, see note to Hopt v. Utah, 28: 262.

reflection by which the act may have been preceded.

5. On a trial for murder, an instruction to the jury which tests the question whether a defendant was entitled to excuse on the ground of self-defense, or acted in the heat of passion, by the deliberation with which a judge expounds the law to a jury, or the jury determines the facts, or with which judgment is entered and carried into execution, is erroneous.

6. Exceptions to instructions must be brought to the attention of the court before the retirement of the jury so as to enable the judge to correct error, if there be any, in his instructions to them.

[No. 841.]

Submitted Oct. 19, 1893. Decided Jan. 15, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment of conviction, and sentence to death of Sam Hickory, a Cherokee, for the murder of Joseph Wilson, a United States Deputy Marshal. *Reversed with directions to grant a new trial.*

Statement by *Mr. Chief Justice* **Fuller:**

Sam Downing, alias Sam Hickory, and Tom Shade, two Cherokees, were indicted and tried for the murder of Joseph Wilson, a United States deputy marshal, the trial resulting in the **304**]*acquittal of Shade and the conviction of Hickory, who, being sentenced to death, prosecuted this writ of error. As stated in the brief for the government, Hickory admitted that he killed Wilson, but claimed that he was the attacking party; that the marshal came to arrest him for a violation of the liquor laws, and after the arrest, and while he was proceeding toward his house to get a saddle, the marshal began firing at him; that he ran into the house and an affray occurred there, in which there was shooting by both, until the marshal was killed; that he concealed the body in a ravine, where it was found two or three days later; then hid in the neighborhood for awhile, and wandered about until he was arrested among the Osage Indians. One Carey testified that he went with the marshal to show him where Hickory lived, and that it was arranged that he should remain in the woods while Wilson went to the house and made the arrest; that after he had arrested Hickory he would fire his pistol to notify Carey that he had done so, so that Carey could meet him at a designated point; that in about half an hour Carey heard a shot, followed by several others.

There was some evidence that Wilson's skull had been fractured; also that Wilson's horse was found dead, with his throat cut, lying in an opposite direction from the body; and an attempt to show that Wilson after being wounded by Hickory was finally killed with an axe by Shade.

A letter written in the Cherokee alphabet, and claimed to be in Hickory's handwriting, to Ollie Hickory alias Williams, was put in evidence and marked A, and was interpreted as follows: "October 15th, 1891. Ollie: I write you a few lines. You must never disclose how this is about Tom Shade. Just say that I was the only one that did it. You must never tell anybody that he killed the horse and all that he done. I tell you you must not. That is all now. I write in haste. Sam."

The letter was identified as in Hickory's handwriting although he denied it, and was admitted under exception on the part of the defendants. Joseph Shade, a witness for the defense, produced a paper on cross-examination, not relevant in itself, which was marked X, which he testified was in *Hicko- [**305** ry's handwriting and which seems to have been put in evidence without objection.

An expert in Cherokee handwriting testified on behalf of the defendants, on comparison of Exhibits "A" and "X," that they were written by different persons, and that the only resemblance was in the signatures. Another witness testified that "A" was not in Hickory's hand writing but that "X" w

Mr. **A. H. Garland,** for plaintiff in error:

A writing made in the presence of the court and jury by a party whose signature is in dispute, may be submitted to the jury for the purpose of comparison.

Chandler v. *LeBarron*, 45 Me. 534.

The Revised Statutes of the United States, § 1038, provide that "when any person is indicted for a capital offense, a copy of the indictment, list of jurors and witnesses shall be delivered to him at least two entire days before the trial."

The objection and motion to exclude the testimony of Charles Snell, was seasonably made.

People v. *Moran*, 48 Mich. 639; *Reg.* v. *Frost*, 9 Car. & P. 147; *Rex* v. *Gordon*, 2 Dougl. 591; *People* v. *Hall*, 48 Mich. 487, 42 Am. Rep. 477; *United States* v. *Neverson*, 1 Mackey, 152; *United States* v. *Williams*, 1 Cranch, C. C. 178.

If a witness state facts against the interest of the party calling him, another witness may be called by the same party to disprove those facts.

2 Phil. Ev. 448; *Rockwood* v. *Poundstone*, 38 Ill. 201; *Rindskoph* v. *Kuder*, 145 Ill. 612.

A party cannot impeach his own witness in the sense of proving him unworthy of credit, but may show he was mistaken, may call witnesses for that purpose or examine him as to other statements for the purpose of reconciling or correcting his previous statements, even though the effect may be unfavorable to his credibility.

Bullard v. *Pearsall*, 53 N. Y. 230; *Smith* v. *Clews*, 14 Abb. N. C. 471, *note.*

"Inconsistent statements can be proven if brought to the witness' attention."

Montgomery v. *Knox*, 23 Fla. 595.

"A state's witness on a criminal trial may be contradicted at the instance of the state by evidence of different statements made out of court."

Conway v. *State*, 118 Ind. 482, 11 Crim. L. Mag. 640; *Smith* v. *Briscoe*, 65 Md. 561; 2 Best, Ev. § 645; Phil. & Am. Ev. 905.

The effect of the charge, here complained of, was to awe jurors into giving to any circumstances prejudicial to defendants, undue weight, and into minimizing those favorable to them.

The very language imports a heated, vehement argument, both in language, manner and emphasis, against the defendants that is unquestionably error, especially when, after a thorough search of the charge, we find no

presentation or summing up of facts for the defendants.

Reiger v. *Davis*, 67 N. C. 185; *State* v. *Simmons*, 6 Jones L. 21; *Thorp* v. *Goewey*, 85 Ill. 612; *Thompson* v. *Force*, 65 Ill. 370; *Merritt* v. *Merritt*, 20 Ill. 65, 80; *Ludwig* v. *Sager*, 84 Ill. 99; *Chicago, B. & Q. R. Co.* v. *Griffin*, 68 Ill. 499, 506.

A practice seems to be growing up to draw out instructions to a very great length and injecting into them an argument of the case. This is bad practice and should not be encouraged.

Thompson, Charging the Jury, pp. 81, 82, *Chapman* v. *Cawrey*, 50 Ill. 512.

The judge who undertakes to present the evidence to the jury, must array before them all the material evidence on either side.

It is obviously wrong for him to single out an isolated fact, and express himself strongly upon it to the undervaluing of the rest of the evidence.

Thompson, Charging the Jury, p. 111, § 80; *Parker* v. *Donaldson*, 6 Watts & S. 132; *Johnson* v. *Kinsey*, 7 Ga. 428.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error:

On comparison of handwritings the authorities are in conflict. They are set forth in the briefs of counsel in *Moore* v. *United States*, 91 U. S. 270 [23: 346]; and in 9 Am. & Eng. Enc. Law, 279–291.

Evidence by comparison of hands is not admissible where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands.

Strother v. *Lucas*, 31 U. S. 6 Pet. 763 [8: 573]; *Rogers* v. *Ritter*, 79 U. S. 12 Wall. 317 [20: 417].

A witness cannot fabricate evidence to be used in his own favor upon the issue of genuineness of handwriting.

1 Whart. Ev. § 706.

On cross-examination the witness may be asked to write in the presence of the jury for the purpose of testing his credibility.

Chandler v. *LeBarron*, 45 Me. 534; *Bronner* v. *Loomis*, 14 Hun, 341; *Stranger* v. *Searle*, 1 Esp. 14.

The testimony of a witness whose familiarity with defendant's handwriting was derived from seeing him write for the express purpose of qualifying the witness as an expert is inadmissible.

1 Greenl. Ev. § 577; *Keith* v. *Lothrop*, 10 Cush. 453; *Reese* v. *Reese*, 90 Pa. 89, 35 Am. Rep. 634; *King* v. *Donahue*, 110 Mass. 155, 14 Am. Rep. 589.

A signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard of genuineness.

Doe v. *Sackermore*, 5 Ad. & El. 703; *Com.* v. *Allen*, 128 Mass. 46, 35 Am. Rep. 356; *Gulzoni* v. *Tyler*, 64 Cal. 334; *Williams* v. *State*, 61 Ala. 33.

The objection that defendant had not been served with any notice of intention to call a witness, as required by section 1033 of the Revised Statutes, was waived.

Logan v. *United States*, 144 U. S. 263 [36: 429].

Objections to the competency of the witness must be made, if at all, before his examination in-chief.

Benson v. *United States*, 146 U. S. 325 [36: 991].

The trial court may have a discretion to entertain a motion to strike out in case of inadvertence.

Miller v. *Montgomery*, 78 N. Y. 282; *Donelson* v. *Taylor*, 8 Pick. 390; *Shurtleff* v. *Willard*, 19 Pick. 202; Whart. Crim. Ev. § 359; 1 Greenl. Ev. § 421.

The question of waiver must be held to be addressed to the discretion of the trial court and not reviewable here except, if at all, in the case of abuse of discretion.

Miller v. *Montgomery*, *supra*; *Pence* v. *Langdon*, 99 U. S. 578 [25: 420].

A witness who surprises the party calling him may be cross examined as to previous statements in contradiction to his present testimony; nevertheless the party calling him is bound by his answers as to these matters, and other witnesses may not be called to testify that he made contrary statements before the trial.

1 Whart. Ev. § 549; Greenl. Ev. (Redfield's ed.) § 444a; Best. Ev. (Chamberlayne's ed.) § 645; Stephen, Ev. (Chase's ed.) 230 note; *Cox* v. *Eayres*, 55 Vt. 24, 45 Am. Rep. 583; *Hurley* v. *State*, 4 L. R. A. 161, 46 Ohio St. 320; *Stearns* v. *Merchants Bank of Cleveland*, 53 Pa. 490; *Adams* v. *Wheeler*, 97 Mass. 67; *Bullard* v. *Pearsall*, 53 N. Y. 230; *Smith* v. *Price*, 8 Watts, 447; *Melhuish* v. *Collier*, 15 Q. B. 878; *Champ* v. *Com.* 2 Met. (Ky.) 17, 74 Am. Dec. 388; *Hull* v. *State*, 93 Ind. 128; *Miller* v. *Cook*, 124 Ind. 101; *Greenough* v. *Eccles*, 5 C. B. N. S. 786; *Batchelder* v. *Batchelder*, 139 Mass. 1; *People* v. *Jacobs*, 49 Cal. 384; *Ryerson* v. *Abington*, 102 Mass. 530; *People* v. *Mitchell*, 94 Cal. 550.

There is no reversible error in the charge of the court regarding circumstantial evidence. The charge is rather vehement, on this point, but vehemence is not a ground of exception.

2 Thomp. Trials, §§ 2299, 2300; *Gates* v. *People*, 14 Ill. 433; *State* v. *West*, 69 Mo. 401, 33 Am. Rep. 506; *Jones* v. *State*, 57 Miss. 684.

The exception to the charge of the court in relation to the plea of self-defense, is a claim of an error by omission in the charge. The claim is valueless, because it was the duty of defendant's counsel to pray additional instructions if he thought the jury would be misled.

Pennock v. *Dialogue*, 27 U. S. 2 Pet. 1 (7: 327); *Schuylkill & D. Imp. & R. Co.* v. *Munson*, 81 U. S. 14 Wall. 442 (20: 867); *Congress & E. Spring Co.* v. *Edgar*, 99 U. S. 645 [25: 487]; 2 Thomp. Trials, §§ 2325, 2341.

No exception lies to a denial of a motion for a new trial.

Arkansas Valley Land & C. Co. v. *Mann*, 130 U. S. 69 [32: 854].

Mr. Chief Justice **Fuller** delivered the opinion of the court:

1. Hickory being called in his own behalf, denied that the letter marked "A" was in his handwriting. His counsel offered a paper which Hickory testified he had written at the table in court that day, "to compare with the

writing on the document marked X, as produced by Joseph Shade, written previous to this time, and also to compare with the writing marked A, offered in evidence by the district attorney." The court excluded the evidence and the defendant excepted.

According to the general rule of the common law, the genuineness of disputed handwriting could not be determined by the court and jury by comparing it with other handwriting of the party, but among the exceptions to the rule was that if the paper admitted to be in the handwriting of the party or to have been subscribed by him was in evidence for some other purpose in the cause, the paper in question might be compared with it by the jury. *Moore* v. *United States*, 91 U. S. 271 [23: 346]; *Rogers* v. *Ritter*, 79 U. S. 12 Wall. 317 [20: 417]. And this with or without the aid of witnesses. 1 Greenl. Ev. § 578.

By acts of Parliament it is now provided in England, as "to all courts of judicature, as well criminal as others," that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, [306] shall be permitted *to be made by the witnesses: and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." 17 & 18 Vict. chap. 125; 28 & 29 Vict. chap. 18.

Under these statutes it has been decided that any writings, of the genuineness of which the judge is satisfied upon the proof, may be used for the purposes of comparison, although they may not be admissible for any other purpose in the cause (*Birch* v. *Ridgway*, 1 Fost. & F. 270; *Cresswell* v. *Jackson*, 2 Fost. & F. 24) and that the comparison may be made either by witnesses or without the intervention of any witnesses at all, by the jury themselves. *Cobbett* v. *Kilminster*, 4 Fost. & F. 490; 1 Whart. Ev. § 712. But in the absence of statute, papers irrelevant to the issues on the record were held not receivable in evidence at the trial for the mere purpose of enabling the jury or witnesses to institute a comparison of hands. *Bromage* v. *Rice*, 7 Car. & P. 548; *Doe* v. *Newton*, 5 Ad. & El. 514; *Griffits* v. *Ivery*, 11 Ad. & El. 322; 1 Greenl. Ev. § 580. The danger of fraud or surprise and the multiplication of collateral issues were deemed insuperable objections, although not applicable to papers already in the cause, in respect of which, also, comparison by the jury could not be avoided.

We do not care to discuss the reasons for the rule or examine the decisions by the courts of the several states, in which there is great want of uniformity, for the question here does not turn on the general rule in relation to comparison of handwriting or the admission of irrelevant papers for the sole purpose of comparison, but on the question of the admissibility of such writings when specially prepared for the purpose; and we are clear that they are not admissible. Undoubtedly circumstances may often arise where a witness may be asked, on cross-examination, to write in the presence of the jury, for the purpose of testing his credibility: but as original evidence, as remarked in *King* v. *Donahue*, 110 Mass. 155, "A signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard of genuineness." *"It would," as was [307] said in *Williams* v. *State*, 61 Ala. 33, "open too wide a door for fraud, if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purposes of comparison."

"All evidence of handwriting," says Greenleaf (1 Ev. § 576) adopting the language of Patteson, *J.*, in *Doe* v. *Suckermore*, 5 Ad. & El. 730, "except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge." We think, however, there is an obvious distinction between comparison by juxtaposition of an admitted or established writing and the disputed writing, and comparison of the latter with an image in the mind's eye, but in either instance papers prepared for the purpose of having the comparison made are objectionable.

In *Stranger* v. *Searle*, 1 Esp. 14, Lord Kenyon refused to admit the testimony of a witness whose familiarity was derived from seeing him write for the express purpose of qualifying the witness, "as the party might write differently from his common mode of writing through design."

It is only when the paper is written, not by design but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness. Coleridge, *J.*, *Doe* v. *Suckermore*, 5 Ad. & El. 703, 705.

The paper offered was rightly excluded by the court.

2. The admission of the testimony of one Charles H. Snell was objected to upon the ground that his name was not on the indictment, and the objection was overruled because not made until the examination-in-chief was concluded. The record shows no exception taken, though counsel expressed a desire to save the point. Under section 1033 of the Revised Statutes, any person indicted of a capital offense has the right to have delivered to him, at least two days before the trial, a list *of [308] the witnesses to be produced, and it would be error to put him on trial and allow witnesses to testify against him whose names have not been furnished, if he seasonably asserted his right (*Logan* v. *United States*, 144 U. S. 263 [36: 429]) but we think he did not do that here, and that the defect was waived. It was suggested by counsel for the defendant that the objection was made as soon as it was discovered that notice had not been given in respect of this witness; but we are of opinion that the discretion of the trial court was properly exercised upon the question. Counsel ought not to sit by and listen to the testimony in chief of a witness before inquiring whether his name has been furnished to the defendants.

3. It is assigned as error that the court did not allow "defendants to show that they were surprised by the testimony of John Johnson, a witness for defendants, and to show previous

declarations of said John Johnson to defendants' counsel through an interpreter on several occasions during the preparation of said case contrary to his testimony on the stand, which declarations were favorable to defendants." Johnson was called for defendants and testified that defendant Shade was at his house Tuesday evening but not again until Friday evening. He was asked if he had not stated to defendants' counsel, through Isaac Shade as interpreter, that Tom Shade was there on Wednesday and Thursday evenings also, but he answered that he had not, and that the interpreter was mistaken. Thereupon Isaac Shade was subsequently asked: "State whether or not in your interpretation of his testimony that he said that Tom stayed at his house Tuesday night, Wednesday night, and Thursday night and Friday night of that week," to which objection was made, which the court sustained, and defendants excepted.

During the trial there was an attempt to show that Wilson survived the shooting, which was on Tuesday afternoon, and that defendant Shade afterwards, and by collusion with Hickory, slew the wounded man with an ax. It is possible that, if the evidence had tended to establish that Hickory and Shade had conspired to compass Wilson's death, testimony in support of Shade's alibi for the two days suc- [309] ceeding Tuesday *(assuming it made out as to that day) might have been material as to Hickory; but upon this record the bearing upon Hickory of Shade's whereabouts on Wednesday and Thursday is extremely slight, and Shade was acquitted.

When a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness. As to witnesses of the other party, inconsistent statements, after proper foundation laid by cross-examination, may be shown (*Chicago, M. & St. P. R. Co.* v. *Artery*, 137 U. S. 507 [34: 747]) but proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law. Best. Ev. § 645; Whart. Ev. § 549; *Melhuish* v. *Collier*, 15 Q. B. 878.

By statute in England and in many of the states, it has been provided that a party may, in case the witness shall in the opinion of the judge prove adverse, by leave of the judge, show that he has made at other times statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been surprised. *Adams* v. *Wheeler*, 97 Mass. 67; *Greenough* v. *Eccles*, 5 C. B. N. S. 786; *Rice* v. *Howard*, L. R. 16 Q. B. Div. 681.

Johnson was not a hostile witness and his testimony was not in itself prejudicial so far as it failed to make out the alibi beyond Tuesday, yet it did contradict defendant Shade, who testified, that he was at Johnson's Wednesday and Thursday nights. But the court allowed defendants' counsel to cross examine Johnson if they chose, and to prove the fact to be otherwise than as stated by him, and we cannot say that error was committed because the court in the exercise of its discretion, under the circumstances, declined to concede any further relaxation of the rule.

*4. Defendants took certain excep- [310] tions to parts of the charge, the first of which was to: "The court's criticism on circumstantial evidence, denouncing persons who are slow to act on circumstantial evidence as fools and knaves." Referring to the necessity of determining the condition of the mind, the court said: "Some say we cannot do it by circumstantial evidence, because it is cruel and criminal, they say, to convict a man upon circumstantial evidence. This is a declaration of either fools or knaves, sympathetic criminals or men who have not ability enough to know what circumstantial evidence is, or to perform the ordinary duties of citizenship. When you consider that these two mental conditions, the fact that the act was done willfully, and done with malice aforethought, can never in any case be found in any other way than by circumstantial evidence, you can see the potency in every case of that class of testimony. Circumstantial evidence means simply that you take one fact that has been seen, that is produced before you by evidence, and from that fact you reason to a conclusion." The exception gives a color to this part of the charge which it will not bear, namely, that it amounted to a denunciation of persons "who were slow to act on circumstantial evidence," whereas the court was inveighing against the declaration that it is cruel and criminal to convict a man upon circumstantial evidence, and that the condition of the mind cannot be found in that way. This was done with great vigor, perhaps induced by the arguments of counsel, but that does not strengthen an exception otherwise destitute of merit.

5. The second exception to the charge was as follows:

"Because the court instructed the jury that the defendant, Downing, or the party who invokes the law of self-defense, at the time of the difficulty puts himself in the place of the judge that lays down the law, of the jury who passes upon the facts and enters up judgment, and of the marshal who executes the sentence, and has centered in himself the whole power of the government or people, without telling them that he is not required to look at the case and the occurrences with the same coolness and deliberation that a court and jury would do in investigating the charge against him, and that, if in this *case, as claimed by him, the [311] officer Wilson fired off his pistol in the first place when his back was to him, and led defendant, Downing, to believe that the officer was assaulting him, or the officer did then and afterwards assault him, then all the circumstances of excitement, agitation, apparent or real peril that surrounded him, and that may have caused him to misjudge as to the purpose of Wilson, or as to the assault, or to misconceive as to his exact rights and duties are all to be taken into consideration."

Hickory's defense was that the homicide was committed in self-defense, that is, that he was assaulted by Wilson upon a sudden affray, and killed him because he was in imminent and manifest danger either of losing his own life or of suffering enormous bodily harm; or that he was under a reasonable apprehension thereof, and the danger, as it appeared to him, was so imminent at the moment of the assault as to present no alternative of escaping its consequences, except by resistance.

The experienced trial judge told the jury that the mere fact that a killing is done willfully does not necessarily make it murder; that it is also done willfully when done in self-defense; and explained the characteristics of that malice the existence of which is the criterion of murder, defining malice in the ordinary acceptation of the term, and malice aforethought, malice express and malice implied, and pointing out that the requisite malice exists when the act is perpetrated without any provocation or any just cause or excuse, not only on special motive or through special malevolence, but also at the dictates of a heart regardless of social duty and deliberately bent on mischief; and saying that such malice imported premeditation, thus continued: "The doing of the act which kills must be thought of beforehand. But how long, you will enquire in this case? A minute, or a day, or an hour, or a year? Why, not at all. If it is thought of at a period, practically speaking, cotemporaneous with the doing of the act, it is premeditated, it is thought of sufficiently long. Especially is that the rule applicable in this day when a man with the rapidity almost of the 312]batting *of an eye or a flash of light may execute a purpose to kill. He may conceive a purpose, and instantly with its conception draw his deadly weapon and execute his purpose before you can bat an eye; the purpose is conceived and executed, and the man is dead, but yet it is premeditated, as shown in a case of that kind by the very drawing and presentation and firing of the gun. The law says, as I will read to you presently, that the deliberate selection and use of a deadly weapon is evidence of the existence of malice aforethought, provided the party had no right to use that weapon, or provided there is an absence of mitigating facts when he did use it." That is to say, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed at any definite period before the fatal act.

The learned judge then quoted from the charge in *United States* v. *King*, 34 Fed. Rep. 302 (Lacombe, *J.*) as follows:

"'It imports premeditation. Therefore there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act; and if the intent to do mischief to another is thus formed, as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice.'"

Manslaughter was defined, and the distinction between that and murder; and the right of self-defense invoked by counsel in the case, was then explained. The first proposition as to the justifiable exercise of that right was laid down generally to be that when a man, "in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent *the intended harm, such [313 as retreating as far as he can or disabling his adversary without killing him, if it be in his power;" and the second proposition, that "when from the nature of the attack there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

And in this connection, the learned judge charged among things as follows:

"You see a man is required to discharge certain great duties under all circumstances, and especially is this law of duty incumbent upon him when he is put in that position, in the position of a judge sitting on the bench deliberating upon what the law is, and of a jury sitting in the jury box listening to the facts, and finding as coolly, deliberately, and dispassionately as possible under the circumstances, what the facts are. When a party is in such a condition he is the judge upon the bench and the jury in the box, and not only that but he is the executioner. He finds what the facts are as a jury, and he makes an application of the law that he finds as a judge to these facts that he finds as a jury, he enters upon a judgment, and he then and there as a marshal kills in the furtherance of the judgment. Suppose that the judge of this court had that power, how long would the people of this land permit him to sit on this bench? Suppose that you, as twelve dispassionate citizens, had that power, how long would the people of this land permit that system to exist? Suppose that the chief executive officer of this government, the President of the United States, presumably a discreet, wise, and just man, having no other purpose than the good of the people, had that power, how long would these people permit one man to exercise a power of that kind? Exercise it, too, when he wasn't confronted with acts that inflamed him, or that infuriated him, but exercised it when he was an intelligent man, and just man, as our Presidents have always been, and a fair-minded man. We have divided this power when it comes to be executed deliberately. We have a court that performs one office *and the jury another and the [314 executive arm of the government another. Yet the law of self-defense puts all of these mighty elements of power into the hands of one man, and it may be in a given case that he is not a very intelligent man, either; it may be in a case where he has sought to make application

of it, that he is not a very discreet man, or that he is not a very dispassionate man, either, yet if the law applies to his case, if there is an application of that kind that can be correctly made to that condition, it is to be made, although there is a concentration of these mighty powers that would not be concentrated in any department of the government alone, but these great powers in a proper case are properly in the hands of the citizens. . . .

"He is required to avoid the necessity of killing if he can with due regard to his own safety. He must do that. If there is a condition where the other party at the time of the killing is doing an act of violence upon him, and he is in the right, and that would take his life unless he avoided it, and he can avoid it otherwise than by killing, and he does not do it, that is a case where he would be guilty of manslaughter, because that is a failure to observe his duty and a use of the law of self-defense hastily. He must not forget that he is judge, jury, and executioner when he is sitting in that tribunal out in the woods or country. He is therefore required to comprehend what this law is. He is required to know what the facts are that confront him and to make a correct application of that law to these facts, and if he does not do that, when he might do it, he makes a mistake in that regard, and he would be guilty of manslaughter."

Having shown that premeditation may exist in the twinkling of an eye, the learned judge thus treats of the act of self-defense as involving, at least in kind, the deliberation of a judge, a jury, and an executioner. If the jury, thus admonished, believed the exercise of the right of self-defense involved the same deliberation as their own grave consideration of a verdict upon which a human life might depend, it is easy to see that they might well confound the distinction between such deliberation and instantaneous conclusions under sud-[315] den *attack or in the presence of apprehended or imminent danger. The charge was open to the construction that, while premeditation may exist in a criminal sense upon the conception of an instant, the conclusion to kill in self-defense must be arrived at upon more serious deliberation, or it furnishes no excuse. If, in the language of the court of appeals of New York in *People* v. *Clark*, 7 N. Y. 385, "there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months;" then in the matter of self-defense, the deliberation of the slayer in respect of the greatness of the necessity to protect himself from death or great bodily harm, if material, would also be sufficient although the conclusion to kill was arrived at instantaneously. The swiftness of thought in the latter case would no more exclude the element of deliberation than in the former, and whether the act was excusable or not could only be determined by all the facts and circumstances disclosed by the evidence.

In short, whether or not a particular homicide is committed in repulsion of an attack, and, if so, justifiably, are questions of fact, not necessarily dependent upon the duration or quality of the reflection by which the act may have been preceded.

The gravest deliberation would not absolve under all circumstances though it might mitigate the offense under some; and if the facts justified the act, the extent of deliberation would be immaterial.

To enlarge upon the magnitude of the power of slaying in defending against an attack, as being a power which in itself would not be tolerated in the Chief Executive of the country or in the judge then passing upon the issues of life and death; and to advise the jury to inquire, not into the existence of defendant's belief or the reasonableness of the grounds on which it rested, but into the character of the deliberation which accompanied it tested by the standard of that of the judge, the jury, and the executioner, in the discharge of their appropriate duties, manifestly tended to mislead. Nor does *this view impute a want of [316] intelligence in the jury. They might find a verdict in disregard of the instructions of the court, but this is not to be presumed, and if that strict attention to judicial direction were paid which the due administration of justice requires, we are constrained to the conclusion that such instructions as those under consideration could not but have a decided influence upon their action.

As was said in *Allen* v. *United States*, 150 U. S. 551 [37: 1179], we do not think that the doctrine is practicable which tests the question whether a defendant was entitled to excuse on the ground of self-defense, or exceeded the limits on the exercise of that right, or acted upon unreasonable grounds, or in the heat of passion, by the deliberation with which a judge expounds the law to a jury, or the jury determines the facts, or with which judgment is entered and carried into execution.

However improbable Hickory's story may have been, and however atrocious his conduct, he could not be deprived of making the defense he put forward, and these instructions of the court were erroneous as they stood unqualified.

The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court before the retirement of the jury as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised without being compelled to search the record to ascertain it. And it is also settled that where several distinct propositions are given, and the exception covers all of them, if any one of them is correct, the exception cannot be sustained. The exception here is not obnoxious to objection as violating the rule in these regards. The trial judge could not have been in doubt as to the particular part of the charge objected to, and, as his attention was called to the matter before the jury retired, could have modified or withdrawn it, if he had thought it necessary to do so; and the portion excepted to is indicated with sufficient precision so far as this court is concerned. Nor did the exception embrace other than the specified statements objected to. Again, the exception was not to

317 the omission of the court to *charge upon a particular point, in which case, in the absence of request that that should be done, it would not have been well taken. *Texas & P. R. Co.* v. *Volk*, *ante*, p. 78; although even in that view, the exception might be held equivalent to a request for the qualification, but the objection really was to the giving of the instructions unqualified, and counsel signified out of abundant caution what in their judgment would remove their ground of complaint. We hold, therefore, that the point was sufficiently saved.

Judgment reversed and cause remanded with a direction to grant a new trial.

Mr. Justice **Brewer** dissented.

Mr. Justice **Brown** took no part in the consideration and decision of this case.

THE CRESCENT MINING COMPANY, *Appt.*, *v.* THE WASATCH MINING COMPANY.

(See S. C. Reporter's ed. 317-323.)

Defense to mortgage—foreclosure—interest.

1. Where the condition of a mortgage is that the money secured thereby shall be paid into court pursuant to its order in and to await the determination of a pending suit, and it requires the co-operation of both mortgagor and mortgagee to procure such order, it is the duty of the mortgagor to unite with the mortgagee in procuring such order, and if he does not signify his readiness to pay and to unite with the mortgagee to procure such order, the mortgage may be enforced, and he cannot prevent a foreclosure instituted upon his default in payment, by putting in the defense of the omission of the mortgagee to procure the order.
2. A mortgagor cannot defeat the foreclosure of a mortgage by the defense that the deed executed to him, which was the consideration of the mortgage, did not contain all the land to which he was entitled, where he has elected to pursue another remedy by bringing an action to reform the deed, in which a reformation of the deed so as to include all the land he purchased has been decreed.
3. Where a mortgage is conditioned to pay the money secured thereby into court, the mortgagee is entitled upon foreclosure after default to interest on the money from the time the payment was to be made especially where the mortgagor has since his default had both the use of the money and the income of the mortgaged property.

[No. 180.]

Argued Dec. 21, 1893. Decided Jan. 22, 1894.

APPEAL from a decree of the Supreme Court of the Territory of Utah, affirming the decree of the District Court for the Third Judicial District of that territory, foreclosing a mortgage and directing a sale of the mortgaged premises, and that the proceeds of sale so far as necessary, to pay the amount due and costs, be paid into court, the action being one brought by the Wasatch Mining Company, plaintiff, against the Crescent Mining Company, defendant. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

In the year 1883, the Wasatch Mining Company, a corporation under the laws of Utah territory, brought an action in the District Court for the Third Judicial District of that Territory, against William and Joseph A. Jennings, to recover possession of a certain tract of mining land, situated in Uintah mining district, Summit county. That action was, at the time of the events subsequently narrated, and still is, pending and undecided.

The Crescent Mining Company, likewise a corporation organized under the laws of Utah territory, desiring to purchase said disputed tract of land, on March 8, 1883, entered into an agreement in writing with Jennings, whereby, after reciting the fact that the action was pending between the Wasatch Mining Company and Jennings, it was agreed that the Crescent Mining Company should purchase the said tract, and pay therefor $50,000, of which $7500 were paid at the time of the signing of the agreement, and the balance when the deed was delivered, which latter event was to take place when the said action should be determined, and if the same should be decided in favor of Jennings; that in the meantime, the deed should be deposited with the Deseret National Bank of Salt Lake City; that the Crescent Mining Company should forthwith go into possession, but until the delivery of the deed should not remove, out of the premises described in the deed, any metal or *ores of value. It was also provided that 319 the Crescent Company might at any time, at its option, pay the balance of the purchase money into the said bank, and lift the deed.

On July 9, 1886, the Crescent Mining Company entered into an agreement, in writing, with the Wasatch Mining Company, whereby the latter sold and conveyed to the former company the premises in dispute, and the latter agreed to pay therefor $42,500; and, on September 1, 1886, a further agreement, in the nature of a mortgage, was entered into between the two companies, referring to the pending litigation between the Wasatch Company and Jennings, and providing that the Crescent Company would pay to the Wasatch Company the said sum of $45,000 in one year from the date thereof—absolutely, if at said time the said suit should be determined in favor of the said Wasatch Company; but if said action should still be pending undeter-

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NOTE.—*Mortgage defined; nature of*, see note to New Orleans Nat. Banking Asso. v. Adams, 27: 910.

As to equitable mortgages by deposit of title deeds, see note to Biebinger v. Continental Bank of St. Louis, 25: 271.

As to deed with contract to reconvey, when a mortgage, and when not; action to have deed declared a mortgage, see note to Conway v. Alexander, 8: 321.

As to right of mortgagor to income and products of mortgaged premises, see note to Gilman v. Illinois & M. Teleg. Co. 23: 405.

As to strict foreclosure of mortgage, see note to Clark v. Reyburn, 19: 354.

As to order of sale of mortgaged premises, see note to Orvis v. Powell, 25: 238.

As to who is entitled to redeem from the lien of a mortgage, see note to Noyes v. Hall, 24: 509.

mined, then said purchase money should be paid into said court in said action, recognized by order thereof, to be disposed of as follows: to be paid to the Wasatch Company on the final determination of said suit in their favor, and subject to be repaid to the Crescent Mining Company, on its request, if said action should be finally and on its merits determined adversely to the Wasatch Company; and in case default should be made in the payment of said purchase money, then the Wasatch Company were authorized to sell the said premises, in the manner prescribed by law, and out of the proceeds to pay said purchase money, with costs and a reasonable attorney's fee for collection, the surplus, if any, to be paid to the Crescent Mining Company.

The present suit was brought to foreclose this mortgage, the complaint alleging that the suit of *Wasatch Min. Co.* v. *Jennings* was still pending and undetermined, and that the Crescent Mining Company had not paid the amount into court, and asking for judgment for $42,500, with interest from one year after the date of said mortgage, with attorney's fee, and for a decree of foreclosure and sale.

The defendant demurred to this complaint on the ground that it did not allege that the plaintiff had obtained an order for the payment of the purchase money into court, or that 320] *such order had been made and that defendant had then refused, or that any demand had ever been made upon defendant for payment, and that it appeared on the face of the complaint that defendant, not being a party to the suit of the *Wasatch Min. Co.* v. *Jennings*, could not appear in that case and ask for an order permitting the payment into court.

This demurrer was overruled, and the Crescent Company answered and alleged that the mortgage sued on had been given to secure the purchase money of certain described mining grounds; that owing to a fraudulent conspiracy between the defendant's manager and certain agents of the plaintiff the most valuable part of the lands purchased had been omitted from the deed; and then added the facts showing that the Crescent Company could not, of itself, obtain an order to pay the purchase money into court, and that the Wasatch Company had never obtained such an order and had never made any demand.

The answer further averred that on January 3, 1887, the Crescent Company had commenced an action, in the same court, against the Wasatch Company, to compel a reformation of the deed, so as to make said conveyance embrace all the ground, and that said last mentioned action had resulted in a decree commanding a reformation of the deed as prayed for; that said decree had been appealed from into the supreme court of the territory of Utah, which latter court had, on August 27, 1888, affirmed said decree, from which said last mentioned decree an appeal had been taken to the Supreme Court of the United States, where said appeal was pending. The record of that appeal in the Supreme Court of the United States discloses that the decision of the court below has been affirmed.

The cause was brought on for trial before the court sitting without a jury, and resulted in certain findings of fact, substantially the same as alleged in the complaint, and in findings of law as prayed for by the complainant, viz: that said plaintiff, the Wasatch Company, was entitled to have said mortgage debt, $42,500, paid in that court, in said action pending between Wasatch Company and Jennings, together with *interest thereon at 10 per [321 cent per annum, from the 1st day of September, 1887, until the same shall have been so paid into court, together with costs and $1000 for an attorney's fee. It was decreed that the plaintiff was entitled to a decree foreclosing said mortgage and directing a sale of the premises covered by said mortgage, and to have so much of the proceeds of sale paid into court as might be necessary to pay said purchase money, interest, and costs as aforesaid.

From this decree an appeal was taken to the supreme court of the territory of Utah, and on June 12, 1890, an opinion and decree of that court were filed, affirming the decree of the district court in substantial respects, but modifying the same by decreeing that thirty days should be allowed the defendant in which to pay the money before the property should be advertised for sale, and also providing that the money should be paid into court in the case between the companies instead of the case of the *Watasch Min. Co.* v. *Jennings*, until an order should be obtained in that case for the deposit of the money.

The record further discloses that the Crescent Mining Company entered into possession of the property, and has been engaged, during the pendency of the litigation, in mining and converting to its own use the ores and metals contained therein.

From the decree of the supreme court of the territory of Utah the present appeal was taken.

Mr. **R. N. Baskin** for appellant.

Messrs. **A. B. Browne** and *J. G. Sutherland* for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

Our examination of this record fails to disclose any error in the decree appealed from.

The proceedings in the district court of the territory of Utah, to enforce the mortgage given by the Crescent *Mining Company [322 to the Watasch Mining Company, were certainly in pursuance of the terms of that instrument. The defense raised by demurrer, that the Crescent Company could not pay the purchase money into the court until an order of the court permitting such payment had been procured, and that the Crescent Company, not being a party of record, could not procure such order, was not sound, because that reason, namely, that the Crescent Company was not a party of record, equally prevented the Wasatch Company from procuring such order. It is true that the Wasatch Company was a party of record; but, of course, the court could not, on the application of that company, have granted an order on the Crescent Company, not a party and not represented in court, to pay money into court.

It is obvious that the contract, in that particular, required the co-operation of the parties. Hence, when, by the terms of the mortgage, the time had arrived for the payment of the money, it was the duty of the Crescent Company to have signified its readiness to pay and to unite with the Wasatch Company in procuring the necessary order of the court. Not having so done, a right to enforce the mortgage at once arose.

Nor do we think that the defense set up in the answer, that the deed executed by the Wasatch Company and deposited, as provided for in the agreement, in the Deseret National Bank, did not contain all the parcels of land to which the Crescent Company was entitled, was sufficient, because the answer itself disclosed that the Crescent Company had availed itself of its remedy by direct proceedings against the Wasatch Company to reform the deed. Such proceedings would necessarily result in a decision that the deed in question was correct, or else in a reformation of it.

An election to pursue a remedy by an independent action would not seem to have left the Crescent Company free to resist an enforcement of its express contract in the mortgage by resorting to the same matter. However this may be, it is satisfactory to know that this view of the subject worked no injury to the Crescent Company when we learn from our 323 |*own records that the result of that independent proceeding was a decree in favor of the company compelling a reformation of the deed, so as to include all of the lands purchased. *Wasatch Min. Co.* v. *Crescent Min. Co.* 148 U. S. 293 [37: 454].

Further objection is urged to the decree of the court below in that it called for the payment of interest on the principal sum from the time fixed for payment until the same shall have been paid into court. It is said that the mortgage does not itself provide for interest, and that if the money had been paid into court it would have there remained without interest. But this is not necessarily so. The court would, doubtless, if so requested by the parties in interest, have ordered so large a sum invested. At all events, it is no hardship that the Crescent Company, which had both the use of the money and the receipt of the issues and profits of the mines, should be charged with interest for the period between the maturity of the mortgage and the payment into court.

Another complaint urged to the decree below is because it directs that the money should be paid into the district court of the territory in the case between the two mining companies instead of in the case between the Wasatch Company and Jennings. But the decree discloses that this disposition of the money is only temporary, to await the obtaining of an order in the latter case. Such an order, as the case now stands, is a matter of course, and doubtless can be obtained forthwith, so as to dispense with the intermediate payment.

The decree of the court below is affirmed.

*F. D. MAYNARD ET AL., *Plffs. in Err.*, v. CHARLES HECHT. [324

(See S. C. Reporter's ed. 324-328.)

Judiciary Act of 1891—jurisdiction of circuit court—review of that question — certificate necessary.

1. Under section five of the Judiciary Act of March 3, 1891, a writ of error can be taken directly to this court from the circuit courts only in the six classes of cases therein mentioned.
2. Under the first class of cases mentioned in section 5 of the Judiciary Act of March 3, 1891, the question involving the jurisdiction of the circuit court must have been in issue and decided against the party seeking to bring it before this court for determination, and must be certified for decision.
3. Section 5 of the Act of 1891 restricts the power of this court, in all suits in which its appellate jurisdiction is invoked by reason of the existence of a question involving the jurisdiction of the circuit court over the case, to the review of that question only.
4. Where there is no certificate of the circuit court presenting the question of its jurisdiction to this court for determination, this court cannot review the case upon that question; the absence of such certificate cannot be helped out by resort to the petition for writ of error nor to the assignment of errors.

[No. 680.]

Submitted Jan. 8, 1894. Decided Jan. 22, 1894.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of Charles Hecht, plaintiff, against F. D. Maynard *et al.*, defendants, for damages which he had suffered by purchase, upon defendant's false and fraudulent representations, of certain land, which turned out to be without value. *On motion to dismiss or affirm, dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

Charles Hecht filed his petition in the Circuit Court of the United States for the District of Nebraska, October 14, 1890, against the plaintiffs in error, alleging that the amount in controversy in the suit exceeded the sum or value of $2000 exclusive of interest and costs, and that he had been damaged in the sum of $2500 by reason of the purchase upon defendants' false and fraudulent representations in writing of certain land for which he paid the sum of $1800, and which turned out to be without value. The petition, among other things, averred that plaintiff had executed a deed of reconveyance of the property in question and formally tendered the same, and he brought said deed into court, and also a

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer, when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit, see note to Roberts v. Lewis, 35: 570.

promissory note of the Saline county nurseries given to him at the time of the purchase as indemnity against a mortgage upon the premises, and prayed judgment for $2500, together with interest and costs. Defendants answered, denying the allegations of the petition, and alleging that the purchase price of the land was paid in horses which Hecht guaranteed to be sound, but which were in fact worthless. To this answer a reply in general denial was filed, and trial having been had a verdict was returned in favor of Hecht for $1720. Defendants then moved for a new trial, and the same day filed a motion to dismiss the [325] case upon the ground that the *circuit court had no jurisdiction, since it appeared from the petition that the amount in controversy was less than the sum of $2000 exclusive of interest and costs, and no evidence was introduced at the trial tending to prove that the amount exceeded that sum. June 10, 1891, the court overruled each of the motions and entered judgment upon the verdict. The writ of error was allowed November 16, 1891. No certificate of question for decision was applied for or granted by the court.

Messrs. **Walter H. Smith, C. W. Holcomb, Walter J. Lamb, A. C. Ricketts** and **H. H. Wilson,** for defendants in error, in favor of motion.

Messrs. **C. S. Montgomery** and *Hastings & McGintie,* for plaintiffs in error, in opposition.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Under section 5 of the Judiciary Act of March 3, 1891, a writ of error can be taken directly to this court from the circuit courts only in the six classes of cases therein mentioned, and the contention is that the writ may be sustained in this case as falling within the first class, described in that section as follows: "In any case in which the jurisdiction of the court is in issue; in such case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." According to that provision the question involving the jurisdiction of the circuit court must have been in issue and decided against the party seeking to bring it before this court for determination, and must be certified for decision. And as no such question was certified by the circuit court in this case, we are confronted on the threshold with the inquiry whether we can take jurisdiction of the writ, an inquiry controlled by the rule that an affirmative description of the appellate jurisdiction of this court in a suit implies a negative on the exercise of such appellate power as is not comprehended within it.

[326] *By the Act of February 25, 1889 (25 Stat. at L. 693, chap. 236) it was provided: "That in all cases where a final judgment or decree shall be rendered in the circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the judgment or decree does not exceed the sum of five thousand dollars the Supreme Court shall not review any question raised upon the record except such question of jurisdiction." The Act of 1891 was framed in this regard in view of the former Act, and section 5 restricts the power of this court, in all suits in which its appellate jurisdiction is invoked by reason of the existence of a question involving the jurisdiction of the circuit court over the case, to the review of that question only. The Act did not contemplate several appeals in the same suit at the same time, but gave to a party to a suit in the circuit court where the question of the jurisdiction of the court over the parties or subject matter was raised and put in issue upon the record at the proper time and in the proper way, the right to a review by this court, after final judgment or decree against him, of the decision upon that question only, or by the circuit courts of appeals on the whole case. *McLish* v. *Roff,* 141 U. S. 668 [35:895].

And the section under consideration declares in express terms that when the case is brought directly to this court the question of jurisdiction so in issue shall be certified for decision.

The rules in relation to certificates of division of opinion in civil causes under sections 650, 652, 693 of the Revised Statutes were well settled. Each question had to be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment on the weight or effect of testimony or facts adduced in the case; and could not embrace *the whole case, even where its decision [327] turned upon matter of law only, and even though it were split up in the form of questions. *Fire Ins. Asso.* v. *Wickham,* 128 U. S. 426 [32:503]; *Dublin Twp.* v. *Milford Fire Cent Sav. Inst.* 128 U. S. 510 [32:533]. The same rules were applicable to the certificate of points on division of opinion on the hearing or trial of criminal proceedings, under sections 651 and 657. *United States* v. *Hall,* 131 U.S. 50 [33:97]; *United States* v. *Perrin,* 131 U. S. 55 [33:88]. And prior to the Act of February 25, 1889, this court had jurisdiction of a case brought up on certificate of division of opinion on the question whether the circuit court had jurisdiction of it. *Baltimore & O. R. Co.* v. *Marshall County Supers.* 131 U. S. appx. xcix. [19:452].

By section 6 of the Act of March 3, 1891, it is provided "that in every such subject within its appellate jurisdiction, the circuit court of appeals may at any time certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

In *Columbus Watch Co.* v. *Robbins,* 148 U. S. 266 [37: 445], it was held that in order to give this court jurisdiction over questions or propositions of law sent up by a circuit court of appeals for decision, it was necessary that the questions or propositions should be clearly and distinctly certified to, and should show that the instruction of this court was desired in a par-

ticular case as to their proper decision. And reference was there made to the rules laid down in reference to certificates on division of opinion above adverted to. So in *Cincinnati, H. & D. R. Co* v. *McKeen*, 149 U. S. 259 [37: 725], it was held that the Act of March 3, 1891, does not contemplate the certification of questions of law to be answered in view of the entire record in the cause, although this court may, if it sees fit order the entire record to be sent up, and thereupon decide the case as if it had been brought up by writ of error or appeal. We think the intention of Congress as to the certification mentioned in both sections is to be arrived at in the light of the rules theretofore prevailing as to certifying from the court below, and since, in the instance of an appeal upon 328] the *question of jurisdiction under the 5th section of the Act, a certificate by the circuit court presenting such question for the determination of this court is explicitly and in terms required in order to invoke the exercise by this court of its appellate jurisdiction, we are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this cause. The narrowness of range in the particular instance can make no difference in the application of the principle.

It appears that the petition for writ of error was filed in this case July 6, 1891, together with a bond for the prosecution thereof, and an assignment of errors, and this petition and the assignment raised the question that the matter in dispute in the cause did not exceed, exclusive of interest and costs, the sum of two thousand dollars; but the trial judge made no indorsement thereon. The writ specifies no particular ground of error, and it is upon the writ that the allowance was entered November 16, 1891, the judge certifying that on that day it was presented to him "for allowance and signature." But in any view the absence of the formal certificate cannot be helped out by resort to these papers. The inquiry is not whether we can ascertain the question sought to be presented, but whether we can exercise jurisdiction under the statute, which we cannot if the certificate is an absolute prerequisite, as we hold it to be. And upon that ground we dismiss the writ without discussing whether the question of jurisdiction indicated could properly be held to have been in issue, or whether, if so, the case would fall within the 5th section.

Writ of error dismissed.

329] CHARLES MORAN ET AL., *Appts.*, v. J. C. HAGERMAN, Admr., ET AL.

(See S. C. Reporter's ed. 329-333.)

Certificate of circuit court, when necessary.

Where no question of the jurisdiction of the circuit court is certified to this court for decision, an appeal from that court on the ground of its want of jurisdiction will be dismissed.

[No. 875.]

Submitted Jan. 12, 1894. Decided Jan. 22, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Nevada, finding that the proceeds of a judicial sale were paid to complainants on the day of sale, and also decreeing the amount due on the bonds held by complainants and defendants and the proportions in which the net proceeds of the sale should be applied, and giving defendants judgment for the respective amounts to which they were entitled, etc., in an action brought by Charles Moran *et al.*, against Jerry Schooling *et al.*, for whom and on whose death J. C. Hagerman, his administrator, was substituted. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

Moran Brothers filed their bill of complaint against William Wright, A. A. Watkins, Jerry Schooling, and others, in the Circuit Court of the United States for the District of Nevada, alleging that the Union Trust Company of New York was the mortgagee in trust of the Nevada & Oregon Railroad Company for the benefit of the holders of certain bonds of the said company, and had brought suit in that court to foreclose the trust deed or mortgage, which suit was then pending therein; that the complainants were holders of three hundred and ten of some six hundred bonds of $1000 each, certified and issued by the trustee under said deed, and that the defendants each claimed to hold some of them; that the company had no right to issue the bonds to the defendants, and that as between complainants and defendants the former were entitled to priority in the distribution of the proceeds of the sale of the mortgage bonds. The bill prayed for an injunction against the transfer of the bonds held by defendants and a decree that the defendants were not entitled to participate or share in the money realized from the sale of the road. In the meantime the property was sold under the foreclosure suit and bid in by Moran Brothers. Defendants answered, and on final hearing a decree was passed as prayed for in the bill and applying the proceeds on the complainants' bonds only. From that decree the defendants appealed to this court, which at October term, 1889, dismissed the appeal as to some of the appellants, affirmed it as to others, and reversed it as to Wright, Watkins, and Schooling, and remanded *the case to the [330 circuit court for further proceedings to be had therein consistent with the opinion. *McMurray* v. *Moran*, 134 U. S. 150 [33: 814]. Thereafter Schooling died, and Hagerman, his administrator, was substituted.

The mandate of this court was issued July 19, 1890, and was filed in the circuit court, November 3, 1890, and on February 2, 1891, the circuit court entered a decree in the cause,

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where ors drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

wherein it was adjudged that complainants holding the three hundred and ten bonds, and Wright, Watkins, and Hagerman, administrator, holding thirty-one bonds, "are entitled to have, and do have, their three hundred and forty-one bonds, mentioned in said bill of complaint, and the answer on file herein, paid out of the proceeds arising from the sale of the mortgaged premises, described in the said complaint, if the proceeds so arising are sufficient; and if such proceeds are not sufficient, then that said complainants and said defendants, A. A. Watkins, and J. C. Hagerman as administrator of the estate of Jerry Schooling, deceased, and John Wright, as administrator of the estate of James Webster, deceased, with the will annexed, share in the proceeds of said sale in proportion to the amount of bonds held by them respectively, and upon terms of equality with complainants." The decree then described how the three hundred and ten and the thirty-one bonds were held, and further adjudged that the said three hundred and forty-one bonds "were negotiated and sold to bona fide purchasers for value, and are valid and subsisting obligations and are unpaid, and a valid and subsisting charge and lien upon the railroad and property described in said bill of complaint, and are entitled to be paid out of the proceeds arising from the sale of said mortgaged property."

October 24, 1891, Watkins filed notice and petition for an order modifying the decree of February 2, 1891, so that there be inserted a provision to ascertain the amount due on the three hundred and forty-one bonds, and the amount of the proceeds of the foreclosure sale, and the costs of sale and suit, and the proportion of the proceeds properly applicable to the payment of the three hundred and ten bonds owned by complainants, and the thirty-one bonds owned by the defendants; and a 331] *further provision that upon the ascertainment and determination of said matter, the defendants have judgment and execution against complainants for the proportionate amount of the proceeds to which they were respectively entitled. The application was accompanied by affidavits and the notice stated that the motion "will be made upon the grounds that said matters were omitted from the said decree by oversight, inadvertence, and mistake, and upon the further ground set forth and contained in the petition hereto annexed and served and filed herewith." The various proceedings were severally set forth in the petition, which also averred that after applying the money realized from the foreclosure and sale to the payment of costs of suit and sale the marshal paid the balance of $367,234.55 to complainants, who received and retained the same; and that, in order to enjoy the full fruits and benefits of the decree and of the mandate of the supreme court, the circuit court should have referred the cause to a master, which, by inadvertence, was omitted from the decree. To the motion and petition complainants filed objections for want of equity; of plenary pleadings; of proper process; and that the term at which the decree of February 2, 1891, was entered had expired before the motion and petition were filed, and that for this reason the court had lost jurisdiction and control of the decree, and had no power to alter or modify the same. The court entertained the application and testimony was taken thereon; and upon hearing, on May 9, 1892, an order was made granting the petition and modifying and amending the decree accordingly, and referring the cause to a master to ascertain and report to the court the matters above mentioned, and reserving the cause for final decree upon the coming in of the report of the master. A bill of exceptions was settled by the judge of the circuit court, June 10, 1892, which contained the proceedings and the motion and the exception of complainants to the order of May 9. The master proceeded under the order and filed his report June 6, 1892, and no exceptions or objections having been filed thereto, a decree was entered September 6, 1892, in which the court found that the net proceeds of the sale were $367,615.31, *and were paid to complainants [332 on the day of sale. The court also found the amount due on the bonds held by complainants and defendants and the proportions in which the net proceeds of the sale should be applied, and made application accordingly and gave defendants judgment for the respective amounts to which they were entitled. On November 3, 1892, complainants prayed an appeal to this court from the decree of September 6, 1892, which was allowed that day, and on the same day complainants filed their assignment of errors to the effect that the decree should have been given in favor of complainants and against the defendants "for the reason that the term had elapsed at which said original decree was made, and the said circuit court had lost jurisdiction of said suit and had no power or authority to modify or amend said original decree, or to make any order or decree in said suit in any manner affecting the rights of the parties herein."

Mr. Wheeler H. Peckham for appellants.

Messrs. Horatio C. King, W. E. F. Deal, and *Edmund Tauszky* for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Complainants below, appellants here, contend that the circuit court had no jurisdiction because the decree of February 2, 1891, was a final decree, and the court had no power after the expiration of the term at which it was rendered to entertain the motion and petition and enter the order of May 9, 1892, and the decree of September 6, 1892; and further that the court had no jurisdiction to render affirmative judgments in favor of the defendants against the complainants, because no cross-bill had been filed and no proceedings had or taken on which such judgments could properly be rendered. On the other hand, it is insisted that the questions raised do not involve the jurisdiction of the circuit court in the sense in which the term is used in the Act *of March 3, 1891. Whether the decree [333 of February 2, 1891, was a final decree; whether the objection that no cross-bill had been filed came too late; whether the court could proceed in a summary way on petition;

whether appearance and objection on the merits waived alleged irregularities; and whether these or like matters might bring a case within the first class named in the 5th section of the Act of March 3, 1891, we find it unnecessary to consider, as no question of the jurisdiction of the circuit court was certified to this court for decision, and therefore, for the reasons given in *Maynard* v. *Hecht*, *ante*, p. 179, the appeal must be dismissed.

ELIJAH W. MEDDAUGH ET AL., *Appts.*, *v.* NATHANIEL WILSON.

(See S. C. Reporter's ed. 333-360.)

Fees of counsel of assignees in bankruptcy are a charge upon the property and its avails.

1. It is the duty of assignees in bankruptcy to look after the interests of all having claims upon the property, and compensation for their services, including the pay of their counsel, is a charge upon the property, prior in right to the claims of creditors or stockholders, although the property is already in the custody of the court through its receiver.
2. Where one of the purchasers of property at a foreclosure sale which is subject to a charge thereon for the fees of the counsel of the assignee in bankruptcy, had agreed to pay such fees out of a certain fund expected to be realized from a subsequent sale of the property, if that fund fails to be made, the property is not relieved from such charge, although the decree of sale was by reason of such agreement entered without any provision for the payment of such fees, but the charge remains upon the avails of such property in the hands of such purchaser, and may be enforced against the same.

[No. 10.]

Argued Oct. 10, 11, 1893. Decided Jan. 22, 1894.

APPEAL from a decree of the Supreme Court of the District of Columbia, affirming a decree of that court, dismissing a suit in equity brought by Elijah W. Meddaugh *et al.*, plaintiffs, against Nathaniel Wilson, defendant, to charge the defendant as trustee for plaintiffs, of 897 shares of the capital stock of the Lake Superior Ship Canal Railway & Iron Company. Reversed, and case remanded with instructions to enter a decree in favor of the plaintiffs for $25,440, and adjudging that sum a lien upon the stock of said company, remaining in defendant's hands.

Statement by *Mr. Justice* **Brewer**:

This was a suit brought in the Supreme Court of the District of Columbia by the appellants, seeking to charge the defendant as trustee for them of 897 shares of the capital stock of the Lake Superior Ship Canal Railway & Iron Company. The bill was filed June 6, 1881; the answer September 13, 1881. Proofs were taken, and on April 5, 1887, a decree was entered dismissing the bill, which decree was affirmed by the general term on March 3, 1888. From that decree of affirmance an appeal was taken to this court.

The following are the undisputed facts in the case: The Lake Superior Ship Canal, Railroad & Iron Company was a corporation organized under the laws of the state of Michigan. On July 1, 1865, it issued bonds to the amount of $500,000, secured by a mortgage upon its property and franchises. Subsequently, and on July 1, 1868, it issued another series of bonds amounting to $500,000, also secured by mortgage, all of which two series of bonds were outstanding in the hands of bona fide holders at the date of the decree hereafter mentioned.

*On the 1st day of July, 1870, it issued [335 a third series of bonds, amounting to $1,250,000, also secured by mortgage; $250,000 of which bonds were retired, and only $1,000,000 thereof were outstanding at the time of said decree. On May 1, 1871, it executed to the Union Trust Company, as trustee, a mortgage deed to secure a further issue of bonds to the amount of $3,500,000, of which, however, only $1,300,000 were issued, and the remainder were in the custody of the Union Trust Company at the time of said decree.

Suits were brought to foreclose these several mortgages. While these suits were pending, and in August, 1872, the company mortgagor was adjudged a bankrupt in the District Court of the United States for the Eastern District of Michigan, and George Jerome and Fernando C. Beaman were appointed assignees, and the plaintiffs, Meddaugh & Driggs, their counsel. These assignees never took possession of any property, for all of it was in the hands of a receiver appointed by the circuit court in the foreclosure suits. They, however, through their counsel appeared in and contested the foreclosure suits. They also filed a bill in the nature of a cross bill. Litigation was carried on for some years. On February 12, 1877, the several suits having been consolidated, a single decree was entered foreclosing all the mortgages. Pending the foreclosure proceedings, as appears from the terms of the decree, the receiver had, under the authority of the court, issued receiver's certificates to the amount of $625,300.

The principal creditors and security holders were J. C. Ayer & Co., J. Boorman Johnston & Co., Theodore M. Davis as receiver of the Ocean National Bank, and James C. Ayer and George C. Richardson, jointly. Certain English capitalists entered into negotiations for the purchase of the property. Don M. Dickinson was acting for the corporation, and interesting himself to bring about a closing of the litigation and a sale of the property to these English capitalists. On September 24, 1875, the four principal creditors above named entered into a written agreement with Dickinson, in which the amounts which each creditor was willing to accept were named; which provided that the parties should consent to a decree of *foreclosure, and an order for the[336 sale of the mortgaged property as an entirety; that the securities should all be deposited with Messrs. S. G. and G. C. Ward, with instructions to deliver them to Dickinson on his making payment of the aggregate amounts due the creditors as provided, this payment to be in

NOTE.—*As to bankrupt and insolvent laws of state, constitutionality of; laws of United States suspend state bankrupt laws; discharge in foreign country no bar*, see note to Sturges v. Crowninshield, 4: 529.

four equal parts at intervals of sixty days each—the entire contract being conditioned upon the ability to purchase the property named, which included all the property covered by the mortgages and certain other lands and stocks, at a gross price not exceeding $2,250,000. It is stated that there was on the same day another agreement entered into between Dickinson and the owners of the balance of the property for its purchase, but that agreement is not in evidence. Also on the same day a contract was made between Dickinson and the defendant, by which Wilson agreed to assist in perfecting the title to the property and carrying through the prior agreements, and which, contemplating that by the use of bonds and receiver's certificates the entire purchase might be made at a sum less than that named, $2,250,000, stipulated that whatever of surplus there might be should be paid over to Wilson. The negotiations for the purchase by the English syndicate were continued from time to time, but for reasons not disclosed the matter was never consummated. On February 27, 1877, another agreement was prepared for execution by the creditors aforesaid and Don M. Dickinson which referring to the prior agreements and also to the fact of a decree having been entered, stipulated that the securities belonging to the creditors should be placed under the control of Albon P. Man, of New York, and the defendant, as trustees: that such trustees should attend the foreclosure sale or sales, and, to the extent of the means furnished them for that purpose, bid in the property; that the title being vested in them, they should organize a new corporation with a capital stock of $8,000,000, to which corporation they should convey the property they had purchased; that the corporation should, besides issuing the $8,000,000 of stock, also issue bonds to the amount of $4,000,000, properly secured by deed of trust, which stock and bonds and deed of trust should be deposited **337** with Drexel, Morgan & Co., with *directions to deliver all to Don M. Dickinson, or such person or persons as he should designate, on his or their depositing on or before the first day of June, 1877, to the credit of the said trustees, the sum of $1,886,251.40, which moneys the trustees were to dispose of, first, in paying the expenses of the sale, purchase, reconveyance, and issue of certificates of stock and bonds and the formation of the corporation; second, in the payment of any moneys that should be furnished them for the purpose of enabling them to perfect the title to said property; third, in the payment of the sums due to the creditors under the agreement of September 24, 1875, amounting to the sum of $1,296,103.41. The fourth stipulation in reference to the disposition of the money was as follows:

"Any balance remaining in the hands of said trustees shall be delivered to Nathaniel Wilson, and his receipt therefore shall be a full discharge to the said Albon P. Man, of all liability therefor, and the said Nathaniel Wilson shall not be liable to account to the parties hereto, or any of them, in respect to the moneys so paid to him as aforesaid, and upon the payment of said moneys to said Wilson the terms and conditions of the trust hereby created shall be considered satisfied."

It was further provided that in case the sum named was not paid on or before June 1, 1877, Drexel, Morgan & Co. should redeliver to the trustees the stocks, bonds, and securities deposited with them by the trustees, and that thereupon the said trustees should transfer and d liver to Dickinson, or to such person or persons as he should direct, in writing, one full tenth part of the stock and bonds, and to the creditors, in such manner as they might in writing appoint and direct, all the residue and remainder of said stock and bonds. That agreement was signed by Man and Wilson, who accepted the trust created by the instrument, and agreed to perform its duties, and also by Dickinson, J. Boorman Johnston & Co., and Theodore M. Davis as receiver, but not by the Ayers. It was, therefore not a fully executed agreement. It is significant, however, as expressive of the intent of the parties signing, and as showing the relations of Wilson to the transaction. But on April 9, 1877, two contracts were entered into, executed by *all the creditors above [338 named, together with Albert G. Cook, also a creditor, as well as by Dickinson, Mann, and Wilson, the first of which contained provisions for the disposition of the moneys in case Dickinson should make the payment to Drexel, Morgan & Co., similar to those found in the contract of February 27, the stipulation as to the payment to Wilson being in these words:

"Fourth. The balance, if any, remaining after the payments aforesaid shall be paid to and retained by said Nathaniel Wilson, his personal representatives or assigns, discharged from this trust, and shall be held, used, and disposed of by him or them without accountability therefore to the parties aforesaid or any of them by reason of anything herein."

The other provided that if Dickinson should not make the payment at the time specified the trustees should take the bonds and stock, cancel all the former, and issue to Dickinson one tenth of the shares, and then, after a sale of a portion, should distribute the balance as follows: To the creditors, respectively, in the proportion which the sums of money they would have received, in case the English sale had been consummated, bear to $1,693,311.74, and to Wilson as follows:

"To the said Nathaniel Wilson, his personal representatives or assigns, the same proportion of said shares remaining as aforesaid which the sum of three hundred and ninety-five thousand dollars is of one million six hundred and ninety-three thousand three hundred and eleven dollars and seventy-four cents. ($1,693,311.74)."

The agreement contained also this stipulation:

"And the said Wilson, in consideration of the interests secured to him by the said indenture and this agreement, doth hereby agree unto and with the said parties of the first part, and each of them, that, in the event of the purchase of said property by said trustees (Man and Wilson) or the survivor of them, he will indemnify said parties of the first part, and each of them, against, and will pay, all

the charges and expenses of said trustees (Man and Wilson) and their said associates, for and in and about the execution of their said trusts; all lawful charges of the trustees under the mort-
339] gages in *foreclosure whereof said property shall be sold: the taxable costs in the suits and proceedings for foreclosure of said mortgages; the charges of the master or masters in chancery, or other officers, in or for the sale of said property; all claims or demands of Alfred Russell remaining unpaid for services and expenses in said suits or proceedings, and for any portion or interest in said property or any shares in the capital stock of said proposed corporation."

The sale of the property was duly made on May 11, 1877. It was bid in by Man and Wilson; the corporation provided for was duly organized under the name and style of the Lake Superior Ship Canal, Railway & Iron Company; the English capitalists failed to make the purchase, and thereupon the stock was distributed to the various parties as named in the last agreement of April 9, 1877.

At the time decree was prepared and submitted to the court for approval and signature, the circuit judge inquired whether provision had been made for the compensation of the assignees and their counsel, and was told that satisfactory arrangements had been made therefor. The arrangements which had been made were these: Dickinson represented to Meddaugh & Driggs the negotiations which were pending with the English syndicate, and which he was sanguine would be successful, and the fees of the assignees in bankruptcy having been fixed at $13,000, the claim for which was subsequently transferred to plaintiffs, and of their counsel at $25,000, Dickinson agreed to pay those sums out of the moneys which he should receive from the English syndicate, when and if the sale was carried through. And this was the agreement which was pronounced by the plaintiffs to be satisfactory. On February 13, the day after the signing of the decree, he wrote to Meddaugh this letter:

"Detroit, Mich., February 13, 1877.

"E. W. Meddaugh, Esq., Detroit.

"Dear Sir: I attended a session of the referee's court last night and also this morning from 9 to 12 o'clock, so that I have had no time before to write you on the ship canal matter.

340] *"I am so entirely confident that I can make an arrangement by which, if the English negotiation now in the hands of Avery is carried out, *that* I can pay out of the $2,250,000 the fees of Meddaugh & Driggs and of the assignees that I am willing to bind myself by the following statement:

"If the English negotiation is consummated, so that the money shall be paid through it for the property and for the discharge of the syndicate indebtedness, I will pay from it to you $38,000.00 as and for fees of Meddaugh & Driggs and of Jerome and Beaman, assignees.

"Yours very truly,

"Don M. Dickinson."

On March 7, Dickinson wrote to Davis this letter:

"March 7, 1877.

"Theo. M. Davis, Esq., 20 Nassau street, New York.

"Dear Sir: Please have the papers signed by Messrs. Man and Wilson and forward to me at your earliest convenience. It is of importance to all of us, as Messers M. & D., having learned of my return from New York, are after me for their voucher.

"I wish you would telegraph me on receipt of this when you will send it, so that I can show them the telegram.

"Yours truly,

"Don M. Dickinson.

"Per A."

To which Davis replied as follows:

"New York, March 10th, 1877.

"Don M. Dickinson, Esq., Detroit, Mich.

"D'r Sir: Yours of the 7th inst. came duly to hand.

"I herewith enclose Wilson's agreement duly signed. The other agreement has been signed by Messrs. J. Boorman Johnston & Co. and myself, and will be signed by the Ayer party as soon as a guardian is appointed, its provisions having been approved by Judge Bonney.

"Said agreement has been delivered to Wm. M. Sebrey. Yours truly,

"Theo. M. Davis."

*The only agreement signed by Wilson 341 in which Meddaugh & Driggs' names appear is the following:

"Referring to the extension agreement of the of the 'Dickinson contract' this day signed, and under which Albon P. Man and myself are appointed trustees, it is provided therein that certain moneys shall be paid to me for which I shall not be held accountable by any party to said agreement, and in case of the success of what is known as the English negotiations referred to in said agreement and of the consequent payment of the money thereunder as contemplated thereby, in consideration that said Don M. Dickinson has or does agree to pay to Messrs. Meddaugh & Driggs, att'ys of Detroit, as and for cash and expenses (by them and their clients incurred and expenses) amounting to thirty eight thousand dollars, I do agree to and with said Dickinson to pay to him for said Meddaugh & Driggs that sum out of said money so to be received by me as aforesaid.

"Dated February 27, 1877.

"Nathaniel Wilson."

Messrs. **Otto Kirchner**, **George F. Edmunds** and *H. H. Wells* for appellants.

Messrs. **W. D. Davidge** and **John E. Parsons** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The argument in support of the conclusion reached below is a simple one, and may be briefly stated thus: The only promise made by the defendant looking to a payment to Meddaugh & Driggs was conditioned on a sale to the English syndicate; that failed, and, therefore, the promise failed. The promise made by him in the second of the two *agreements 342 of April 9, 1877—that agreement under which the matter was finally disposed of—specified certain payments, but among them was none to the plaintiffs. In other words, he received the stock transferred to him burdened with certain express trusts; the plaintiffs were not

named as beneficiaries therein, and, therefore, they can claim nothing by virtue of any express promise. In the foreclosure suits their services were antagonistic to the interests of the mortgage creditors, the parties to the agreements with Wilson. Nothing was charged against the property in their behalf in those suits. The mortgagees were under no obl gations to them, because in that litigation they represented adverse interests. Thus, neither by express decree nor upon any principle of equity was the property, when purchased for the benefit of the mortgages, burdened with a charge in their favor. Hence, not only was Wilson under no express promise to or for them upon which an action at law would lie, but also he received the stock free from any express or implied burdens in their favor. There was no trust attached to the property which they could enforce.

While this reasoning is direct and clear, there are considerations many and persuasive which show that equity will not be satisfied, nor will justice be done, unless and until the plaintiffs are admitted to a share in the stock transferred to the defendants. And first must be considered the situation of the parties at the time the decree was entered. The mortgagor had been thrown into bankruptcy, and Beaman and Jerome appointed as assignees. As such assignees they represented not merely the mortgage creditors, but all the creditors and all the stockholders in the company. It was no single interest which was committed to their care, but it was their duty as assignees to look after the interests of all having claims upon the property. Acting in good faith, as it must be supposed that they did, they conceived it their duty to defend the foreclosure suits and to file a cross bill looking to the administration of the entire assets of the corporation. Their services in this respect not being to any party or parties but in respect to the property itself, and 343] to *secure its proper application among all parties interested, it is clearly in accordance with settled rules of equity jurisprudence, as well as with the practice in bankruptcy proceedings, that compensation for their services, including the pay of their counsel, should be made a direct charge upon the property, and a charge prior in right to the claims of creditors or stockholders. "It is a general principle that a trust estate must bear the expenses of its administration." *International Imp. Fund Trustees* v. *Greenough*, 105 U. S. 527, 532 (26: 1157, 1160). It is true that ordinarily the assignees in bankruptcy have possession of the property, and such possession adds to their cares as well as to their compensation. In this case they did not have possession, the property being already in the custody of the court through its receiver. But the lack of possession did not relieve them from all duty, nor destroy their right to compensation. The duty of looking out for the interests of all was as pronounced as though they had the actual possession, and the lack of possession was only to be considered in determining the amount of compensation.

It was in this situation of things that a decree was entered for the foreclosure and sale of the properties without any express provision for their compensation. This decree was entered in pursuance of negotiations which had been for some time pending between the creditors and the representative of the corporation and its stockholders, in which the amount that the creditors would take in cash was agreed upon, and out of the difference between that sum and the amount which such representative was hoping to obtain from a proposed purchaser were to be paid all the expenses of the litigation. The representative was sanguine of the success of his proposed sale. The plaintiffs were doubtless affected with his confidence, and so accepted his promise to pay their compensation out of the moneys received from that purchaser, and waived any incorporation of an express provision therefor into the terms of the decree. But while, as it seems, they were unduly sanguine, is it for a moment to be supposed that they were intending to donate their services in case the proposed sale should not be accomplished, or that the *creditors or [344 defendant understood that they so intended? The question carries its own answer. The case is not such as would arise if these plaintiffs had accepted an absolute promise from Dickinson or defendant in lieu of a charge upon the property provided in the decree. If, for instance, either had promised them absolutely to pay the $38,000, it might have been argued that they wholly waived any right to look to the property; were willing that provision for a charge thereon should be omitted from the decree, and were content to take the responsibility of such promisor. But here the promise was only a conditional one, that, if a proposed sale was accomplished, out of its proceeds payment should be made. Evidently, confidence in the accomplishment of the proposed sale was so great that it was deemed unnecessary to provide for the contingency of its failure. But the unexpected did happen. The sale failed. But their equitable right to have their charges paid out of the proceeds of the property did not cease. They would have been entitled at any time before the final consummation of the foreclosure proceedings to have had the decree modified, or an order entered making their fees a charge upon the property. These mortgage creditors and the defendant knew of the existence of the claims of the plaintiffs, and the amount thereof, and must as a matter of law be presumed to have known that they were properly charges against the property, and could, if need be, by express order be made a prior lien thereon. In this situation the trustees named in the creditors' agreement, one of whom was the defendant, become the purchasers of the property. They purchase it at the master's sale, knowing that these charges of plaintiffs, rightfully existing against the property, were only conditionally provided for. If the condition happened, and the contemplated sale to the English syndicate was made, then defendant, out of the moneys that would come into his hands, would pay their charges. This he had expressly covenanted to do. If the property was bought and the condition never happened, can it be that he took the property free in equity from the burden of such charges?

*Suppose that the case was relieved [345 from the embarrassment of conflicting testimony, and that the facts as claimed by the defend-

ant were free from dispute. The decree was entered without any provision for the payment of fees of the assignees or their counsel, such omission being upon the conditional promise of Dickinson and the defendant. Suppose that thereafter, and before the sale under the decree, the creditors, the defendant, and Dickinson, finding that the negotiations with the English syndicate were going to fail, agreed and determined to say nothing to the plaintiffs about such failure, to let the decree stand without any provision for their compensation, to purchase the property in the same way that purchase had theretofore been contemplated, and then to divide it among themselves without making any provision for the plaintiffs, and that all this was carried into effect, the plaintiffs being ignorant of the changed condition of affairs and the altered purposes until after the stock had been distributed—can it be said that under such circumstances equity would be powerless to interfere, that if the plaintiffs were willing to trust the matter of their compensation to the conditional promise, the parties who made it and the parties interested in the property could, upon the failure of that condition, ignore their claims for compensation and secure a title to the property discharged of all liability to them? If that be so, it would seem that equity lies under the imputation of sometimes preferring the form to the substance of things. Suppose that the second of the agreements of April 9 had never been signed, and that the creditors (sharing in the confidence apparently possessed by Dickinson and the plaintiffs in the successful carrying through of the pending negotiations) had stipulated for the purchase of this property by Man and Wilson, and the disposition of it only through the means of the proposed sale to the English syndicate, and that, thereafter, such proposed sale had failed of accomplishment, can it be doubted that Man and Wilson would hold the title in trust for their benefit, and for each of them according to his proportionate interest? Could they say, we took this property with an express promise to dispose of it in a certain way, and because that way has failed 346] *we hold it discharged of all liability? Is the rule any different when these plaintiffs, who had a claim of equal equity against the property, come into court, and say that the condition expressly provided for has failed? Have they not the same right to be recognized and paid out of the property? It is a cardinal rule of equity that it assumes that that is done which ought to be done; that it looks rather at the substance of rights than at the forms of proceedings. Unquestionably when Man and Wilson, the trustees, purchased at the master's sale—the time for the completion of the proposed sale to the English syndicate not having then expired—they took the property burdened with an implied obligation to the plaintiffs. It was to be satisfied by the payment of money if the contemplated sale was carried through. This promise of Dickinson and the defendant to the plaintiffs was not a donation, a mere gratuity, something done out of the abundant kindliness of their hearts, but it was in discharge of an obligation equitably resting upon the property, and to relieve it from the burden thereof.

This is not the case of a stranger making a purchase, who might be justified in relying on what appeared upon the face of the record, and upon a purchase take the property free from all liabilities. For here the decree of the court, and the sale in pursuance thereof, were but steps in the schemes originated by the creditors with Dickinson and the defendant for the purpose of securing to themselves an absolute title, and one free from burdens.

But what was really the understanding and intent of the parties, and especially of the defendant? This is his testimony:

"Mr. Dickinson said to me that it might be necessary in order to effect a sale to pay some money to Meddaugh & Driggs, the attorneys for the assignees in bankruptcy, and to the assignees in bankruptcy, for their fees and expenses, which had been considerable, so that he might have to provide for them for the expenses and costs. Whether anything was said about fees as fees I do not recollect. He said if the money came into my hands, as it was anticipated it might, I could *very well [347 afford to pay him whatever he had to pay them. I at first objected, and something was said concerning the amount which he would have to pay, and concerning the amount of their costs and expenses, and finally the sum of $38,000 was mentioned as being the amount of the costs and expenses of all the parties, the assignees, and the attorneys of the assignees, which was as much as he expected in any event to be called upon to pay, and immediately afterwards the same representations and statements were made by Mr. Theodore M. Davis in the same room, and, I think at the same time. It was in New York; and then I said that I would agree, if the English negotiations went through and the money secured by the agreement was paid to me, that out of that money I would pay to him whatever he had agreed or should agree, or might have to pay to Meddaugh & Driggs and the assignees in bankruptcy for expenses and costs to the extent of $38,000. I do not recollect that anything was said about fees."

This shows that the defendant, at the commencement, understood that this $38,000 was part of the costs and expenses of the litigation then pending.

The description of the claim as costs and expenses and not as fees is significant. It interprets the meaning of Wilson's express stipulation in the second of the two contracts of April 9, 1877, for he stipulates to pay "the taxable costs in the suits and proceedings for foreclosure of said mortgages;" not the taxed, but the taxable costs. Strictly speaking, that which is allowed to trustees and counsel, as compensation for their services, is not a part of the taxable costs, and, ordinarily, those sums which they pay out for their personal expenses and other costs of the trial are included with their compensation in a gross allowance. And yet the money which they pay out for such costs and expenses may, if separately stated and charged, be not inaptly called part of the taxable costs. If this were the only matter throwing light upon the understanding of the parties, it might be said that this was a mere refinement as to the meaning of words, but immediately following the stipulation referred

to is this language: "Neither of said parties of the first or second parts shall by reason of any-
348] thing *herein be personally liable for or on account of any moneys procured, advanced, or used by said trustees in the purchase of said property, nor for any expenses or charges in or for the execution of the trust herein created."

The trust herein created, as shown by the previous language of the agreement, and that made contemporaneously with it, was the purchase by the trustees, Man and Wilson, of all the property, the securing of a perfect title, the creation of a corporation, the conveyance to it of the property thus purchased, and the distribution of the stock, or, as the duty was expressed in the agreement—

"First. To the payment of the expenses and charges of said sale and purchase of said property, the establishment of said corporation, and the execution by said Man and Wilson and their said associates of the trusts hereby created.

"Second. To the repayment of any moneys by said trustees procured or advanced and used in the purchase of and payment for said property to the extent authorized and limited by said agreement of even date herewith."

"To the payment of the expenses and charges of said sale and purchase of said property." This means, of course, all the expenses and charges. All the express liens had passed into the foreclosure decree, and had been provided for in the agreement by specific appropriations of stock; and the scope of the general language here used was obviously to cast upon Man & Wilson, as trustees, the duty and the burden of removing every charge or incumbrance which in law or equity could, as a consequence of the legal proceedings rest upon the property. Such duty and burden passed, by the clear language of the agreement, from Man and Wilson to Wilson, as the recipient of the residuum of the stock.

The parties of the first and second part were respectively the creditors named, and Dickinson. Upon them, by the provision above quoted, none of the expenses or charges of the execution of the trust were to fall. Necessarily it follows that whatever had to be paid was to be paid by Wilson, and out of the stock which was coming to him as his portion. Nor is this strange. The sums which the creditors were to
349] receive, whether *in cash or in stock, by one or the other of the agreements, were for securities of the old corporation, whose form and amount were specified, and which were to be surrendered by them to the trustees, Man and Wilson. In other words, they agreed to receive a certain specified sum for the securities which they turned in, and the figuring as to the amount was, in most cases, carried to the very cent. While the consideration for the one tenth transferred to Dickinson is not in terms expressed on the face of these contracts, it clearly appears from the testimony that it was the services rendered by him in bringing the litigation to a close, the equity of redemption belonging to the mortgagor corporation, and the satisfaction of claims in behalf of some of the stockholders. As for Wilson, there was no specific statement in detail as to items and amounts of all the consideration for the money *or stock to* be paid to him. Evidently the odds and ends of closing out this transaction were to be thrown upon him. Dickinson and the creditors were to have so much stock absolutely; he was to take the remainder, pay out of it or its proceeds all that had to be paid, to perfect the title and remove all charges and incumbrances upon the property, and the balance was compensation for his services and risk. So the stipulation was that Dickinson and the creditors should be liable for nothing, and as the scheme involved the entire settlement of the affairs of the corporation it follows that Wilson was the party upon whom the residuary burden was cast. It is not strange, therefore, that the witnesses, speaking from memory as to what took place in the various negotiations, do not agree as to the items composing this residuum. It is not to be wondered that all the items were not named, or the amounts fixed, and, hence, naturally arises some contradiction in the testimony as to what was said and understood between the parties. The parties all looked to the defendant as the one to relieve them of all liability. He was, as may be said, the residuary legatee of all the burdens and expenses.

With reference to the obligations assumed by him in case the sale to the English syndicate was carried through, when asked what was to become of the balance that would remain *in his hands after paying the [350
creditors, and whether it was intended as a gift or otherwise, he testified:

"Out of that balance, whatever it was, I was to pay for receiver's certificates, for bonds, for trustees' commissions. I was to pay counsel fees to Alfred Russell, whatever they might be, and I was to pay $38,000 under and in pursuance of the agreement I had made with Dickinson of February 27, 1877, in reference to his obligation to Meddaugh & Driggs. Whatever was left was for my own compensation."

And further, with reference to the same matter, appear these questions and answers—

"Q. In case there was a deficiency and the balance which was expected to remain applicable to that purpose should not be sufficient to pay and discharge the whole amount of all of the several claims so provided for, by whom was the remainder to be paid?

"A. By myself. That was a responsibility and risk that I assumed.

"Q. If there should turn out to be an unexpended remainder of said balance after the discharge of all of said claims, what were you to do with such balance; was it to be kept by you for your own benefit, or to whom was it to go?

"It was to be my own, for my own benefit."

It is admitted that the written stipulation in the last contract did not express all that he agreed to do in consideration of the stock transferred to him. Thus he testifies, referring to that contract:

"A. I have stated what my liability was under that contract, and there were things undoubtedly to be provided for not specifically mentioned in that contract. For instance, no mention is made of receiver's certificates, or of bonds, or of stock. The trustees' commissions were provided for, I think; and there was no mention of my compensation."

And again:

"A. There was no other written agreement to which I was a party, but it was understood that I was to pay or take care of certain bonds and receiver's certificates and the claims that I [351] *have enumerated. The charges of the trustees and compensation to them were provided for in the agreement."

And when asked between whom was that understanding and when was it made, he answered:

"A. It was made before the agreement of April 9th, and was between the members of the syndicate, Mr. Davis individually, and myself."

The written promise was, therefore, by his own admission not the full measure of his obligations.

In 1880 there was a Congressional investigation, having reference mainly to the transactions of Davis, as receiver of the Ocean National Bank. On that investigation the defendant was a witness, and testified as follows:

"As against the stock still in my hands there are outstanding claims—at least one, and perhaps more—on the part of persons who claim that they were employed by the syndicate and that money is due to them, and that they are to look to me for it. One claim is made by Meddaugh & Driggs, who were counsel in the bankruptcy proceedings. They claim to be entitled to $34,000 ($38,000) for their professional services, and they have threatened to bring suit against me for it. I do not think they are entitled to that under the agreement that was made with them, but if there was any liability to them under that agreement with them which I signed I am the person on whom it rests. It was for the purpose of providing for these contingencies that this amount was fixed in the way it was."

And again, responding to this question:

"Q. Out of that $395,000 I understand that you were to pay the expenses of litigation, and whatever money was due Mr. Russell under his agreement with those people?"

He answered, "Yes, sir."

And still again, when asked for what he received the stock, after naming some things, he said: "In addition to which was the liability that I came under to pay all the charges that any one had against this syndicate, as it has been called." Could language be used to more clearly affirm that his agreement was, as he understood it, to pay among others this claim [352] of *plaintiffs, which, as we have seen, was equitably a charge upon the property, and of course, therefore, against the syndicate?

Another matter: In the spring of 1878, Alfred Russell, whose name appears in the stipulation signed by the defendant, not having received the payment which he expected, prepared to commence a suit against defendant. The latter was advised of this fact, and on April 1, 1878, he wrote to him a letter, containing this statement:

"My obligation, as I understand it, is to pay to you whatever stock you are entitled to under any agreement that you may have with the so-called syndicate. You and Mr. Davis do not agree as to what that agreement was. I have no knowledge of it except as I learn of it from others. One thing, I believe, is admitted, and that is if the English negotiations had gone through, of the $587,967, which was to come into my hands, $50,000 was to be paid to you in cash. The English negotiations did not go through, and no $587,967 came to me. Instead of that, the conditions of the agreement of April 9, 1877, take its place. Instead of $587,967, I am to receive $395,000, or so much of the capital stock as is the proportion between that sum and $1,600,000—that is to say I now have $395,000 to pay to the same persons who were to have been paid $587,967.

Are you entitled to receive precisely the same sum or amount of stock as if I had $587,967, or should you submit to a *pro rata* reduction, just as I and every one interested in the fund will submit to? My own opinion is that you are fairly entitled to the same proportion of the $395,000 that you were to receive of the 587 M, and should unhesitatingly say that such was your just due. If you were to receive the sum which I have already mentioned, I would not hesitate, on my own responsibility and without the approval of any of the syndicate, to make a declaration of trust in your favor to the effect that you are entitled to the same proportion of the stock which I received as you were to receive under the original agreement—that is to say, your share in the whole capital stock is diminished in the rate that 587 M has to 395 M. This would easily be expressed in figures."

*Herein is an express declaration, made [353] within a year of the signing of the last agreement, that out of the stock received under that agreement he was to pay the same persons who were to receive payment out of the moneys which he would have received under the first agreement, and an argument therefrom that, as he was to receive under the latter agreement less than under the former, the parties to receive payment should proportionately scale down the amounts they should be satisfied with.

In the bill filed by Russell was a copy of a memorandum, which he alleged had been made by Davis, the receiver of the Ocean National Bank, who was clearly, as shown by the testimony, a leading spirit in the negotiations, as follows:

"100 bonds and 10 certificates	$30,699 09½
Int. acc't since Jan. 1, 1871, and certificates since May 8, 1874, other interests equal cost of	24,470 79½
Int. on 50 bonds am't to prin. cost	12,344 63½
20 certificates 12,136.16 call, total for both	70,000 00
Certificates par 10%, etc	76,000 00
Bal. certificates and int., int. 10%	63,700 00
Man trustee Hubbell	10,500 00
Frost, Sutheriand, Birdseye & McCarter, $5,000 each	20,000 00
Over	170,200 00
Forward	170,200 00
Russell	50,000 00
Davis	115,000 00
Meddaugh & Driggs	38,000 00
Sundries, including said Wilson	21,800 00
Total	$395,000 00"

On August 2, 1878, the defendant wrote this letter:

"My Dear Mr. Russell:

"In the memorandum referred to in your bill a sum appears which is to be paid to Meddaugh & Driggs, and which makes up in part the 395 M which was to have been paid to me. I have 354] *rec'd and now enclose a copy obtained from Mr. Dickinson of my agreement with Meddaugh & D., from which you will see that I was to pay them only in the event of the success of the English negotiations and the payment to me of the cash. I send you this to show that the mem. could not have been intended to definitely fix the disposition of the stock that was to be issued to me. If that mem. is conclusive then M. & D. have a right to a portion of the stock which I hold, and that liability I can never admit, because I never assumed it. I am willing to pay and to act upon the assertion of your right to so much of the stock in my hands as I designated in a former letter. Have you anything to offer or suggest as to a method of settlement? Will you state (abate) anything of your first demand? I am very anxious that you should have your stock without any delay. Delay may be injurious to both. . . . Write to me at your convenience. Let us make an effort at adjustment before it is too late."

Do not these letters tend to show that the claim now made that plaintiffs were not to be compensated out of the stock transferred under the last agreement to defendant was an afterthought, springing from the fact that the defendant had noticed, or had his attention called to, the omission of their names in the stipulation in that agreement? How easily that the defendant would be led to such a conclusion! His obligation was expressly to the creditor's syndicate (so-called) and Dickinson. His promise was to save them harmless. Whatever debt rested against the property, or could be made a personal obligation of theirs, growing out of the transaction, he was to discharge. The less he had to pay in this direction the larger were his own profits. At first he recognized his liability to the plaintiffs, spoke of it in the way that might be expected as one of the things that he had to take care of, but discovering himself, or having his attention called to the omission of plaintiffs' names from the stipulation, he proceeded to insist upon his non-liability for their claim.

Another matter throws light upon this. It appears that the corporation as finally organized 355] had stock of $4,000,000—*40,000 shares of $100 each. The number of shares transferred to the defendant was 8387 shares. Of these he issued and transferred in satisfaction of various claims which he recognized, including those to Russell, 4640 shares, leaving in his hands 3747 shares, in respect to which he testifies: "The remainder of the stock was owned by me, and I have issued no other shares, except temporarily for use in borrowing money in my own private transactions."

For what was this balance of stock given to Wilson? It must be remembered that these creditors were not claiming any general amounts; they figured to a cent the sums which each except the Ocean National Bank was to receive. Each, evidently, was anxious to secure for himself as much as possible. Negotiations were carried on for months—even into years. All the liabilities, conceded and doubtful, must have been known to them. Davis, the receiver, testifies "we knew how many bonds and receiver's certificates Mr. Wilson had and represented." It is not to be supposed that they would throw away anything, or make generous donations to any one. While of course it was reasonable, and to be expected, that they would leave for the defendant, who assumed the general residuary liability, a margin above all obligations actually known, in order to compensate him for the risk as well as to pay him for his services, it is not to be supposed that they were so ignorant of the situation, so misunderstood the real obligations growing out of their negotiations and foreclosure proceedings and all the litigation, as to give to him stock amounting, according to the value then placed upon it, to the sum of $175,000 and over. Evidently they understood, and he understood, that that surplus stock represented other obligations than those he has provided for. And while he testifies to having purchased some receiver's certificates and bonds with his own money, he shows no investment in excess of a few thousand dollars. Indeed, the significance of the testimony in this respect is chiefly in its indefiniteness and omissions. As a witness in this case he testified that Mr. Girard and himself at first bought 40,000 certificates for between $25,000 and $30,000, and that the *money that the two expended and paid [356 into the hands of the receiver for bonds amounted to between $50,000 and $60,000 in cash. In the list of persons to whom stock was issued he names Edwin Girard as receiving 1026 shares. An entry made in his memorandum book at the time the receiver's certificates were purchased shows that one half of the cash was paid by him and one half by Girard, and his statement of the manner in which the subsequent purchases were made indicates that such purchases were on their equal account. During the Congressional investigation, he was asked this question: "Q. I want to get at how you came into possession of 3694 shares of this valuable stock. What did you give for it?" To this he replied, "I will give you the figures as near as I can. I got possession of that stock by paying, in the year 1874, $25,000, and between $35,000 and $37,000." And then, after one or two intermediate questions—there appearing to have been some interruption—the question was again asked, "For what did you receive this stock," and his reply was, "I am telling you. When you interrupted me, I had gone so far as to say that it cost me $37,000, and the costs of the suit were $2000 or $3000 more, in addition to which was the liability that I came under to pay all the charges that any one had against this syndicate, as it has been called."

It may be noticed that the $25,000, which he here says he paid in 1874, was, as shown by the memorandum referred to, paid by Girard and himself in equal proportions.

Again, he testifies that in fixing the amount of $595,000, $10,000 was estimated for his services and $20,000 for those of the trustees, Man and Wilson, and it appears that Man received a certificate of stock of 203 shares as compensation for his services.

He testifies that "the stock to Edwin Girard

was for receiver's certificates and bonds which he and I had bought together; $40,000 receiver's certificates, $75,000 of bonds, and $10,000 of stock of the old corporation, my recollection is."

Putting this testimony together, it will be perceived that he retained 3694 shares as his own 357] property. Girard received *1026 shares on account of their joint purchases, and it is to be presumed that on like account he was entitled to the same number. 1026 from 3694 leaves 2668 shares. If Man received 203 shares he, as co-trustee, would be entitled to the same number, and for his subsequent services, according to his own statement of the estimate, another equal sum, or 406 shares for those two items. Subtracting that, there still remain 2262 shares for which no satisfactory explanation is given.

It is true that when asked what was included within and covered by the $395,000 in the last agreement, he testified as follows:

"A. $90,000, receiver's certificates; $40,000 trustees' commissions; $160,000 stock and bonds; $50,000 to J. Boorman Johnston and Company or Gordon Norrie on account of bonds; $25,000 or $35,000, I do not remember which, to Alfred Russell; $10,000 to defray the expenses provided for in the agreement, and $10,000 for my compensation. That must have made Russell $35,000 if these figures are right."

This shows $300,000 out of $395,000 for bond, stocks and certificates, but the application of the stock transferred to him shows no such proportionate disposition thereof for such purposes.

Another item of testimony is a memorandum said to have been made during the negotiations prior to the signing of the last contract, by one who was present, as follows:

"What Davis must pay out of amo. which he receives on failure of English negotiations, viz, to Sept. 1, '75:

Probable amo. required for Girard's bonds (75 @ 43 M & int.).	$60,000
Probable amo. required for 79 certif., 2d issue, May 8, '74, & int., say	89,000
" " " " A. P. Man's trustee bonds (Hubbell) say	11,500
" " " " Chas. L. Frost, trustee	25,000
" " " " other trustees, Birdseye, Sutherland, & McC.'s, 5000 each	15,000
358] " " " Russell claimed	25,000
" " " " Man & Wilson, trustees	15,000
" " " " costs of court	10,000
" " " " expenses preparing bonds	4000
" " " " wagon road lands, 4700 acres; T. M. Davis' profit	140,500
	$395,000"

The last item therein is significant, especially taken in connection with the testimony given by defendant to the effect that of the $250,000 going to the Ocean National Bank only $150,000 represented stock and bonds, and $100,000 was for compensation of the receiver, Davis.

We must not be misunderstood as imputing to the defendant a lack of truthfulness, or suggesting that his testimony was false. On the contrary, his truthfulness doubtless compelled this very omission and indefiniteness. It does not seem reasonable that a man of the business capacity shown in these transactions by the defendant would have entered into any obligation of this character without knowing exactly, or nearly so, the items and amounts which he was to become charged with, and that if in the settling up of the affairs any item failed, wholly or in part, he would be able to disclose it exactly. And the fact that the testimony is so indefinite and unsatisfactory in these respects is additional reason for believing that it was part of the understanding of the parties that the plaintiffs were to be paid out of this stock transferred to the defendant.

We have in our consideration of the case thus far endeavored to eliminate all matters of conflicting testimony, and to determine what are the fair inferences from the undisputed facts. There is, in addition to this, the direct testimony of witnesses that this claim of plaintiffs was embraced in the matters provided for by this last contract. Still, we do not care to notice in detail that testimony, for it is contradicted by witnesses apparently equally reliable, and upon that conflicting *testimony [359 alone it could not be affirmed that the plaintiffs had established their case.

In conclusion on this branch of the case, we think it may be affirmed that the property was in equity chargeable with the claim of plaintiffs; that the charge was not incorporated into the decree by virtue of a reliance upon the conditional promise; that the defendant became one of the purchasers and interested in this property with full knowledge of the consideration and the equitable obligation to the plaintiffs; that the arrangement between the parties in interest and himself resulted in fixing the amounts which they should receive absolutely and under no further liability for expenses or otherwise, while he, for the considerations named, assumed all the liabilities, fixed as well as unsettled, growing out of the perfection of the title to that property; that he at one time recognized this liability to plaintiffs as one of those assumed by him in this arrangement with the creditors and others interested, and that it still remains an undischarged obligation resting upon him, and is in equity a lien upon the stock of the new corporation in his hands.

We have thus far considered only the question of the fact of liability. Upon that is the stress of the case, and to it was devoted most of the testimony, as well as of the argument. Having reached the conclusion that the defendant is under obligations to the plaintiffs, there remains the further question as to the measure of such liability. On the one hand, it may be said that the amount of the plaintiff's claim was by agreement fixed at $38,000, and that that was the sum which the defendant promised to pay in case the English negotiations were carried through. On the other hand, it is said that if those English negotiations had been carried through he was to have received $590,000 in cash, while under the arrangement as finally consummated he received stock representing only $395,000, and that, therefore, to that extent the claim of plaintiffs should be scaled down.

We have heretofore referred to the fact that the evidence is unsatisfactory as to what was intended to be included within and provided for by these two respective amounts. There is testi-[360] mony *to the effect that in arriving at the latter amount those claims included in the former, which did not represent cash, such as commissions to trustees, were to be reduced, though apparently not by any uniform ratio. Russell, who had a claim for $50,000 under the arrangement, settled at a much less figure paid in stock. It may fairly be said that the plaintiffs have not proven that their claim was to be exempted from a reduction corresponding to that made in others of like character, and of course the burden is on them to make out their case. If it be said that the amount of $38,000 was agreed upon in the first instance, a sufficient reply is that that agreement was not made with the creditors, and was only in view of the proposed sale to the English syndicate. There is no testimony as to the real value of those services. Equity would seem to say that the claim of plaintiffs should be scaled down proportionately to the amount allotted to Wilson under the two contracts, which, as we figure it, would reduce the sum to $25,440. A majority of the court are of the opinion that in view of the peculiar circumstances of the case the plaintiffs should not be allowed interest.

The decree of the court below must, therefore, be reversed and the case remanded, with instructions to enter a decree in favor of the plaintiffs, awarding to them the sum of $25,440, and adjudging it a lien upon the stock of the Lake Superior Ship Canal, Railway & Iron Company remaining in the hands of defendant.

DORIS WERNER, *Plff. in Err.*, v. CITY COUNCIL OF CHARLESTON.

(See S. C. Reporter's ed. 360, 361.)

Review of state judgment.

A judgment of the supreme court of South Carolina, affirming a judgment or order of the court of common pleas of that state, which overruled a demurrer to the complaint, is not a final judgment reviewable by this court.

[No. 941.]

Submitted Jan. 15, 1894. Decided Jan. 22, 1894.

IN ERROR to the Supreme Court of the State of South Carolina, to review a judgment of that court, affirming a judgment or order of the Court of Common Pleas of that state which overruled a demurrer to the complaint in this action. On motion to dismiss. *Dismissed.*

Statement from brief of appellee's counsel:

The judgment brought here by writ of error for review, is a judgment of the supreme court of the state of South Carolina, which simply affirmed a decision of the lower court overruling a demurrer, and thereby remanded the case to the court below for a hearing on the merits. It is therefore an interlocutory judgment and is in no sense a final decree.

Statement from the opinion of McGowan, *A. J.*, of the supreme court of South Carolina:

This is an action by the city council of Charlestown to recover from the defendant, Doris Werner, the amount paid by the city council for filling up a low lot in the city, the property of the said defendant, which said lot or portion thereof had been inspected by the "board of health," determined to be a nuisance dangerous to the public health, and ordered to be filled. The defendant having been notified, as required by law, to fill the said lot and having failed so to do, the same was filled by the city authorities, and the present action is for the recovery of the cost of the said filling, viz: For 1503 cubic yards of earth, at an expense of $1157.10, which has been paid out of the city treasury. The plaintiff alleges that no part thereof has been paid by the said defendant, and that said sum does not exceed "one half the value of defendant's said lot of land."

Whereupon plaintiff demands judgment against the said defendant for the said sum of $1157.10, with interest and costs.

When the complaint was read the defendant, by her counsel, interposed a verbal demurrer and moved to dismiss the complaint for the reason that it did not state facts sufficient sufficient to constitute a cause of action. His honor Judge Kershaw overruled the demurrer, and the defendant appealed to the supreme court of the state.

The supreme court of South Carolina, affirmed the judgment of the lower court, and the judgment of the supreme court was brought to this court by writ of error.

Mr. **Charles Inglesby**, for defendant in error, in favor of motion.

Mr. **T. Moultrie Mordecai**, for plaintiff in error, in opposition.

The Chief Justice: The writ of error is dismissed. *Meagher* v. *Minnesota Thresher Mfg. Co.* 145 U. S. 608 [36: 834]; *Rice* v. *Sanger*, 144 U. S. 197 [36: 403]; *Hume* v. *Bowie*, 148 U. S. 245 (37:438.)

UNITED STATES, *Appt.*, [362 v. PHILIP R. ALGER.

(See S. C. Reporter's ed. 362-366.)

Officer of Navy—grade—statute—professor of mathematics—longevity pay.

1. A retired officer of the navy is not entitled to have active service credited in regulating his pay after his active service has ceased.
2. If an officer of the Navy has been twice in the

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 109.

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

service, the grade, the pay of which is the test of computation, is the lowest held by him since entering the service for the second time.

3. Where an officer of the Navy has entered the service but once, that entry is to be taken as his last entry, within the meaning of the statute.

4. By section 1556 of the Revised Statutes, fixing the rate of pay of officers in the Navy, the pay of professors of mathematics, is graduated by the length of service.

5. Where an officer of the Navy was continuously in active service from September 22, 1876, to November 10, 1890, first as cadet midshipman, then as midshipman, then as ensign, and on November 10, 1890, he resigned the office of ensign, and his resignation was accepted to take effect on the same day, and on the next day, November 11, he was appointed professor of mathematics to rank from November 1, and immediately accepted the appointment and took the oath of office, his services were for one continuous period, and the time with which he is to be credited, in computing his longevity pay began on September 22, 1876, the date of his appointment as a cadet midshipman, and the longevity pay to which he is entitled is that of ensign only.

[No. 885.]

Submitted Jan. 8, 1894. Decided Jan. 22, 1894.

APPEAL from a judgment of the Court of Claims, in favor of Philip R. Alger, a professor of mathematics in the Navy, for the amount due him from the United States for longevity pay. *Reversed, and case remanded for further proceedings.*

Statement by *Mr. Justice* **Gray:**

This was a claim by a professor of mathematics in the Navy for $32.87, alleged to be due him for longevity pay from November 11, 1890, to November 30, inclusive. The petition alleged that during that period he had been allowed and paid at the rate of $2400 per annum, being the shore pay of a professor of mathematics in the first five years after the date of appointment; whereas, as he contended, he should have been paid at the rate of $3000 per annum, being the pay of a professor of mathematics in the third five years from the date of appointment, by reason of his prior service in the Navy from September 22, 1876, to November 10, 1890, by virtue of the provision of the Naval Appropriation Act of March 3, 1883, chap. 97, which is as follows:

"And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade, having graduated pay, held by such officer since last entering the service: Provided, that nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: Provided further, that nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy." 22 Stat. at L. 473.

The petition also alleged, and the Court of [363] Claims found, *the following facts:

"Claimant was appointed cadet midshipman September 22, 1876; graduated June 22, 1882, and promoted to midshipman the same day; commissioned ensign June 26, 1884. Resigned November 10, 1890, and resignation accepted to take effect the same day. November 11, 1890, appointed professor of mathematics, to rank from November 1, 1890; accepted the appointment and took the required oath of office the same day. He was given credit, upon his commission as ensign, for his services as cadet midshipman, and as a midshipman, and was paid the pay of an ensign after five years of service, from June 26, 1884, to the date of his resignation. He has not been allowed credit under the Act of March 3, 1883, in the lowest grade, having graduated pay, since he entered the Navy as professor of mathematics by appointment as aforesaid."

Upon these facts, the Court of Claims decided, as a conclusion of law, that the claimant was entitled to recover the sum claimed, and gave judgment accordingly. The United States appealed to this court.

Messrs. **J. E. Dodge,** *Assistant Atty. Gen.,* and **Felix Brannigan** for appellant.

Messrs. **John Paul Jones** and **Robert B. Lines** for appellee.

Mr. Justice **Gray,** delivered the opinion of the court:

The theory of longevity pay was well stated by *Chief Justice* Drake, speaking for the Court of Claims, in an opinion cited by both parties in this case, in which he said: "There was, no doubt, an underlying principle and purpose in the introduction of longevity pay into the Navy. We think it was intended, first, to induce men to enter the Navy and remain in it for life; second, to remove the depressing influence of long periods of service in one grade without an increase of pay; third, to compensate for increased professional knowledge and efficiency in officers by increasing their pay in advance of *promotion. [364] If these views are correct, the whole basis of longevity pay is the officer's capacity for duty, and his performance of it. In other words, longevity pay is for longevity in actual service." *Thornley* v. *United States,* 18 Ct. Cl. 111, 117.

Accordingly, a retired officer is not entitled to have active service credited in regulating his pay after his active service has ceased. *Thornley* v. *United States,* 113 U. S. 301 [28: 999], and 18 Ct. Cl. 111; *Roget* v. *United States,* 148 U. S. 167 (37: 408) and 24 Ct. Cl. 165.

But every officer in active service is entitled, by the Naval Appropriation Act of March 3, 1883, chap. 97, to be credited with the time of his actual service in the Navy in any grade, "as if all said service had been continuous and in the regular Navy in the lowest grade, having graduated pay, held by such officer since last entering the service." 22 Stat. at L. 473.

The whole aim and scope of the Act are to give the officer, in the grade held by him after its passage, the benefit of the whole time of his actual service, and to fix the rate of increased compensation by the lowest grade, having graduated pay, held by him

"since last entering the service." *Barton* v. *United States*, 129 U. S. 249 [32: 663], and 23 Ct. Cl. 376; *United States* v. *Foster*, 128 U. S. 435 [32: 486]. The Act is as applicable to those officers whose actual service has been continuous, as to those who have actually served at two or more distinct periods. If an officer has been twice in the service, the grade, the pay of which is the test of computation, is the lowest held by him since entering the service for the second time. *United States* v. *Rockwell*, 120 U. S. 60 [30: 561], and 21 Ct. Cl. 332. But if he has entered the service but once, his first entry is to be taken as his last entry, within the meaning of the statute. *United States* v. *Mullan*, 123 U. S. 186 [31: 140]; *United States* v. *Green*, 138 U. S. 293 [34: 960].

By section 1556 of the Revised Statutes, fixing the rate of pay of officers in the Navy, the pay of cadet midshipmen or of midshipmen is not graduated by length of service; but the pay of ensigns, as well as of professors of mathematics, is so graduated.

This claimant was continuously in active **365**] service from *September 22, 1876, to November 10, 1890, first as cadet midshipman, then as midshipman, then as ensign. On November 10, 1890, he resigned the office of ensign, and his resignation was accepted to take effect on the same day. On the next day, November 11, he was appointed professor of mathematics to rank from November 1, and immediately accepted the appointment and took the oath of office.

There is no doubt that the time, with which he is to be credited, began on September 22, 1876, the date of his appointment as a cadet midshipman. *United States* v. *Hendee*, 124 U. S. 309 [31: 465]; *United States* v. *Baker*, 125 U. S. 646 [31: 824]; *United States* v. *Cook*, 128 U. S. 254 [32: 464].

The controverted question is as to the grade, by which his longevity pay as a professor of mathematics is to be computed; and this depends upon the question whether the date of his "last entering the service" is the date of his appointment as professor of mathematics, in which case the pay of that office is the test; or the date of his original appointment as cadet midshipman, in which case the test is the pay of an ensign, that, having been his lowest grade with graduated pay. The question is, in short, whether his actual service was for two distinct periods, or for a single and continuous period of time.

This court is of opinion that, in substance and in law, it was for one continuous period. His express resignation of the lower office, the very day before his appointment to the higher office, and when he must have known of and counted upon the coming appointment, was evidently tendered with no intention of leaving the service, and was but equivalent to the resignation which the law would have implied from his acceptance of the higher office. The fact is therefore immaterial (which might otherwise be significant) that his new appointment was to rank from a date before his resignation of the old one. If such a formal resignation were sent in for the purpose of eluding the statute and claiming longevity pay on the higher scale, the attempt would be as unbecoming in the officer or his advisers, as it would be ineffectual to charge the United States.

The result is that the longevity pay to which the claimant *is entitled since [**366** his appointment as professor of mathematics (as before this appointment) is that of ensign only, that having been "the lowest grade, having graduated pay, held by such officer since last entering the service," within the meaning of the statute.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

UNITED STATES, *Appt.*,
v.
ALBERT W. STAHL.

(See S. C. Reporter's ed. 366-368.)

Longevity pay of naval engineer—continuous service—set off.

1. While the pay of a cadet midshipman, of a midshipman, or of a cadet engineer is not, the pay of an assistant engineer or of an assistant naval constructor is, graduated by length of service.
2. The claimant's whole service, from the time of his entering the Naval Academy, and notwithstanding his resignation of one commission the day before he received another, must be considered a continuous service.
3. Where an officer sues the government to recover an additional amount claimed by him for pay, the government may have deducted from the sum due him for such pay, any sum which has been mistakenly and improperly paid to him.

[No. 886.]

Submitted Jan. 8, 1894. Decided Jan. 22, 1894.

APPEAL from a judgment of the Court of Claims, in favor of Albert W. Stahl, against the United States, for longevity pay of the plaintiff, as assistant engineer in the Navy. *Reversed, and case remanded for further proceedings.*

Statement by *Mr. Justice* **Gray:**

This was a claim for $1000, alleged to be due for longevity pay as an assistant engineer in the Navy from June 10, 1882, to August 10, 1887. The petitioner alleged that he was entitled to this amount, "after deducting all just credits and offsets." The answer was a general traverse.

The findings of fact by the Court of Claims were as follows: "Claimant entered the Naval Academy, September 14, 1876; graduated June 10, 1880; and was commissioned assistant engineer June 10, 1882. On August 10, 1887, he resigned his commission as assistant engineer. On August 11, 1887, he was duly appointed and commissioned an assistant naval constructor. Claimant has never received any credit upon his commission as assistant engineer for his service in the Navy from his entry into the Naval Acad-

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 537.

emy, September 14, 1876, till the date of his said commission, June 10, 1882. On December 30, 1888, claimant was given credit, for his prior service at the Naval Academy and as assistant engineer, upon the commission then held by him of assistant naval constructor. The amount due claimant is $1000, as unpaid longevity pay."

367] *Upon these facts, the Court of Claims decided, as a conclusion of law, that the claimant was entitled to recover the sum claimed, and gave judgment accordingly. The United States appealed to this court.

Messrs. **J. E. Dodge,** *Assistant Atty. Gen.,* and **Felix Brannigan** for appellant.
Mr. **John Paul Jones** for appellee.

Mr. Justice **Gray,** delivered the opinion of the court:

The claimant, as is implied in the facts found, and is admitted by the counsel of the United States, was continuously in active service in the Navy from September 14, 1876, to August 10, 1887, first in the Naval Academy as a cadet midshipman, then, it would seem, as a midshipman or a cadet engineer, and then as assistant engineer. See Rev. Stat. §§ 1512, 1521-1525, 1536 *ad fin.* On August 10, 1887, he resigned his commission as assistant engineer; and on August 11, 1887, he was appointed an assistant naval constructor. While the pay of a cadet midshipman, of a midshipman, or of a cadet engineer is not, the pay of an assistant engineer or of an assistant naval constructor is, graduated by length of service. Rev. Stat. § 1536. The claimant's whole service, from the time of his entering the Naval Academy, and notwithstanding his resignation of one commission the day before he received another, must be considered a continuous service, for the reasons stated in the opinion just delivered in *Alger* v. *United States, ante,* p. 192. He has been given credit, for his whole prior service, upon his last commission, upon which he was not entitled to it; and has been allowed no credit upon his commission as assistant engineer, upon which he was entitled to it. The Court of Claims, applying the same rule that it did *Alger* v. *United States,* apparently considered him entitled to both.

As this court holds him to be entitled to 368] longevity pay as *assistant engineer only, there should be deducted from the sum due him for such pay the sum which has been mistakenly and improperly paid to him. *McElrath* v. *United States,* 102 U. S. 426 [26: 189]; *United States* v. *Burchard,* 125 U. S. 176 [31: 662].

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

THE MERCHANTS COTTON PRESS & STORAGE COMPANY, *Plff. in Err.,*
v.
THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL.

THE NATIONAL FIRE INSURANCE COMPANY, OF CONNECTICUT, *Plff. in Err.,* v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE MUTUAL FIRE INSURANCE COMPANY OF NEW YORK, *Plff. in Err.,* v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, *Plff. in Err.,* v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE FIRE ASSOCIATION OF NEW YORK, *Plff. in Err.,* THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY, of England, *Plff. in Err.,* v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL. THE ROYAL INSURANCE COMPANY OF ENGLAND, *Plff. in Err.,* v. THE INSURANCE COMPANY OF NORTH AMERICA, of Philadelphia, ET AL.

(See S. C. Reporter's ed. 368-389.)

Removal of cause—voluntary joinder of parties—pleadings—separate controversy—parties interested—interstate commerce law.

1. In a suit in equity in the nature of a creditor's bill brought by insurance companies against a railroad company and other companies who are

NOTE.—*As to removal of causes; right to remove; grounds of removal; citizenship; prejudice or local influence; Federal question; parties,* see note to Butler v. National Home for Disabled Volunteer Soldiers, 36: 346.

As to removal of causes, under Act of 1875; citizenship, see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies, see note to Sloane v. Anderson, 29: 899.

As to removal of cause to United States courts for local prejudice, see note to Gaines v. Fuentes, 23: 524, and to Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, Act of Congress or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied, see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers (Rev. Stat. § 643), see note to Davis v. South Carolina, 27: 574.

Removal of cause from state court to Federal court; separable controversies.

A defendant cannot make an action several which a plaintiff has elected to make joint. Torrence v. Shedd, 144 U. S. 527 (36: 528).

Separate defenses do not create separate controversies, within the meaning of the Removal Act. Wilder v. Virginia, T. & C. Steel & I. Co. 46 Fed. Rep. 676.

A separate controversy is not presented, within the Removal Act because complainants might have severally prosecuted a suit which they have properly brought jointly. Wilder v. Virginia, T. & C. Steel & I. Co. 46 Fed. Rep. 676.

A single count in a petition is not a suit removable to the Federal courts when arising under the

made parties in aid of the relief asked against that company, if the suit is in fact a single cause of action against the railroad company with incidental relief against the other companies the railroad company is an indispensable party to the litigation, and there is no separable controversy between the other defendants which will allow a part of them to remove the cause from the state court to a Federal court.

2. The voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite.

3. The right of removal must be determined by the pleadings at the time the petition is filed.

4. In order to justify a removal of a cause from a state court to the U. S. circuit court, on the ground of a separable controversy, between citizens of different states, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

5. The right to take steps for the removal of a cause to the circuit court of the United States, on the ground of a separable controversy, is confined to the parties actually interested in such controversy.

6. There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of an allowance of a rebate to the agents of the owners or consignees of goods, if actually made, would invalidate the contract of afreightment or exempt a railroad company from liability on its bills of lading.

[Nos. 807, 808, 809, 810, 811, 812, 813.]

Submitted Jan. 8, 1894. Decided Jan. 22, 1894.

IN ERROR to the Supreme Court of the State of Tennessee, to review a judgment of that court, affirming a decree of the Chancery Court of Shelby County, of the State of Tennessee, upon the merits, and sustaining the decision of the Chancery Court, denying the petition of several of the plaintiffs in error to remove the cause to the Circuit Court of the United States for the Western District of Tennessee, and holding that certain rebates allowed on cotton shipped on a railroad did not invalidate the bills of lading thereof, in a suit brought by The Insurance Company of North America, of Philadelphia, *et al.*, against The Merchants' Cotton Press & Storage Company, the Cairo, Vincennes & Chicago Line of Illinois *et al.*, defendants, for the relief sought for in the complaint and to charge the railroad company with the loss sustained by shippers and that certain insurances might be collected for the benefit of complainants, etc. On motion to dismiss or affirm. These seven causes were submitted together and present the same Federal questions. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. P. Walker, C. W. Metcalf, Luke E. Wright** and **T. B. Turley,** for plaintiffs in error:

The motion to affirm should not be entertained for the reason that, though it is nominally coupled with a motion to dismiss, such motion to dismiss is colorable only, and manifestly made for the purpose of bringing on the motion to affirm.

Whitney v. *Cook*, 99 U. S. 607 (25: 446).

The record presented a case for removal to

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laws of the United States. State v. Day Land & C. Co. 49 Fed. Rep. 503.

Averments of indebtedness incidental to the real controversy raised by the bill cannot be treated as separate controversies constituting a basis for removing the entire cause under the statute. Wilder v. Virginia, T. & C. Steel & I. Co. 46 Fed. Rep. 676.

Defendants cannot remove a cause to the Federal courts on the ground of citizenship, where cross-petitioners who are aliens or citizens of the same state as such defendants demand the same relief for themselves as is sought by plaintiff. Adelbert College v. Toledo, W. & W. R. Co. 47 Fed. Rep. 856.

A suit for partition of land cannot be removed from the state court into the United States circuit court upon the petition of plaintiff and one of numerous defendants, where the controversy between them relates only to the title in an undivided share of the land, and cannot be determined without the presence of the other defendants. Torrence v. Shedd, 144 U. S. 527 (36: 528).

A controversy between a county and creditors of a railroad, as to the priority of their several claims in respect to its claim for the value of the property of another railroad of which it was sole stockholder, turned over to the former railroad company, is separable from a controversy between the county and the company as to stock in such company which it claims should be issued to it in payment for such property, and which the company claims is not to be issued until all liens on the property are discharged, and a controversy between the county and the railroad as to a lien claimed to be on such property, and which the former claims should be discharged in part by another county. Foster v. Chesapeake & N. R. Co. 47 Fed. Rep. 369.

There is no separable controversy in a suit by a school district against a bank of the same state and an individual resident of another state to cancel for illegality judgments recovered against it by the bank and orders issued in payment thereof, which judgments and orders have been assigned and transferred to such individual by the bank. Rock Rapids Independent Dist. v. Bank of Rock Rapids, 48 Fed. Rep. 2.

An action against two railroad companies for a joint tortious injury is not separable so as to allow its removal to the Federal courts by one of the defendants on the ground of diverse citizenship. Bowley v. Richmond & D. R. Co. 110 N. C. 315.

A cause cannot be removed on the ground of a separable controversy by a lessee railroad company organized under the laws of another state and sued jointly with its lessor—a citizen of the state—to compel them to lower tracks used by both and construct a suitable street crossing over them; and this though it files a separate answer. State v. Columbus & X. R. Co. 48 Fed. Rep. 626.

In a bill filed in a Virginia state court by stockholders and creditors of a New Jersey corporation, citizens of Virginia and of other states, against the corporation and certain Virginia corporations, and individuals residing in Virginia and other states, proceeding upon the theory of the right of complaints to have the entire assets of the New Jersey corporation brought into court for distribution, allegations that one of the Virginia corporations was organized for the benefit of some of the individual defendants, to defraud the New Jersey company and its stockholders and creditors, and of fraudulent conveyances to it by the latter company, do not constitute a separable controversy. Wilder v. Virginia, T. & C. Steel & I. Co. 46 Fed. Rep. 676.

The incidental interest of a fire insurance company liable to a carrier for loss by fire, in defeating a claim, by marine insurance companies by subrogation for nondelivery of the goods, arising from

the Federal court, under the Act of Congress in that regard. It showed a separable controversy between citizens of different states, which could be determined without the presence of any of the other parties to the record.

Knapp v. *Troy & B. R. Co.* 87 U. S. 20 Wall. 117 (22: 328); *Barney* v. *Latham*, 103 U. S. 206 (26: 514); *Hyde* v. *Ruble*, 104 U. S. 407 (26: 823); *Harter Twp.* v. *Kernochan*, 103 U. S. 562 (26: 411); *Kanouse* v. *Martin*, 55 U. S. 15 How. 198 (14: 660); *Meyer* v. *Delaware R. Const. Co.* 100 U. S. 457 (25: 593); *Ayers* v. *Chicago*, 101 U. S. 184 (25: 888); *Shainwald* v. *Lewis*, 108 U. S. 158 (27: 691); *Ayres* v. *Wiswall*, 112 U. S. 187 (28: 693); *Ayers* v. *Watson*, 113 U. S. 594 (28: 1093); *Crump* v. *Thurber*, 115 U. S. 56 (29: 328); *Insurance Co. of N. A.* v. *Delaware Mut. Ins. Co.* 50 Fed. Rep. 243.

The record establishing that the contracts of affreightment between the C. V. & C. Line and Jones Bros. & Co. were made in violation of the Interstate Commerce Law—such violation making the whole contract illegal under the terms of the statute—no recovery should have been allowed on the bills of lading issued by the C. V. & C. Line to Jones Bros. & Co., and the case of the complainant marine companies depending upon the establishment of the liability of the carriers must therefore fail so far as concerns those bills of lading.

Clarke v. *Providence*, 1 L. R. A. 725, 16 R. I. 337, 27 Am. & Eng. Corp. Cas. 8; *Petrel Guano Co.* v. *Jarnette*, 25 Fed. Rep. 675; *Dent* v. *Ferguson*, 132 U. S. 50 (33: 242); *Hannay* v. *Eve*, 7 U. S. 3 Cranch, 242 (2: 427); *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396 (32: 979); *Miller* v. *Ammon*, 145 U. S. 421 (36: 759); *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393 (36: 748).

Messrs. **John M. Butler, Holmes Cummins** and **William H. Carroll,** for defendants in error:

The denial of the right of removal presents no Federal question.

Swan Land & C. Co. v. *Frank*, 148 U. S. 611 (37: 580); *Porter* v. *Sabin*, 149 U. S. 479 (37: 818).

Denial of the right of transfer raises a Federal question re-examinable upon the assignment of error of the other petitioning defendants.

The domicils of these corporations are no. shown by the records.

Jackson v. *Ashton*, 33 U. S. 8 Pet. 148 (8: 898).

The jurisdiction of the circuit court of the United States depends either upon the existence of a Federal question, or the diverse citizenship of the parties to a suit, where the matter in dispute exceeds the sum of $2000 exclusive of interests and costs.

Byers v. *McAuley*, 149 U. S. 619 (37: 872).

Where the whole controversy is between citizens of different states, all the parties on one side of that controversy must be citizens of different states from all the parties on the other side.

Strawbridge v. *Curtiss*, 7 U. S. 3 Cranch, 267 (2: 435); *Smith* v. *Lyon*, 133 U. S. 318 (33: 636); *Meyer* v. *Delaware R. Const. Co.* 100 U. S. 457 (25: 593); *Central R. Co. of N. J.* v. *Mills*, 113 U. S. 256 (28: 951); *Smith* v. *Akers* ("*Akers* v.

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the fact that its defeat will extinguish their claim against it to be exonerated out of its policy, will not make their cause of action against it inseparable from that against the carrier, so as to prevent its removal to the Federal court. Insurance Co. of N. A. v. Delaware Mut. Ins. Co. 50 Fed. Rep. 243.

A controversy between a railroad company and the owner of lands sought to be taken by it for the purpose of providing a substitute for a highway taken in the construction of its road is separable from that between the railroad company and the town in which the land lies, for the purpose of removal of the cause, when the railroad has to provide the substitute and put it in as good condition as the original highway, and the town as such has nothing to do with the matter. New York, N. H. & H. R. Co. v. Cockcroft, 46 Fed. Rep. 881.

That a mere nominal party citizen of the same state as complainant is joined as plaintiff when he should have been joined as defendant will not prevent removal of a cause. New Chester Water Co. v. Holly Mfg. Co. 3 U. S. App. 264, 53 Fed. Rep. 19.

A railroad engineer joined in a suit against the owner of the railroad for personal injuries is merely a nominal party whose joinder will not prevent such owner from removing the suit on the ground of diverse citizenship, where the only allegation against such engineer is that the injury was caused by a broken bumper on a car which defendants had negligently permitted to remain broken, and there is no allegation showing any duty on his part to control the cars or see that they were in proper condition or repair, or that he had any supervision of the train. Rivers v. Bradley, 53 Fed. Rep. 305.

The question of priority between persons holding liens against a railroad does not make a separable controversy between them in a suit to foreclose one of the liens, since the railroad company is an indispensable party to the determination of such priority. Marsh v. Atlanta & F. R. Co. 53 Fed. Rep. 168.

Where the object of the suit is to condemn and appropriate to the public use a single lot of land, the controversy is not divisible because the two defendants own distinct interests and may be entitled to separate damages; and therefore one of them cannot remove the cause as to himself alone from the state court to the circuit court of the United States. Bellaire v. Baltimore & O. R. Co. 146 U. S. 117 (36: 910).

One of the two defendants sued jointly in a state court for a tort cannot remove the cause into a a Federal court under the Act of Congress of March 3, 1875, chap. 137, § 2, upon the ground of a separate controversy between the plaintiff and himself, although he has filed separate defenses and plaintiff might have brought the action against either alone. O'Harrow v. Henderson, 52 Fed. Rep. 769.

A suit cannot be removed from a state court to a Federal court by one of several defendants unless his interest is so separate and distinct from that of the other defendants that it can be fully determined, as between him and the plaintiff, without the presence of the other parties. Mitchell v. Smale, 140 U. S. 406 (35: 442).

A cause is not removable under Act of Congress of March 3, 1887, § 2, cl. 3, as amended by Act of 1888, unless it embraces a separable controversy. Rogers v. Van Nortwick, 45 Fed. Rep. 513.

The question as to a separable controversy does not arise where there is but one proper party plaintiff or defendant, although other parties are improperly joined. Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. R. Co. 44 Fed. Rep. 456.

Separate defenses do not create separate controversies, within the meaning of the Act of Congress for removal of causes. *Re* San Antonio & A. P. R. Co. 44 Fed. Rep. 145.

Akers"), 117 U. S. 197 (29: 888); *Susquehanna & W. V. R. & Coal Co.* v. *Blatchford*, 78 U. S. 11 Wall. 172 (20: 179).

And when in any suit recognizable in the circuit court of the United States, there is a separable controversy, by the settled construction of the third clause of section 2 of the Act of the 3d of March, 1887, as corrected by the Act of the 13th of August, 1888, the whole subject-matter of the separable suit must be capable of being finally determined as between the parties thereto, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

Hyde v. *Ruble*, 104 U. S. 407 (26:823); *Corbin* v. *Van Brunt*, 105 U. S. 576 (26: 1176); *Fraser* v. *Jennison*, 106 U. S. 191 (28: 131); *Winchester* v. *Loud*, 108 U. S. 130 (27: 677); *Shainwald* v. *Lewis*, 108 U. S. 158 (27: 691); *Ayres* v. *Wiswall*, 112 U. S. 187 (28: 693); *Fidelity Ins. T. & S. D. Co.* v. *Huntington*, 117 U. S. 280 (29: 898); *Graves* v. *Corbin*, 132 U. S. 571 (33: 462); *Brown* v. *Trousdale*, 138 U. S. 389 (34: 987).

The matter in dispute in such distinct and separable controversies must exceed the sum of $2000 exclusive of interest and costs, and the requisite diverse citizenship must exist before the suit can be transferred upon the petition for removal into the circuit court of the United States by one or more of the defendants actually interested therein.

Ex parte Pennsylvania Co. 137 U. S. 455 (34: 740); *Torrence* v. *Shedd*, 144 U. S. 527 (36: 528).

It is indispensable, before the state court is required to surrender its jurisdiction of this suit, that the petitioners, or one of them, file in that court a removal petition and give the required security.

Pittsburg, C. & St. L. R. Co. v. *Ramsey*, 89 U. S. 22 Wall. 328 (22: 824).

If such petition be filed, and it fails to show the citizenship of the parties, it is defective.

Crehore v. *Ohio & M. R. Co.* 131 U. S. 240 (33: 144).

The jurisdiction of the circuit court of the United States over this suit rests and depends upon the statement made in the petition for its transfer into that court, and verified by the oath of the petitioner.

Virginia v. *Paul*, 148 U. S. 123 (37: 392); *Ex parte Virginia* ("*Virginia* v. *Rives*"), 100 U. S. 313 (25: 667); *Graves* v. *Corbin*, 132 U. S. 571 (33: 462).

A real and not a fictitious Federal question, is essential to the jurisdiction of this court to re-examine the judgment of the supreme court of Tennessee.

Hamblin v. *Western Land Co.* 147 U. S. 531 (37: 267).

For the purpose of determining whether a controversy is separable the allegations in the bill must be taken as true, and the combination charged between these defendants viewed in that light does not present a separable controversy.

East Tennessee, V. & G. R. Co. v. *Grayson*, 119 U. S. 240 (30: 382); *Central R. Co. of N. J.* v. *Mills*, 113 U. S. 249 (28: 949).

The test of a right claimed must be determined by the case made by the pleadings at the time the petition is filed; and the test of the sufficiency of the petition is the averments in it.

A separable controversy does not exist in behalf of some of the defendants in a cause of action, several as well as joint, where plaintiff has elected to sue them jointly. Ames v. Chicago, S. F. & C. R. Co. 39 Fed. Rep. 881; Sexton v. Seelye, 39 Fed. Rep. 705.

An action of tort in a state court, being joint and several against two defendants, is severable: and one of them, who is a non-resident, may be entitled to remove it to a Federal court, although the other is a resident of the same state as the plaintiff. Spangler v. Atchison, T. & S. F. R. Co. 42 Fed. Rep. 305.

The question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of filing the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court. Louisville & N. R. Co. v. Wangelin, 132 U. S. 599 (33: 474), 7 Ry. & Corp. L. J. 150; Chesapeake, O & S. W. R. Co. v. Hendricks, 88 Tenn. 710.

Where a suit is brought to reach the entire property of a limited partnership, and to declare certain judgments against the same void, there is, in the suit, but a single controversy between the plaintiff on the one side and the defendants who had adverse claims against the property on the other, although there are various defendants and various claims by the several defendants. Graves v. Corbin, 132 U. S. 571 (33: 462), 7 Ry. & Corp. L. J. 142.

Separate defenses do not create separate controversies, within the meaning of the Removal Act. Ames v. Chicago, S. F. & C. R. Co. 39 Fed. Rep. 881.

A declaration which charges two corporations with having jointly trespassed on plaintiff's land does not show a separable controversy between plaintiff and either defendant. Louisville & N. R. Co. v. Wangelin, 132 U. S. 599 (33: 474), 7 Ry. & Corp. L. J. 150.

A suit to restrain county officials from collecting a tax to pay bonds, on the grounds of their illegality, and also to restrain enforcement by the bondholders, and to declare the bonds void, does not present a separable controversy as to the bondholders. Anderson v. Bowers, 40 Fed. Rep. 708.

In an action of trespass on the case, the fact that the plaintiffs may not be able to maintain their action as against all of the defendants does not make a separate controversy in favor of any one of them. Kaitel v. Wylie, 38 Fed. Rep. 865.

The nonservice of process upon one of the defendants, who were sued jointly, where the statute allows the suit to proceed against those served, cannot change the character of the suit so as to make a separable controversy as to the defendant served, where the suit could not be removed if both defendants had been served. Patchin v. Hunter, 38 Fed. Rep. 51.

Citizenship in the state in whose court a suit is brought will not prevent a defendant from removing a separable controversy therein between himself and a plaintiff who is a citizen of another state, to a circuit court of the United States, under the Act of 1888, § 2. Stanbrough v. Cook, 3 L. R. A. 400, 38 Fed. Rep. 369.

On a bill by one partner against others for an account of the proceeds of a sale of firm property to a corporation, also defendant, averring that part of

Graves v. *Corbin*, 132 U. S. 585 (33: 467).

The bill does not aver facts tending to show any separable controversy between the petitioners or either of them, and any of the other parties to the suit. On the contrary, the bill is an indivisible cause of action as to the petitioners.

Peninsular Iron Co. v. *Stone*, 121 U. S. 631 (30: 1020); *Bank of Rome* v. *Haselton*, 15 Lea, 216; *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 401 (33: 785); *Home Ins. Co.* v. *Baltimore Warehouse Co.* 93 U. S. 527 (23: 868); *London & N. W. R. Co.* v. *Glyn*, 1 El. & El. 652; Hutchinson, Carriers, § 412 (2d ed.) § 429.

The National Insurance Company filed no petition for the removal of any controversy to be found in the cross-bill of the Phenix Insurance Company.

Rand v. *Walker*, 117 U. S. 345 (29: 909).

To reach the indebtedness due by the National Insurance Company to these two carriers, or either of them, they are indispensable parties defendant.

United States v. *Howland*, 17 U. S. 4 Wheat. 108 (4: 526).

And, however this suit be classified, the National Insurance Company is a defendant as garnishee.

Ogilvie v. *Knox Ins. Co.* 59 U. S. 18 How. 577 (15: 490); *Lewis* v. *Woodfolk*, 2 Baxt. 25; *Peak* v. *Buck*, 3 Baxt. 71; *Cook* v. *Whitney*, 3 Woods, 715; *Weeks* v. *Billings*, 55 N. H. 371; *Dewey* v. *West Fairmount Gas Coal Co.* 123 U. S. 383 (31: 181); *Bacon* v. *Rives*, 106 U. S. 99 (27: 69).

The controversy is an incidental one, and not within the removal acts.

First Nat. Bank of Alexandria v. *Turnbull*, 83 U. S. 16 Wall. 190 (21: 296); *Barrow* v. *Hunton*, 99 U. S. 80 (25: 407).

A court of equity will not decree between defendants when neither pleadings nor proof show any controversy or adverse interest between them.

Graham v. *La Crosse & M. R. Co.* 70 U. S. 3 Wall. 712 (18: 251); *Veach* v. *Rice*, 131 U. S. 293 (33: 163).

Mr. Justice **Jackson** delivered the opinion of the court:

The writ of error in each of these seven causes (which were submitted together) presents the same Federal questions, which are, first, whether the supreme court of Tennessee erred in sustaining the action of the chancery court of Shelby county of that state, denying the petition of several of the plaintiffs in error to remove the cause to the Circuit Court of the United States for the Western District of Tennessee; and, secondly, in holding that certain alleged special rates, rebates, or drawbacks, allowed by Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo, Vincennes & Chicago Railroad Company, through L. L. Fellows, their agent at Memphis, to Jones Brothers & Company, of that place, on cotton shipped over that line to various points in the east, were not in violation of the interstate commerce acts regulating commerce between states of the Union, and did not render the bills of lading issued by the railroad for cotton transported or to be transported so illegal as to invalidate the same and prevent any recovery thereon against the carrier.

The questions thus presented grew out of the following state of facts: On November 17, 1887, about 14,000 bales of cotton in the

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the purchase money is still due: and to enjoin the sale or transfer on the corporation books of certain stock received as part of the purchase price: and for the appointment of a receiver—there is no separable controversy between the corporation and any of the parties, which can be removed on the ground that the corporation is a nonresident. Yearian v. Horner, 36 Fed. Rep. 130.

In a suit by a citizen of Massachusetts, against three corporations, citizens of New York, Massachusetts, and Connecticut, to obtain the restoration of property conveyed by plaintiff's ancestor to the Connecticut corporation under a mutual mistake of fact, and which is now held by the Massachusetts corporation, which had received it with full knowledge of plaintiff's equities, there is no separable controversy with the Connecticut corporation such as entitles it to remove the cause to the Federal court. Vinal v. Continental Const. & L. Co. 35 Fed. Rep. 678.

A suit to set aside a deed obtained from the complainant by alleged fraud, and to set aside a subsequent deed and a lease by the grantee, and to quiet complainant's title, presents a controversy in which the subsequent grantee and lessee have an interest; and there is no separable controversy between the complainant and the original grantee. Miller v. Sharp, 37 Fed. Rep. 161.

A bill to quiet title against several defendants, which requires each to set up any claim or right he may have, or be forever barred from so doing, does not present a single controversy so as to prevent a removal by one of the defendants claiming to be the sole owner of a portion of the land, in which none of the other defendants are interested or in possession. Bacon v. Felt, 36 Fed. Rep. 870.

If but one cause of action is presented, involving many defendants, the fact that these defendants have each separate defenses does not make separable controversies. The fact that one of them defaults, and so passes out of the controversy, does not leave a separable controversy as to the other remaining and contesting defendants. Hax v. Caspar, 31 Fed. Rep. 500.

An action to establish a will is not a separable, but single, controversy, and is not removable under the Act of 1887, where one defendant is a resident of the state where brought. Anderson v. Appleton, 32 Fed. Rep. 855.

In an action on a bond, one defendant being principal, and the others sureties, and the only relief sought being a money judgment against all, there is but a single controversy. Western U. Teleg. Co. v. Brown, 32 Fed. Rep. 337.

In a suit to set aside a general assignment by plaintiffs, who were separate judgment creditors of the assignors, where the only issue was whether the assignment was fraudulent, no separable controversy is presented; and removal of the action for diversity of citizenship cannot be had where some of the plaintiffs reside in the same state with the defendant. Reineman v. Ball, 33 Fed. Rep. 692.

In an action by an assignee of an insolvent debtor to compel assignments by a corporation of stock belonging to the debtor, the cause of intervention by purchasers at a judicial sale of the stock subsequent to the debtor's assignment is inseparable from that of the corporation. Weller v. Pace Tobacco Co. 32 Fed. Rep. 860.

West Navy Yard Compress of the Merchants' Cotton Press & Storage Company (hereafter called the compress company) were destroyed by fire. The value of the cotton was about the sum of $700,000. Of the total number of bales thus destroyed about 9608 bales were covered by bills of lading issued by various transportation companies to the owners or consignees of the cotton. The bills of lading issued by the Cairo, Vincennes & Chicago 372] Railroad Company (hereafter *called the railroad company) covered 5087 bales of the cotton destroyed, valued at $245,783.46.

In May, 1887, a contract had been entered into between the railroad company and its receivers, Anthony J. Thomas, and Charles E. Tracy, on the one side, and the compress company on the other, by the terms of which the railroad company and its receivers agreed to give to the compress company all cotton to compress that the railroad company might have to transport out of Memphis in a compressed condition. The compress company, on its part, agreed to properly compress all such cotton, and also to insure the same for the benefit of the railroad company, or owners, for a certain compensation to be paid weekly, which was intended to cover both the service for compressing the cotton and the insurance to be taken out thereon, in good and solvent companies by the compress company. This insurance was to cover any loss while the cotton was under the control of the compress company and until delivered to the railroad company. The contract further provided that the railroad company and its receivers constituted the compress company its agent to receive all cotton intended for transportation over the railroad company's line, and to sign receipts therefor, on the production of which, bills of lading would be issued by the railroad company. This contract was to continue in force until August 31, 1896.

Under and in pursuance of this contract cotton was delivered to the compress company, by the owners or their agents, for transportation over the line of the railroad company from Memphis to points east to the extent of 5087 bales, for which dray tickets or receipts were given by the compress company, and on the production of which the agent of the railroad company issued bills of lading to the several and respective owners or consignees of such cotton.

The railroad company had an all rail line from Memphis, and also a partly water and partly rail line, the water line extending from Memphis to Cairo, Illinois, at which point the railroad company's rail line commenced and extended by means of its connection eastward. 373] *The compress company had a similar arrangement for insuring cotton with other transportation lines, and in pursuance of its undertaking with the carriers it took out insurance on the cotton deposited with it for compression before being transported, aggregating the sum of $301,750, in forty four different fire insurance companies, corporations of various states of the Union and of foreign kingdoms. The amount of this insurance fell far short of the value of the cotton deposited with it for compression and which was destroyed by the fire. In all these policies of insurance taken out under and in pursuance of its contract with the carriers, the compress company was named as the assured, but in the body of each of the policies it was set forth and stated that the insurance on the cotton was for the benefit of the railroads transportation lines, or owners. The insurance was to attach on receipt of the cotton by the compress company, and to terminate when the same was removed for transportation.

The various owners or consignees of the 5087 bales of cotton covered by the bills of lading of the railroad company, with one or two exceptions, insured their interests in their respective lots of cotton in what is called in the litigation marine insurance companies.

There were $301,750 of insurance thus taken out by the compress company for the benefit of the carriers, and at the same time there was a large amount of insurance taken out by the owners or consignees in the marine insurance companies on the bills of lading issued by the railroad company to the several owners of the cotton.

Soon after the destruction of the cotton various suits were commenced in the state courts by the owners of the cotton destroyed, and the rights of the parties were to some extent settled and adjusted in the cases of the *Lancaster Mills* v. *Merchants Cotton Press & S. Co.* 89 Tenn. 62, and *Deming* v. *Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306, 358.

In this last case the supreme court of Tennessee held that the marine insurance companies—most, if not all of whom, had paid the policies issued by them covering the losses of the owners *or the consignees of the cotton—were en- [374 titled to be subrogated to the rights of such owners or consignees, as against the railroad company under its various bills of lading, if that company was liable on such bills of lading. The supreme court further declared in that case that the compress company held the insurance in the forty-four fire insurance companies taken out by it for the benefit and indemnity of the railroad company or companies which had issued bills of lading on the cotton destroyed, and that to the extent of its proper share or proportion of such fire insurance the railroad company was entitled to have the same collected for its protection and indemnity; but in respect to the liability of the railroad company upon its bills of lading to these marine insurance companies, the court could make no decree, or render any judgment, for the reason that the railroad company was not a party to that cause. It, however, declared the rights of the marine insurance companies and the liability of the compress company, and of the fire insurance companies, and left the former companies to their remedy by way of subrogation against the railroad company upon its bills of lading to be settled and determined by some new proceeding; and it was ordered that $210,224.37 of the fire insurance fund be reserved for the indemnity of the railroad company, if that line should be sued and its liability to the marine insurance companies should be established.

Accordingly, on August 7, 1891, after the decision of the supreme court of the state had been rendered in *Deming* v. *Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306,

the Insurance Company of North America, of Philadelphia, a corporation by the laws of the state of Pennsylvania; the Atlantic Mutual Insurance Company, a corporation by the laws of the state of New York; the Providence Washington Insurance Company, a corporation by the laws of the state of Rhode Island, on behalf of themselves and all other marine insurance companies standing in like position, who had paid their insurance to the owners of the cotton, filed their bill in the chancery court of Shelby county, Tennessee, against the Delaware Mutual Safety Insurance Company, 375| a corporation by the laws *of the state of Pennsylvania; the Marine Insurance Company, Limited, of London, resident of the United Kingdom of Great Britain and Ireland; the Phenix Insurance Company, a corporation by the laws of the state of New York; R. H. Deming and James H. Foster, partners as R. H Deming & Co., residents of the state of Rhode Island; The British & Foreign Marine Insurance Company, Limited, of Liverpool, England, resident of the United Kingdom of Great Britain and Ireland; the Cairo, Vincennes & Chicago Line of Illinois; Anthony J. Thomas and Charles E. Tracy, as receiver thereof, citizens of New York; the Merchants' Cotton Press & Storage Company, a corporation of Tennessee; S. R. Montgomery, Napoleon Hill, and Thomas H. Allen, Jr., as trustees, citizens of Tennessee, together with six other alien marine insurance companies, and William Watson and E. R. Wood, aliens; and forty four fire insurance companies of West Virginia, Pennsylvania, New York, Illinois, Lousiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and of the United Kingdom of Great Britain and Ireland.

The bill, in the nature of a creditor's bill, after reciting the facts already presented, set out the various lots of cotton which the complainants and the other marine insurance companies had insured for the owners or consignees thereof, and which were covered by the bills of lading of the railroad company, which insurance they had paid to the owners upon the destruction of the cotton, and further alleged the contract between the compress company and the railroad company, and that the former was to keep the cotton insured for the benefit of the railroad company. The bill then proceeded to charge that, having paid the owners the insurance on the cotton destroyed, the complainants were entitled to be subrogated to the rights of such owners against the railroad company on its bills of lading, and to have the rights of the railroad company enforced against the compress company, and the various fire insurance polices which the latter company had taken out on the cotton for the benefit of the railroad company.

The bill stated that the compress company held the fire insurance as trustee or agent for 376| the railroad company; that the *railroad company, being liable to the owners of the cotton, to whom it had issued bills of lading for the cotton while in the possession of the compress company, and the marine insurance companies having paid the owners for the loss thereof, were entitled to be substituted to the position of the owners of the cotton as against the railroad company, and as against the compress company, and the fire insurance companies, which had issued policies to the compress company for the benefit of the railroad company.

It was further set out in the bill that after the loss occurred the compress company wrongfully assumed to deal with the fire insurance fund by applying a portion thereof, amounting to $52,472.26, for the use of such owners of the cotton as had dray tickets from the compress company, and to whom no bills of lading had been issued, and who had no other insurance; and that each defendant fire insurance company had paid on its respective policies to the compress company about 15½ per cent of the amount of its insurance.

It was claimed in the bill that the compress company wrongfully assumed to thus deal with the fire insurance fund, and in disregard or violation of the decision of the supreme court of the state, which had held that the fire insurance collected should be held for the benefit of the transportation lines which had issued bills of lading for the cotton covered therein.

The bill further alleged that the compress company was neglecting its duty to collect the fund, and it and the fire insurance companies were confederating to prevent and avoid the payments by the fire insurance companies of their policies on the cotton represented by the railroad company's bills of lading.

The bill sought to reach and subject, not only the fire insurance taken out by the compress company for the benefit of the railroad company, but also a share or interest of the railroad company in and to certain real estate which the compress company had conveyed after the fire to Napoleon Hill, S. R. Montgomery, and T. H. Allen, Jr., to secure to the persons in contractual relations with it the payment of the contingent *liability of the [377 compress company to any or all of them by reason of the failure to fully insure the cotton for which the carriers were liable.

It also claimed that of the $52,472.26 collected by the compress company and misappropriated to other losses, the sum of $4394.12 of these collections should have gone to the railroad company on account of cotton covered by its bills of lading. The compress company was sought to be held liable for this amount.

It was further claimed that several of the fire insurance policies were lost by reason of the compress company not collecting the same, and that others were not taken out in good and solvent companies, and for those lost the compress company was sought to be made liable in favor of the railroad company.

Among various marine insurance companies which were named as defendants, as standing in like position with the complainants, was the Phenix Insurance Company, a corporation by the laws of the state of New York, which had policies outstanding in favor of the owners of 3600 bales of cotton, of the value of $179 108. The Phenix Insurance Company, together with Deming & Company, on August 12, 1891, filed their answer and cross-bill against the same defendants, setting out that it had paid the loss on that cotton, and claimed the same rights as were sought to be asserted in the bill of the complainants.

On August 7, 1891, the railroad company and Anthony J. Thomas and Charles E. Tracy, receivers thereof, together with the Delaware Mutual Safety Insurance Company, filed their answer and cross bill in the case against the compress company and the fire insurance companies, which admitted the liability of the railroad company to the Delaware Mutual Safety Insurance Company to the extent of 500 bales, for which it had issued bills of lading; but denied generally its liability to the marine insurance companies on the bills of lading which it had issued.

The prayer of the original bill was that the questions arising upon the matters and things 378] connected with the loss of the *cotton, the insurance thereon, both fire and marine, together with the bills of lading issued by the railroad company to the owners of the cotton which was to be transported by it, and the liabilities of the railroad company on its bills of lading, and of the compress company, might be settled and adjusted, and that the rights of all parties interested therein might be determined in behalf of the complainants and such marine insurance companies as might choose to come in and become parties to the cause; that the railroad company might be declared liable to them, respectively, for the losses in each lot of cotton covered by its bills of lading; that the compress company should be declared as holding the fire insurance policies as indemnity to the railroad company for the benefit of the complainants and other marine insurance companies standing in like position, and that such insurance might be collected for their benefit; "that attachment issue and be levied upon the interest of the Cairo, Vincennes & Chicago Line in the trust fund held by the Merchants' Cotton Press & Storage Company, and by garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon their respective policies applicable to the liability of the Cairo, Vincennes & Chicago Line, if liability shall be declared herein, or by any court with the parties requisite to the validity of the judgment before such court."

The bill further prayed for publication as to non-resident defendants, "and that upon a final hearing of this cause this court will decree that the C. V. & C. Line is liable to the holders, and through the holders to the plaintiffs, for the value of each of the lots of cotton covered by the plaintiffs' policies and the bills of lading of the C. V. & C. Line, and will apply the insurance effected by the Merchants' Cotton Press & Storage Company uncollected, rendering proper decrees therefor against the Merchants' Cotton Press & Storage Company and the defendant fire insurance companies in exoneration of that liability, giving the proportionate share to the plaintiffs severally, and to such of the defendants as stand in relation to the cotton as the plaintiffs do; that the court will enforce the trust in the Senatobia street 379]shed for the benefit *of the plaintiffs and others, to the end that the plaintiffs, and others similarly situated as the plaintiffs, may be fully paid the value of the aforesaid cotton covered under their respective policies of insurance, and distribute the residue, if any there be, to the holders of the certificates issued by the the compress company, some of which are held by defendants Napoleon Hill and S. R. Montgomery, who are called upon to produce a specimen of them; and that the said Hill is asked to furnish a list of the holders of such certificates, that they may be parties thereto, they belonging to a numerous class, and their names unknown to the plaintiffs. And the plaintiffs pray for such other relief, general and special, as may be consistent with the facts of the case."

The theory of the bill was that the railroad company and its receivers were liable to the holders of its bills of lading for the value of the cotton burned, and which was covered by them; that the marine insurance companies which had insured the cotton and paid the losses thereon to the owners or consignees thereof, were entitled to be subrogated to the rights of such owners as against the carrier; that the railroad company, through its agent, (the compress company) was entitled to recover against the fire insurance companies under the policies they had issued to the compress compress company, as its agent, and for its benefit, and that the complainants, and those standing in like position, were entitled to reach the fire insurance fund through the rights of the railroad company, for whose benefit such fire insurance was taken out by the compress company.

On September 5, 1891, the defendants, the Royal Insurance Company, the Continental Insurance Company, the Fire Association, the Home Insurance Company of Louisiana, the Liverpool, London & Globe Insurance Company, and the National Fire Insurance Company presented their petition for removal of the cause from the chancery court of Shelby county to the United States Circuit Court for the Western District of Tennessee. That petition was defective and was not acted upon. Thereafter, on November 21, 1891, the same defendants filed their joint amended petition for the removal *of the cause, and, after 380 setting out the nature and character of the original and cross-bills, and the steps taken in the cause up to date, and the relief sought by the original and cross-bills proceeded as follows:

"Petitioners state and show that the Merchants' Cotton Press & Storage Company is a citizen of the state of Tennessee; that the C. V. & C. line is a citizen of the state of Illinois, and that the petitioners are citizens and subjects of foreign states or of states other than the state of Tennessee or Illinois, the said Royal Insurance Company and the said London, Liverpool & Globe Insurance Companies being citizens and subjects of Great Britain, and the said Continental Insurance Company and said Fire Association being citizens of New York, the said Home Insurance Company being a citizen of Louisiana, and the said National Fire Insurance Company being a citizen of the state of Connecticut, and that the controversy is wholly between citizens of different states or between citzens of one or more of the several states and foreign citizens and subjects, and that the same can be fully determined as between them.

The Merchants' Cotton Press & Storage Company is the assured in the policies issued by said fire insurance companies, and the sole question, so far as concerns said fire insurance

companies, is whether said Merchants' Cotton Press & Storage Company, a defendant upon the record, can recover against said fire insurance companies on their respective policies as set out in the bill of complaint in behalf of the plaintiffs and others in like situation or in behalf of the C. V. & C. Line.

"Petitioners further state and show that the amount in the controversy as between the said plaintiffs and each of the petitioners exceeds the sum of two thousand dollars, exclusive of the interest and cost."

The necessary bond was tendered with the petition. The chancery court denied the application for removal, and the cause then proceeded in that court to a final decree, which granted substantially the relief sought for in the bill, and from that decree certain of the defendants appealed to the supreme court of the state of Tennessee. That court affirmed the de-**381**]cree *below upon the merits, and sustained the action of the chancery court in denying the application for removal, on the ground that the real controversy in the cause was between the marine insurance companies and the railroad company and its receivers; that the object of the controversy was to charge the railroad company with the loss sustained by shippers and paid by the marine insurance companies, and incidentally to collect from the fire insurance companies such decree as might be obtained against the railroad company and its receivers, to the extent that the railroad company was a beneficiary in the fire policies taken out by the compress company.

The supreme court of the state further held that the fire insurance companies occupied substantially the position of garnishees, and that their indebtedness upon their respective policies might be reached and held subject to such final decree as complainants might obtain against the railroad company, and that the fire insurance companies had no separable controversy in the sense of the judiciary acts which entitled them, or either of them, to remove the cause from the state court to the Circuit Court of the United States for the Western District of Tennessee.

The court further held that if the complainants, and the other marine insurance companies standing in like situation with them, should fail to establish liability against the railroad company, that no controversy would remain as to the other defendants, as the marine insurance companies had no right of action against any of the fire insurance companies, except as incidental to their litigation with the carrier; that the fire insurance companies were made parties only in aid of the relief which was asked, and that no relief could be granted against them unless the marine insurance companies obtained a judgment against the railroad company. So that the latter was an indispensable party to the litigation, and the suit was in fact a single cause of action against the carrier, with incidental relief against the compress company and the fire insurance companies, and was not removable by the latter companies under the principles laid down in *St. Louis & S. F. R. Co.* v. *Wilson*, 114 U. S. 62 [29: **382**] 67]; *Orump* v. *Thurber*, *115 U. S. 56, 61 [29: 328, 329]; *Fidelity Ins. T. & S. D. Co.* v. *Huntington*, 117 U. S. 280, 282 [29:898, 899].

In this conclusion of the supreme court of the state of Tennessee we fully concur. The case made by the bill and the relief sought thereunder in behalf of complainants, and those standing in like situation with them, clearly did not present any separable controversy. The plaintiffs in error, who were the petitioners for removal, put their right of removal mainly upon the ground that the case made by the original and cross bills was virtually a suit by the compress company against the fire insurance companies; that as the compress company was a citizen of Tennessee, and each of said petitioning fire companies was a citizen of another state, or an alien, the latter had a right to remove the cause. This, we think, is a clear misapprehension of the scope of the bill. It admits of no question that the fire insurance policies taken out by the compress company under its contract with the railroad company were, as expressed on the face of the policies, for the benefit of the carrier, and were intended for its protection and indemnity. The compress company had, therefore, no personal interest whatever in the fire insurance policies as against the railroad company by virtue of the contract between the railroad company and the compress company, and by the terms of the fire insurance policies the railroad company was the beneficiary under those policies to the extent necessary to indemnify it against liability for losses incurred directly to itself, or through its liability on its bills of lading. The railroad company had such an insurable interest in the cotton, and was, to that extent, the owner of the insurance standing in the name of the compress company, or held in trust for it. This is settled by *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 387, 423 [33: 730, 740].

The compress company, aside from the claims which were sought to be asserted against it personally, as trustee of the fire insurance fund, which was sought to be reached to the extent of the railroad company's interest therein, was a necessary and indispensable party to the suit, under the authority of *Thayer* v. *Life Assn. of America*, 112 U. S. 717 [28:864], and *Wilson* v. *Oswego Twp. ante*, p. 70.

*It admits of no question that the pri- [**383**
mary liability, or the right to reach the fire insurance fund, had also to be worked out in favor of the complainants, and other marine insurance companies, through the liability of the railroad company upon its bills of lading. The suit could not have proceeded a step without the presence of the railroad company, and certainly it presents no separable controversy as between the compress company and the several fire insurance companies.

It is further suggested, as to the right of removal, that each of the marine insurance companies had a distinct and separate cause of action against each of the fire insurance companies on their respective policies. This is a misapprehension, for the marine insurance companies had no right of action against the fire insurance companies. Their cause of action was against the railroad company under its bills of lading issued to the owners of the

cotton, who were the assured in the marine companies, and whose loss had been paid by those companies. The right of those companies was directly against the railroad company, by way of subrogation, and to enforce its liability under its bills of lading. They could not have proceeded directly against the fire companies without the presence of the railroad company. The latter was an indispensable party to the relief sought, for it was through only this alleged liability that the fire insurance fund could be reached and subjected to the indemnity of the marine insurance companies. If each of these marine insurance companies had filed a separate bill for the same relief sought by their joint suit there could have still been no right of removal on the part of the fire insurance companies on the ground of a separable controversy, even if the fire insurance companies were not garnishees, as held by the supreme court of Tennessee, for the reason that the railroad company and the compress company would both have been indispensable parties, and could not have been arranged on the same side with the complainants, inasmuch as the liabilities of the railroad company to the marine insurance company 384] was the primary question to *be determined. *Louisville & N. R. Co.* v. *Ide*, 114 U. S. 52 [29:63]; *Pirie* v. *Tvedt*, 115 U. S. 41 [29:331].

The complainants had a right to join in enforcing the common liability of the railroad company upon its bills of lading, and, in the language of *Chief Justice* Marshall, in *New Orleans* v. *Winter*, 14 U. S. 1 Wheat. 91 [4:44], "having elected to sue jointly the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite." This ruling has been approved in *Peninsular Iron Co.* v. *Stone*, 121 U. S. 631, 633 [30:1020, 1021].

In the present case, as in *Peninsular Iron Co.* v. *Stone*, the rights of each of the complainants and of other marine insurance companies occupying the same position, depend, as against the petitioners for removal, on the alleged right of the marine companies to hold the railroad company liable, by way of subrogation, upon its bills of lading, and, as an incident to that liability, to collect the fire insurance fund to the extent of the railroad company's share therein. "Although, as between themselves, they have separate and distinct interests, they joined in a suit to enforce an obligation which is common to all; . . . and while all the complainants need not have joined in enforcing it, they have done so, and this, under the rule, in *New Orleans* v. *Winter*, 14 U. S. 1 Wheat. 91 [4:44], controls the jurisdiction." The voluntary joinder of the parties has the same effect for purposes of jurisdiction as if they had been compelled to unite.

The right of removal must be determined by the pleadings at the time the petition is filed (*Graves* v. *Corbin*, 132 U. S. 585 [33: 467]) and testing the application made in the present case by this rule, we had no dispute or controversy set forth in the bill or in the petition for removal between the compress company and the fire insurance companies. On the contrary, these defendants are charged with confederating together for the purpose of relieving the fire insurance companies from liability on their policies.

The bill seeks to charge the railroad company, and then to reach and subject its equitable rights and interests in the fire insurance fund, taken out by the compress company for its benefit. *There is not in the bill or in the [385 cross-bills any suggestion or intimation that there is any controversy or dispute between the railroad company and the compress company; or between the compress company and the fire insurance companies. Under such circumstances there is manifestly no separable controversy made by the pleadings, such as entitles the fire companies, or either of them, to remove the cause. There is, in fact, no controversy "which can be fully determined as between them," and as stated by this court in *Torrence* v. *Shedd*, 144 U. S. 527, 530 [36:528, 531], "by the settled construction of this section (referring to separable controversies) the whole subject matter of the suit must be capable of being finally determined as between them (the parties seeking removal) and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

It may be, under the Judiciary Act of March 3, 1887 (and 1888) as under the Act of March 3, 1875, that the court may disregard the particular position of the parties as complainants or defendants, assigned to them by the pleader, for the purpose of determining the right of removal (*Harter Twp.* v. *Kernochan*, 103 U. S. 562 [26: 411]) and the matter in dispute may be ascertained by arranging the parties to the suit on opposite sides of the dispute, and if by such an arrangement it appears that those on one side are all citizens of different states from those on the other, the suit may be removed. *Meyer* v. *Delaware R. Const. Co.* (*Removal Cases*) 100 U. S. 457 [25: 593]; *Ayers* v. *Chicago*, 101 U. S. 184 [25: 838].

The plaintiffs in error in the present cases seek to sustain the right of removal by the application of this rule; but it will not avail them, for if the parties are arranged on opposite sides of the primary and controlling matter in dispute, we shall have the three complainants, together with the Phenix Insurance Company, a corporation of the state of New York; the Union Marine Insurance Company, Limited, of London, England; the British & Foreign Insurance Company of Liverpool, England, and the Standard Marine Insurance Company, Limited, of England, on one side, and the railroad company, the compress company, and the fire insurance *compa [386 nies, together with the other defendants, as parties on the other side.

Now, as thus arranged, we have two alien corporations on the side of the complainants, and two alien fire insurance companies (the London, Liverpool & Globe Insurance Company, and the Royal Insurance Company) on the side of the defendants. Under such position, the alien petitioners would not be entitled to removal; besides it is settled by *King* v. *Cornell*, 106 U. S. 395 [27: 60] that subdivision two of section 639 of the Revised Statutes was repealed by the Act of 1875, so that an alien

sued with a citizen had no right of removal, and this subdivision two of that section was not restored by the Act of March 3, 1887; hence, an alien, in the position of the alien petitioners, in the present case, would have no right to remove the cause on the ground of a separable controversy.

Again, the parties being arranged, as above, according to the matter in dispute, we have the Phenix Insurance Company of New York in the position of plaintiff, with the Mutual Fire Insurance Company of New York (No. 809) the Continental Insurance Company (No. 810) and the Fire Association (No. 811) corporations of the same state, applying for the removal. It is too clear to require the citation of authorities that in this position of the New York corporations, those occupying the position of defendants had no right of removal.

It is further shown by the pleadings that the Phenix Insurance Company in its cross-bill made a defendant of the Newport News & Mississippi Valley Company, a corporation organized under the laws of Connecticut, which was a carrier from Memphis to points east, and had a contract with the compress company like that of the Cairo, Vincennes & Chicago Railroad Company, to insure cotton to be carried over its line, under which arrangement it had issued bills of lading to various parties insured by the Phenix Insurance Company; and that company, after payment of the losses by its cross bill, sought the same relief against the Newport News & Mississippi Valley Company which was sought against the Cairo, Vincennes & Chicago Railroad Company. So that to the cross bill of the Phenix [387] Company there were two *Connecticut defendants, viz. the National Fire Insurance Company (No. 808) and the Newport News & Mississippi Valley Company, and the relief sought made both of those corporations necessary and indispensable parties. The Connecticut corporations could not in this situation of the parties, if no other objection existed, be entitled to remove the cause.

In respect to the two other plaintiffs in error, the Merchants' Cotton Press & Storage Company (No. 807) and the Mutual Fire Insurance Company (No. 809) it appears that neither of these parties made application to remove the cause from the chancery court of Shelby county. So that neither of them is in position to assign error as to the action of the court in denying the other parties the right of removal. In *Land* v. *Walker*, 117 U. S. 340, 345 [29: 907, 909], it was held that the right to take steps for the removal of a cause to the circuit court of the United States, on the ground of a separable controversy, was confined to the parties actually interested in such controversy. In that case the court said on this subject: "That neither of the parties to the controversy, if it be separable, a question which we do not decide, have petitioned for removal, and the right to remove a suit on the ground of a separable controversy is, by the statute, confined to the parties actually interested in such controversy."

It is, therefore, we think, clear that whether the cause be looked at as a whole, or whether it be considered under any adjustment or arrangement of the parties on opposite sides of the matter in dispute, there was no right of removal on the part of the several plaintiffs in error, or either of them.

The remaining assignment of error based upon the alleged allowance by the local agent of the railroad company of special rates, rebates, or drawbacks to Jones Brothers & Company which, it is claimed, rendered the bills of lading issued by the railroad company to the owners of consignees of the cotton void, so that the marine insurance companies, who had paid the losses, could have no right upon such bills of lading against the railroad company, or the fire insurance companies, needs but little consideration. The supreme court of the state disposed of this question as follows: "This fact of *special rate and rebate is denied [388] and it is a matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the interstate commerce law does not apply for the reason that the evidence disproves any 'common contract' over the river and rail rate. We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it, which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence. No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any other." We concur in the correctness of this conclusion of the state supreme court.

Jones Bros. & Company were either the agents of the owners or consignees of the cotton, or the sellers thereof to eastern consignees, and the rebates or drawbacks which they claimed to have been allowed, if allowed at all, according to the testimony of one of the members of the firm, was a private benefit which the firm secured, and, so far as appears, without the knowledge or consent of the owners or consignees of the cotton. Under such circumstances, if such rebates were paid or allowed to the firm by the agent of the railroad company, it is difficult to understand upon what principle such an allowance would vitiate or render void the bills of lading which the railroad company issued to the owners of the cotton. It is *still more difficult to under- [389] stand how the compress company, or the fire insurance companies, could avail themselves of the arrangement, even regarding it as illegal, between the agent of the railroad company and Jones Brothers & Company. They were not

parties to it, and they were not affected by it in any way, shape, or form.

There is nothing in the interstate commerce law which vitiates bills of lading, or which, by reason of such allowance to Jones Brothers & Company, if actually made, would invalidate the contract of affreightment or exempt the railroad company from liability on its bills of lading.

The principles laid down in *Interstate Commerce Com.* v. *Baltimore & O. R. Co.* 145 U. S. 263 [36: 699] 4 Inters. Com. Rep. 92, fall far short of establishing that the alleged allowance of rebate to Jones Brothers & Company would render the railroad company's bills of lading invalid and defeat the right of the marine insurance companies, who had paid the losses, to subrogation against the railroad company on bills of lading issued to the owners or consignees of the cotton, who are not shown to have known of, or consented to, the railroad company's agent giving such rebates.

We are, therefore, of opinion that the Federal questions presented by the assignments of error were not well taken and are not sustained, and that the judgment of the supreme court of the state of Tennessee in all of the causes must be affirmed.

THE CALIFORNIA POWDER WORKS, *Plff. in Err.*, *v.* WILLIS E. DAVIS, Admr. of the estate of Isaac Davis, deceased, ET AL.

(See S. C. Reporter's ed. 389-396.)

Review of state judgment—independent ground—Federal question—fraudulent grant.

1. To give this court jurisdiction to review a state judgment on writ of error, it must appear affirmatively not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.
2. Where a state decision rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented.
3. Where the jurisdiction of this court to review a state judgment depends upon the denial by the state court of a title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed.
4. The state courts can determine between individuals the priority or validity of conflicting titles under different grants from the same antecedent source, and the issue as to whether one of the two grants was forged or obtained by fraud, does not involve the denial of a right or title set up under a treaty or statute, nor present a Federal question.

[No. 301.]

Submitted Jan 8, 1894. Decided Jan. 22, 1894.

IN ERROR to the Supreme Court of the State of California, to review a decree of that court, affirming a decree of the Superior Court of the city and county of San Francisco, in favor of plaintiffs Willis E. Davis, Admr., *et al.*, against the California Powder Works, defendant, quieting plaintiffs' title to certain lands in Santa Cruz county, California. On motion to dismiss. *Dismissed.*

See same case below, 84 Cal. 617.

Statement by *Mr. Chief Justice* **Fuller:**

This was a suit in equity brought by Isaac E. Davis, for whom his administrator, Willis E. Davis, was duly substituted, and Henry Cowell, against the California Powder Works in the District Court of the Fifteenth Judicial District of California in and for the city and county of San Francisco, and subsequently transferred to the superior court of said city and county, to quiet plaintiffs' title to certain lands in Santa Cruz county, California. Both parties claimed the title under patent from the United States; plaintiffs, through Pedro Sainsevain, patentee of the rancho Cañada del Rincon en el Rio San Lorenzo; defendant, through William Bocle, patentee of the tract called La Carbonera.

The case having been heard, the superior court made special findings of fact, and found as a conclusion of law that the plaintiffs were entitled to a decree according to the prayer of the bill.

From the findings it appeared that Sainsevain's patent was based on a concession of July 10, 1843, the grant being duly approved June 10, 1846; that the archives of the Mexican government contained a full record of the proceedings; that the claim was confirmed January 17, 1854, by the land commissioners of the United States, duly organized under acts of Congress in that behalf, and their decree made final by the dismissal of an appeal therefrom by the District Court of the United States for the District of California; that a survey *was [391 duly had, and that the patent issued June 4, 1858. As to Bocle's patent, it appeared that the grant to him bore date February 3, 1838; that it was confirmed January 23, 1855, and that a patent subsequently issued (July 7, 1873) but it was found that the grant had been falsely antedated, and that it was made in the year 1848; that "there is not and never has been any paper, document, writing or entry in any book or record in the Mexican archives pertaining to California relating to said alleged grant or concession to said Bocle; nor is the

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question, see note to Hamblin v. Western Land Co. 37: 267.

same noted in a book called the Jimeno's Index, nor has said purported grant any map or diseño attached to it, nor is any such map or diseño referred to. And at the said date, the 3d of February, 1838, said Bocle was not a naturalized citizen of Mexico, but was a subject of the Kingdom of Great Britain and Ireland;" that the decree of confirmation by the land commissioners of the alleged grant to Bocle was obtained by fraud, "the said fraud consisting of the fact that no such grant was made to said Bocle for said land, and said paper purporting to be such grant was false, simulated and fabricated, and made after the conquest of California by the United States from the Republic of Mexico, and in or about the year 1848, and was fraudulently imposed upon said board of land commissioners as valid and genuine. And the dismissal of the appeal therefrom to the United States district court was likewise procured by the same fraud and by the concealment of said facts of the fabrication of said pretended grant from the United States authorities acting in that behalf. And said land commissioners and said authorities were each and all ignorant of any such fraud, and of the fact that said alleged grant was false and simulated, and were misled and deceived by the false allegations of the said Bocle in that behalf."

A decree in plaintiffs' favor having been entered, defendant moved for a new trial, which was denied, and an appeal was thereupon taken to the supreme court of California from the order denying said motion, by which that order and the judgment were affirmed.

The supreme court of California (*Davis* v. *California Powder Works*, 84 Cal. 617) among other things, held: "Where both parties to an **392**]action to quiet *title claim the land in dispute under patents confirming Mexican grants, the question of the genuineness of each original grant is a legitimate subject of inquiry in the action, provided such inquiry is admissible under the pleadings; and it may be shown in such case that the grant bearing the oldest date was not made during the term of office of the Mexican governor whose signature it bears, and that it was fraudulently antedated. When the evidence in such action shows that there is no official paper appertaining to an alleged Mexican grant, nor any record or trace thereof, which appears anywhere in the archives of California, when a part of Mexican territory, a strong presumption arises against the genuineness of the grant, which can only be overcome by the clearest proof of its genuineness; and when the oral testimony of witnesses, offered in support of such genuineness, is of an inconclusive or suspicious character, a finding against the genuineness of the grant will not be disturbed upon appeal."

Application for a rehearing was made and overruled, and thereupon a petition for the allowance of a writ of error from this court was presented in which it was set forth that petitioner claimed the land in controversy under the treaty of Guadalupe Hidalgo, and under a certain statute of the United States entitled "An Act to Ascertain and Settle Private Land Claims," approved March 3, 1851; that such lands were ceded to the grantor of petitioner by the republic of Mexico in 1838; that such concession was confirmed by the government of the United States, and a patent therefor issued to the petitioner's grantor under the laws of the United States; that such concession and the patent thereon issued were attacked by the bill in equity alleging that the concession was not actually made until 1848; that on issue joined on that allegation, trial was had and plaintiffs below secured the entry of a judgment that theirs was the better title; that the decision of the supreme court of the state of California in the cause, was and is against a title and right claimed by petitioner under the treaty and the statute of the United States, approved March 3, 1851. The writ of error was allowed and the case came on on a motion to dismiss.

Messrs. **A. T. Britton, A. B. Browne, J. H. McKune** and *W. F. George*, for defendants in error, in favor of motion.

Messrs. **John Garber, John H. Boalt** and **Thomas B. Bishop**, for plaintiffs in error, in opposition.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. *Eustis* v. *Bolles*, 150 U. S. 361 [37:1111]. It is equally well settled that where our jurisdiction depends upon the denial by a state court of a title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Schuyler Nat. Bank* v. *Bollong*, *supra*. We cannot find that the title or right referred to in argument was specially set up or claimed prior to its assertion in the petition for the writ of error, which forms no part of the record of the court below. *Clark* v. *Pennsylvania*, 128 U. S. 395 [32:487].

But such special claim, if duly made, would have been unavailing, as the judgment rested upon the proposition that the grant under which the plaintiff in error deraigned title was simulated, and this was a ground sufficient to sustain it, *involving no Federal question. [**394** The parties claimed under separate private land claims, originating, as alleged, under the republic of Mexico, and separately confirmed, surveyed, and patented by the authorized officers of the United States.

The eighth article of the treaty of Guada-

lupe Hidalgo (9 Stat. at L. 929) provided: "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

Upon the acquisition of the country, the rights of the inhabitants to their property were retained, and they were entitled by the law of nations to protection in them to the same extent as under the former government, which protection the treaty also secured. As remarked by *Mr. Justice* Field in *Beard* v. *Federy*, 70 U. S. 3 Wall. 478, 492 [18:88, 92], "the obligation, to which the United States thus succeeded, was of course political in its character, and to be discharged in such a manner and on such terms as they might judge expedient. By the Act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation." This Act created a special tribunal for the investigation of claims to land and the determination of their validity as respected the United States. (9 Stat. at L. 631, chap. 41.) By section 15 it was enacted: "That the final degrees rendered by the said commissioners, or by the district or Supreme Court of the United States, or any patent to be issued under this Act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

While the confirmation of these claims might be conclusive as against the United States and those claiming under them, such confirmation and patent could have no effect upon the interests of third persons in respect of grants to them from the former sovereign. The state courts were open for the determination between individuals of the priority or validity of conflict-395] ing *titles under different grants from the same antecedent source, and the issue as to whether one of the two grants was forged or obtained by fraud did not involve the denial of a right or title set up under the treaty or the statute. The treaty extended no protection to a fraudulent claim, nor did proceedings under the statute to which each was respectively not a party or privy determine any such question as between these private parties, neither of whom claimed under the United States by title subsequent, but both of whom claimed under patents based upon Mexican grants. *Lynch* v. *De Bernal*, 76 U. S. 9 Wall. 315, 323 [19:714, 715]. The case was the ordinary one of a contest in respect of a forged or fraudulent deed. In *Phillips* v. *Mound City Land & W. Asso.*, 124 U. S. 605, 610 [31:588, 590], it was ruled that the adjudication by the highest court of a state that certain proceedings before a Mexican tribunal, prior to the treaty of Guadalupe Hidalgo, were insufficient to affect the partition of a tract of land before that time granted by the Mexican government, which grant was confirmed under the Act of March 3, 1851, presented no Federal question; and *Mr. Chief Justice* Waite, delivering the opinion of the court, said: "Article VIII. of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject matter of the action, was free to act in the premises." The case is in point and is decisive. *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304 [4: 97], is not to the contrary, for there the plaintiff claimed under the treaty of 1783, and the state court decided against the title thus set up.

We have not deemed it necessary to examine the question raised under the practice in California allowing separate *appeals to lie from[396 a judgment and from an order granting or refusing a new trial, and for the purposes of this case have treated the judgment of the supreme court, which not only affirmed the order of the superior court overruling the motion but the judgment as well, as the last and final judgment in affirmance of a final decree in equity in the court below.

Writ of error dismissed.

JOHN POINTER, *Plff. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 396-420.)

Joinder of separate felonies in one indictment—compelling an election—challenges to jury—state laws—impaneling jurors—peremptory challenge—discretion of court—motive for crime—practice—sufficiency of record—deficiency.

1. A joinder in one indictment, in separate counts

NOTE—*As to trial by jury; how affected by 7th Amendment to the Constitution*, see note to New York Super. Ct. Justices v. United States, 19: 658.

As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors, wrong person serving as juror by mistake, see note to Silsby v. Foote, 14: 394.

As to causes of challenge of juror and their qualifications, see note to Clinton v. Englebrecht, 20: 659.

As to discharge or withdrawal of juror before verdict; effect of, see note to United States v. Perez, 6: 165.

As to questions of law and facts, for court or jury, in civil and criminal cases, see note to King v. Delaware Ins. Co. 3: 155.

In criminal case right of prisoner to be present during his trial, and necessity of his being present; record must show that he was present, see note to Lewis v. United States, 36: 1011.

As to criminal law; correction of sentence of one convicted; re-sentence, see note to Ex parte Cross, 36: 969.

As to jurisdiction of United States courts over common law offenses, see note to United States v. Coolidge, 4: 124.

As to officers de facto; indictment for murder, sufficiency of statement of time and place of death, see note to Ball v. United States, 35: 377.

of different felonies, of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment; but the court may in its discretion, compel the prosecutor to elect upon what one of the charges he will go to trial; such discretion has not been taken away by U. S. Rev. Stat. § 1024.

2. Where two murders were committed at the same place, on the same occasion, and under such circumstances, that the proof in respect to one necessarily threw light upon the other, the rights of the accused were not prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the two charges he would proceed, but the government may be required at any time before the trial is concluded to elect upon which charge it will ask a verdict.

3. Where the jurors were all examined as to their qualifications, and thirty-seven were found not liable to objection for cause, it is not error in the court to require the accused to exercise his right to exclude by challenge twenty of such jurors, he being notified that the first twelve unchallenged by either side would constitute the jury to try him, and it is not necessary that the twelve who are to try him be first selected.

4. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling.

5. The mode of impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law.

6. A prisoner cannot be compelled to make a peremptory challenge to a juror until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for inspection and examination of him.

7. Where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court.

8. It is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury; proof of motive is never indispensable to conviction.

9. If in charging a jury the judge reads from the opinions or judgments of other courts, such practice, although not to be encouraged, is, in the absence of a statute prescribing a different rule not ground for the reversal of the judgment of the trial court, unless it appears that the jury has been misled.

10. Where it appears from the journal entries of the trial, as well as from the bill of exceptions, that the verdict of guilty was returned into and recorded by the court, in the presence of the accused, that is sufficient statement in the record that the verdict was received and recorded.

11. In a criminal case all parts of the record are to be interpreted together, effect being given to all, if possible, and a deficiency at one place may be supplied by what appears in another.

[No. 759.]

Submitted Oct. 19, 1893. Decided Jan. 22, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment of conviction and sentence of John Pointer for the murder of one Samuel E. Vandiveer, as charged in the first count of the indictment, and for the murder of William D. Bolding as charged in the third count of the indictment. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. B. Maxey** and **Jacob C. Hodges,** for plaintiff in error:

When a circuit court of the United States fails to conform to the methods prescribed by the statutes of the state in which the court is held in impaneling a jury in a capital case, then any method that conflicts or abridges the right of a prisoner upon trial for his life as they exist at common law, is error for which the Supreme Court ought to reverse a case.

And any method that does not require each juror called into the box in the presence of the court and prisoner, and a fair and full opportunity given to the prisoner to then and there inspect and question each juror and in the presence of the court exercise his right of challenge according to his own peculiar prejudice, is abridging a prisoner's rights as they exist at common law.

Alexander v. *United States*, 138 U. S. 353 (34: 954); *Lewis* v. *United States*, 146 U. S. 370 (36: 1011).

The court ought to have required the district attorney to elect and try plaintiff for the murder of one person, or, at least have the jury make one finding.

The finding must be a general verdict of guilty or not guilty, and judgment must be rendered upon the verdict as returned.

1 Black, Judgm. 142; *Marder* v. *Wright*, 70 Iowa, 42; Bishop, Statutory Crimes (2d ed.) 348; 1 Bishop, Crim. Proc. (2d ed.) 443, 1001; 2 Bishop, Crim. Proc. (2d ed.) 641; 1 Chitty, Crim. L. 635, 636.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error:

The method of impaneling the jury, was like that adopted in *Alexander* v. *United States*, 138 U. S. 353 (4: 954); *Lewis* v. *United States*, 146 U. S. 370 (36: 1011).

Specifically stating the grounds of the objection waives all grounds unspecified.

Evanston v. *Gunn*, 99 U. S. 660 (25: 306); *Belk* v. *Meagher*, 104 U. S. 279 (26: 735).

The reason why the prisoner's presence is required is stated by the court as follows, from *Hopt* v. *Utah*, 110 U. S. 574 (28: 262):

"The prisoner is entitled to an impartial jury, composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which by personal presence, he may give to the counsel and to the court and triers in the selection of jurors."

In the well known case of *Com.* v. *York*, 9 Met. 93, 114, 43 Am. Dec. 373, *Chief Justice* Shaw said that where there is no proof of "provocation or sudden quarrel the law presumes malice from the act of killing, unless the matter of excuse or extenuation affirmatively appears." This doctrine was afterwards confined by him to cases "where the killing was proved to have been committed by the defendant and nothing further is shown."

Com. v. *Hawkins*, 3 Gray, 463.

Proof of motive is never indispensable to conviction.

1 Bishop, Crim. Proc. § 1107, and cases cited; *McLain* v. *Com.* 99 Pa. 86; *Clifton* v. *State*, 73 Ala. 473.

If the criminal act and the connection of the appellant are clearly proved, the absence of evidence of motive is immaterial.

Green v. *State*, 38 Ark. 304; *State* v. *Whitman*, 14 Rich. L. 113; *People* v. *Minisci*, 12 N. Y. S. R. 719; *Hornsby* v. *State*, 94 Ala. 55, 67; 3 Greenl. Ev. § 144.

The use of illustrations in instructing the jury may be criticised, but it is common, and it is hardly the subject of exception. We do not find any precedent of a reversal for this reason; on the other hand, the practice is approved within proper limits.

2 Thomp. Trials, §§ 2315, 2321; *Masters* v. *Warren*, 27 Conn. 293; *Melledge* v. *Boston Iron Co.* 5 Cush. 158, 51 Am. Dec. 59; *Boyd* v. *United States*, 142 U. S. 450 (35: 1077).

Defendant excepted to all of that portion of the charge which defines and explains accidental killing. The exception is so general as to be of no value.

Bogk v. *Gassert*, 149 U. S. 17 (37: 631); *Connecticut Mut. L. Ins. Co.* v. *Union Trust Co.* 112 U. S. 250, 260 (28: 708, 712).

The prisoner having been found guilty upon two counts, for either of which he could be hanged, was sentenced to be hanged generally for both. This certainly cannot prejudice him. The sentence was therefore sufficient even at common law. 1 Bishop, Crim. Proc. § 1327. The common law rule is reaffirmed by section 1025 of the Revised Statutes. The judgment and sentence in this case follow the precedent set by *Mr. Justice* Nelson and *Judge* Hall in the first case decided under the statutes allowing joinder of different offenses.

United States v. *Albro*, cited in *People* v. *Liscomb*, 60 N. Y. 559, 588, 19 Am. Rep. 211.

In a capital case it is unnecessary to consider the questions discussed in Tweed's case just cited, in the Tichborne case (*Castro* v. *Reg.* L. R. 6 App. Cas. 229); 1 Bishop, Crim. Proc. § 1327; and similar authorities.

The court could properly in its discretion direct the prisoner to be tried for both murders at the same time, since they were part of the same transaction.

Ex parte Henry, 123 U. S. 372 (31:174); *Harmon* v. *Com.* 12 Serg. & R. 69; *Carlton* v. *Com.* 5 Met. 532; *Com.* v. *Hills*, 10 Cush. 530; *State* v. *Nelson*, 29 Me. 329; *Ex parte Hibbs*, 26 Fed. Rep. 421, 427; *Ex parte Peters*, 2 McCrary, 403; *United States* v. *O'Callahan*, 6 McLean, 596; *United States* v. *Bennett*, 17 Blatchf. 357; Whart. Crim. Pl. & Pr. §§ 293, 294, 910.

Mr. Justice **Harlan** delivered the opinion of the court:

At the February term, 1892, of the Circuit Court of the United States for the Western [398] District of Arkansas, the grand *jury returned an indictment against John Pointer, for the crime of murder.

In the first count it was charged that the defendant, on the 25th of December, 1891, at the Choctaw Nation, in the Indian county, within the above district, did, with an axe, feloniously, willfully, and of his malice aforethought, "strike, cut, penetrate, and wound" upon the head one Samuel E. Vandiveer, a white man and not an Indian, inflicting thereby a mortal wound, from which death instantly ensued. The second count charged the same offense, and differed from the first only in using the words "beat, *bruise*," in place of "cut, penetrate."

In the third count the defendant was charged, in the words of the first count, with having, in the same manner, on the 25th of December, 1891, feloniously, willfully, and of his malice aforethought, at the Choctaw Nation, in the Indian country, within the same district, killed and murdered one William D. Bolding, a white man and not an Indian. The fourth count differed from the third only as the second count differed from the first.

The defendant pleaded not guilty. On a subsequent day of the term he moved to quash the indictment upon various grounds, one of which was that it charged two distinct felonies. That motion was overruled.

The defendant called the attention of the court to the fact that he had been served some time before with a list of thirty-seven jurors, and, subsequently, with an additional list. He objected to that mode of serving lists of jurors by "piecemeal." To this the court replied: "In the first place, the list of thirty-seven was served, and it always happens that some of the original thirty-seven cannot serve, by reason of incompetency or sickness, and, out of abundance of precaution, we have the additional list served on the defendant, so that there will be a sufficient number served to go on with the trial of the case, without waiting for two days' service on the defendant when the case is called for trial. It is not a service by piecemeal, but service of additional talesmen."

The entire panel of the petit jury was called and the jurors were examined as to their qualifications, and, the journal *entry [399] states, thirty-seven in number were found to be generally qualified under the law, that is, in the words of the bill of exceptions, "qualified to sit on this case." The defendant and the government were then furnished, each, with a list of the thirty-seven jurors thus selected, that they might make their respective challenges, twenty by the defendant and five by the government, the remaining first twelve names, not challenged, to constitute the trial jury. The defendant at the time objected to this mode of selecting a jury: "1st, because it was not according to the rule prescribed by the laws of the state of Arkansas; 2d, because it was not the rule practiced by common law courts; 3d, because the defendant could not know the particular jurors before whom he would be tried until after his challenges, as guaranteed by the statutes of the United States, had been exhausted; 4th, because the government did not tender to the defendant the jury before whom he was to be tried, but tendered seventeen men instead of twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended."

At the time this objection was made the defendant's counsel saved an exception to the mode pursued in forming the jury, and said: "The point we make is, that the government must offer us the twelve men they want to try the case." The court observed: "They offered you thirty-seven." "We understand," counsel said, "but we want to save that point."

Before the case was opened to the jury for the government, the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. That motion having been overruled, he was required to go to trial upon all the counts.

Upon the conclusion of the evidence the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him. This motion was overruled. After an elaborate charge by the court, the jury retired to consider their verdict, and returned into the court the following: "We, the jury, find the defendant John Pointer guilty of murder as charged in the first count of the indictment. F. M. Barrick, *Foreman*. We, the jury, find the defendant John Pointer guilty of murder **400**] as charged in the third *count of the indictment. F. M. Barrick, *Foreman*."

A motion for a new trial was made and overruled, and on the 30th of April, 1892, the court sentenced the defendant to suffer the punishment of death.

1. The motion to quash the indictment and the motion to require the government to elect upon which count it would try the defendant, present the question whether two distinct charges of murder can properly be embraced in one indictment.

It is provided by section 1024 of the Revised Statutes—following, substantially, the words of the Act of February 26, 1853 (10 Stat. at L. 161, chap. 80)—that "when there are several charges against any person for the same act or transaction, or two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may properly be joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and if two or more indictments are joined in such cases, the court may order them to be consolidated."

Although the two murders in question are alleged to have been committed by the defendant on the same day, and in the same county and district, it does not affirmatively appear from the indictment that they were the result of one transaction, or that they were "connected together." But the indictment does show upon its face that the two offenses are of the same class or grade of crimes, and subject to the same punishment. Could both crimes properly be joined in one indictment, in separate counts? The statute does not solve this question, but leaves the court to determine whether, in a given case, a joinder of two or more offenses in one indictment against the same person is consistent with the settled principles of criminal law. If those principles permit the joinder of two or more felonies in the same indictment, in separate counts, then the joinder in question here was proper.

401] *In *People* v. *Gates*, 13 Wend. 322, 323, *Chief Justice* Savage, speaking for the court, said: "The first question arising upon the trial was whether the court should have compelled the district attorney to elect which count he would go upon. In *Young* v. *Rex*, 3 T. R. 100, Buller, *Justice*, says that where different felonies are included in the same indictment, the judge may quash the indictment, lest it should confound the prisoner in his defense; but these are only matters of prudence or discretion. This court has recently said in the case of *People* v. *Rynders*, 12 Wend. 425, that there is no impropriety in trying a prisoner for different offenses, at the same time, if the offenses are charged in the same indictment and are of the same grade, and subject to the same punishment." Substantially to the same general effect are the decisions of other American courts: *United States* v. *O'Callahan*, 6 McLean, 596; *Kane* v. *People*, 8 Wend. 203, 211; *Carlton* v. *Com.* 5 Met. 532, 534; *Com.* v. *Gillespie*, 7 Serg. & R. 469, 476, 10 Am. Dec. 475; *Com.* v. *Hills*, 10 Cush. 530, 533; *Campbell* v. *State*, 9 Yerg. 333, 335, 30 Am. Dec. 417; *Burk* v. *State*, 2 Har. & J. 426, 429; *Storrs* v. *State*, 3 Mo. 7; *Baker* v. *State*, 4 Ark. 56, 58; *Wright* v. *State*, 4 Humph. 194, 196; *Johnson* v. *State*, 29 Ala. 62, 67, 65 Am. Dec. 383; *Weinzorpflin* v. *State*, 7 Blackf. 186, 188; *State* v. *Hazard*, 2 R. I. 474, 482; *Hoskins* v. *State*, 11 Ga. 92, 95. See also *Logan* v. *United States*, 144 U. S. 263, 296 [36: 429, 440].

The rule in England is not materially different. In Chitty's Criminal Law it is said: "In cases of felony, no more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment lest it should confound the prisoner in his defense, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to elect on which charge he will proceed." "But," the author adds, "this in only matter of prudence and discretion which it rests with the judges to exercise." Vol. 1, pp. 252, 253. *The rule is thus [**402** stated by Archbold: "If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge, in his discretion may require the counsel for the prosecutor to select one of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election. But this practice has never been extended to misdemeanors." 8th ed. chap. 3, p. 95. In Roscoe's Criminal Evidence the author, after observing that there was no objection in point of law to inserting, in *separate* counts of the same indictment, several distinct felonies of the same degree and committed by the same offender, and that such joinder was not a ground for arrest of judgment, says: "In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the court in its discretion would quash the indictment, or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed." 8th Am. ed. 206.

The question of election between distinct

charges has always seemed to depend on the special circumstances of the case in which it has arisen. For instance, in *Reg.* v. *Trueman*, 8 Car. & P. 727, which was an indictment for arson, containing five separate counts, each charging the firing of a house of a different owner, it appeared from the opening by the prosecutor that the houses in question constituted a row of adjoining houses, and that the fire was communicated to four of them from the one first set on fire. As the burning of each house was a distinct felony, the prisoner asked that the prosecutor be put to his election. Erskine, *J.*, said: "As it is all one transaction, we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and 403] *may, therefore, be likely to embarrass the prisoner in his defense."

While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defense by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial. The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. That discretion has not been taken away by section 1024 of the Revised Statutes. On the contrary, that section is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarrassed in his defense, if that course be not pursued.

In the present case, we cannot say from anything on the face of the indictment that the court erred or abused its discretion in overruling the defendant's motion to quash the indictment or his motions for an election by the government between the two charges of murder. The indictment showed that the two murders were committed on the same day, in the same county and district, and with the same kind of instrument. These facts alone *justified the* court in forbearing, at the beginning of the trial, and before the facts were disclosed, *to compel an election by the [404 prosecutor between the two charges of murder. When, however, the evidence was concluded—indeed, as soon as the defendant testified in his own behalf—the wisdom of the course pursued by the court became manifest; for it appeared that the two murders were committed at the same place, on the same occasion, and under such circumstances, that the proof in respect to one necessarily threw light upon the other. The accused and the two men alleged to have been murdered were companions in traveling, and were together, in camp, at the place where the killing occurred. The killing of Vandiveer immediately preceded that of Bolding. There was such close connection between the two killings, in respect of time, place, and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other. It is, therefore, clear that the accused was not confounded in his defense by the union of the two offenses of murder in the same indictment, and that his substantial rights were not prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the two charges he would proceed.

It is appropriate to say that we lay no stress upon the circumstance that the motions in question were not made until after the defendant had pleaded not guilty. We have already said that, if in the progress of the trial it appeared that the accused might be embarrassed or confounded in his defense, by reason of being compelled to meet both charges of murder at the same time, and before the same jury, it was in the power of the court, at any time before the trial was concluded, to require the government to elect upon which charge it would seek a verdict. It is, also, proper to say that we have not regarded as part of the record that which appears in the brief of counsel for the defendant purporting to be an order made in the court below, on the 2d day of October, 1893, amendatory and explanatory of the order of March 23, 1892, relating to the impaneling of the jury that tried this case. The object of this amendatory order was to show more fully than was done by the order of March 23, 1892, how the trial jury was impaneled. The motion of defendant to strike from the record *a copy of that order was unnecessary, [405 because the government has not moved that it be treated as part of the record, and disclaims any purpose to ask that it shall be considered on this writ of error. Under these circumstances we have not considered whether the alleged order of October 2, 1893, was within the power of the court to make, nor have we based our conclusions upon anything contained in it.

2. The next question to be considered relates to the impaneling of the jury that tried the defendant. It is contended that the action of the court below in that respect was substantially that condemned in *Lewis* v. *United States*, 146 U. S. 370 [36: 1011]. But this contention cannot be sustained. The decision in that case proceeded upon the ground that it did not appear affirmatively from the record

that the prisoner, when required to make his challenges, was brought face to face with the jurors whose names appeared upon the list of thirty-seven qualified jurymen that was furnished, by direction of the court, to the accused and the government. This court said: "It does, indeed, appear that the clerk called the entire panel of the petit jury, but it does not appear that when the jury answered to said call they were present so that they could be inspected by the prisoner; and it is evident that the process of challenging did not begin until after said call had been made. We do not think that the record affirmatively discloses that the prisoner and the jury were brought face to face at the time the challenges were made, but we think that a fair reading of the record leads to the opposite conclusion, and that the prisoner was not brought face to face with the jury until after the challenge had been made, and the selected jurors were brought into the box to be sworn. Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed."

The record before us discloses a wholly different state of facts. It shows that the jurors 406] were all examined as to *their qualifications, and that thirty-seven were found to be qualified to sit in the case, that is to say, not liable to objection for cause; that the defendant was in court during this examination, was face to face with the jurors so examined, and had an opportunity to participate in the examination to such extent as was necessary to ascertain whether any of them were liable to objection for cause; and that he was at liberty to strike from the list of those thus found to be qualified the names of those, not exceeding twenty, whom he did not wish to serve on the jury. If it did not appear affirmatively from the record of this case that the accused was, in fact, brought face to face with all the jurors who were examined as to their qualifications, and whose names were on the list of thirty-seven furnished to him, or that he was not present during such examination, or that they were not all in his presence when he exercised his right of challenge, the judgment would be reversed for the reasons stated in *Lewis* v. *United States*. We adhere to the decision in that case, as based upon sound principle.

The objection that the jurors were not selected in the particular mode prescribed by the laws of Arkansas, cannot be sustained. By section 800 of the Revised Statutes of the United States, it is provided, substantially, in the words of the Act of July 20th, 1840 (5 Stat. at L. 394, chap. 47) that jurors to serve in the courts of the United States, in the several states, shall have the same qualifications —subject to the provisions contained in other sections, and which have no bearing upon this case—and be entitled to the same exemptions, as jurors of the highest courts of law in the respective states may have, and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they are required to be "designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such state court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to juries in the state courts, from time to time in such state." Rev. Stat. § 800. And by the Act of June 30th, *1879 (21 [407 Stat. at L. 43, chap. 52, § 2) all jurors, grand and petit, in any court of the United States, including those summoned during the session of the court, are required to be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section 800 of the Revised Statutes, which names shall have been placed in the box by the clerk of court and a commissioner appointed by the judge, who shall be a citizen of good standing, residing in the district in which such court is held, and a well known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and the commissioner each to place one name in said box alternately, without reference to party affiliations. That Act further provides that nothing contained in it shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the state authorities in selecting juries in the highest courts of the state, and that "no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this Act shall be drawn in conformity therewith: *Provided*, That no citizen possessing all other qualifications which are or may be prescribed by law shall be designated for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude."

There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. *United States* v. *Shackleford*, 59 U. S. 18 How. 588 (15: 495); *United States* v. *Richardson*, 28 Fed. Rep. 61, 69. In the absence of such a rule or order (and no such rule or order appears to have been made by the court below) the mode of *designating and [408 impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by

the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses.

There is no claim, in the present case, that the jurors for general service in the court below during the term at which the defendant was tried were not selected in accordance with law. The record shows that he was duly served with a full and complete list of the petit jurors selected and drawn by the jury commissioners of the court. Nor is it contended that the jurors who were examined as to their qualifications before the list of thirty-seven qualified jurors was furnished were not properly selected for general service during the term. The complaint by the accused is that the particular mode in which the jury that tried him was impaneled was illegal. It is true that mode was not in conformity with the statutes of Arkansas. But that objection, as already suggested, cannot avail the accused. So that the inquiry must be whether the jury was organized in violation of any settled principle of criminal law relating to the subject of challenges.

The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused. "The end of challenge," says Coke, "is to have an indifferent trial, and which is required by law; and to bar the party indicted of his lawful challenge is to bar him of a principal matter concerning his trial." 3 Inst. 27, chap. 2. He may, if he chooses, peremptorily challenge "on his own dislike, without showing any cause:" he may exercise that right without reason or for no reason' arbitrarily and capriciously. Co. Litt. 156b; 4 Bl. Com. 853; *Lewis* v. *United States*, 146 U. S. 376 [36: 1014]. Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned. And, therefore, he cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an **409**] opportunity *given for such inspection and examination of him as is required for the due administration of justice.

Were his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. The jurors legally summoned for service on the petit jury were, as we have seen, examined in his presence as to their qualifications, and thirty-seven were ascertained, upon such examination, to be qualified to sit in the case. Both the accused and the government had ample opportunity, as this examination progressed, to have any juror who was disqualified rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the case. It is apparent, from the record, that the persons named in the list so furnished were all brought face to face with the prisoner before he was directed to make, and while he was making, his peremptory challenges.

Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the state before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that method. Mansfield's Dig. § 2242. And such is regarded by some courts as the better practice, even where no particular mode of challenge is prescribed by statute. *State* v. *Cummings*, 5 La. Ann. 330, 332. But as no such provision is embodied in any Act of Congress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law. The uniform practice in England, as appears from the observations of *Mr. Justice* Abbott, afterwards Lord Tenterden, in *Brandeth's Case*, was to require the accused to exercise his right of challenge before *calling upon the [**410** government. He said: "Having attended, I believe, more trials of this kind than any other of the judges, I would state that the uniform practice has been that the juryman was presented to the prisoner or his counsel, that they might have a view of his person; then the officer of the court looked first to the counsel for the prisoner to know whether they wished to challenge him; he then turned to the counsel for the crown to know whether they challenged him." In the same case, *Lord Chief Baron* Richards said that he conceived it to be clear that "it is according to the practice of the courts that the prisoner should first declare his resolution as to challenging." *Mr. Justice* Dallas expressed his concurrence in those views. 32 How. St. Tr. 771, 774, 775. But the general rule is, that where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court. *Com.* v. *Piper*, 120 Mass. 185; *Turpin* v. *State*, 55 Md. 464; *Jones* v. *State*, 2 Blackf. 475; *State* v. *Hays*, 23 Mo. 287; *State* v. *Pike*, 49 N. H. 406, 6 Am. Rep. 533; *State* v. *Shelledy*, 8 Iowa, 480, 504; *State* v. *Boatwright*, 10 Rich. L. 407; *Schufflin* v. *State*, 20 Ohio St. 233.

In some jurisdictions the mode pursued in the challenging of jurors is for the accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified and not subject to be challenged for cause, is presented for challenge or acceptance. But it is not essential that this mode should be adopted. In *Reg.* v. *Frost*, 9 Car. & P. 129, 137 (1839) the names of jurors were taken from the ballot-box, and each was sworn on the *voir dire* as to his qualifications before being sworn to try. When the government peremptorily challenged one who had been sworn on the *voir dire* as to his qualifications, it was objected that the challenge came too late, because the juror had taken the book into his hand to be sworn to try. In disposing of this objection *Chief Justice* Tindal said: "The

rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking 411] the book, *having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." These observations, it is apparent, had reference only to the question whether a peremptory challenge could be permitted after the juror had, in fact, taken the book into his hand for the purpose of being sworn to try. At most, in connection with the report of the case, they tend to show that the practice in England, as in some of the states, was to have the question of peremptory challenge as to each juror, sworn on his *voir dire* and found to be free from legal objection, determined as to him before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in Frost's case that that mode was the only one that could be pursued without embarrassing the accused in the exercise of his right of challenge. The authority of the circuit courts of the United States to deal with the subject of impaneling juries in criminal cases, by rules of their own, was recognized in *Lewis* v. *United States*, subject to the condition that such rules must be adapted to secure all the rights of the accused. 146 U. S. 379 [36: 1015].

We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory challenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit on the case. Such a list was furnished to him, and he was at liberty to strike from it the whole number allowed by the statute, with knowledge that the first twelve on the list, not challenged by either side, would constitute the jury. And after it was ascertained, in this mode, who would constitute the trial jury, it was within the discretion of the court to permit them to be again examined before being sworn to try. But no such 412] course was *suggested, and the record discloses no reason why a further examination was necessary in order to secure an impartial jury. The right of peremptory challenge, this court said, in *United States* v. *Marchant*, 25 U. S. 12 Wheat. 480, 482 [6: 700], and in *Hayes* v. *Missouri*, 120 U. S. 68, 71 [30: 578, 580], is not of itself a right to select, but a right to reject, jurors.

It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstance does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. No injury was done if the government united with him in excluding particular persons from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jurymen furnished him by the court. If upon that list appeared the name of one who was subject to legal objection, the facts in respect to that juror should have been presented in such form that they could be passed upon by this court. But it does not appear that any objection of that character was made, or could have been made, to any of the thirty-seven jurors found, upon examination, to be qualified.

Thus, in our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an impartial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle.

3. We come now to examine some of the exceptions taken *by the defendant to the [413 charge of the court. Among other observations made by the court to the jury were these: "At this point it becomes necessary for us to ascertain what is meant by these expressions, willfully and with malice aforethought, because they are the characteristics that enter into the crime of murder; they must exist as a part of that crime; there can be no crime of this kind without them. It is necessary, therefore, for us to understand correctly, and to understand with precision and accuracy, exactly what the law means by them, because they have a legal meaning, they have a meaning that is peculiar to the law, and it is by the application of that meaning to the facts of the case, or the truth of the case, that you, as intelligent, impartial, and dispassionate citizens, are able to arrive at a just and correct and honest conclusion. In finding their existence, it is not necessary that the proof should show that a motive for the act done existed."

The defendant insists that the reverse of this was the law; that proof of malice ought always show some motive for the homicide. What was in the mind of the court, when the above observations were made, is apparent by the following clauses of the charge that immediately follow those to which exception was taken: "There is always a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it cannot be fathomed; sometimes because of its inadequate character, because of its utter insignificant nature compared with a great offense of that kind, honest men, whose minds and hearts have not been corroded by the commission of

crime, overlook it, they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed, that it cannot be fathomed, and as it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary at best—that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics 414]*of that act; the law says, however, that wherever motive can be found, though it is not required to be found, it is the duty of the jury to find it, though when they do find it they are not to expect that it will ever be adequate; that it will be in proportion to the act done, because there is nothing on this earth that is in proportion to the crime of willfully and deliberately taking human life; there is no motive adequate to it; there is nothing that can be weighed upon the one side of the scale with the crime of deliberate and wicked murder upon the other side of it, and be pronounced by honest men as equal in weight to the crime committed. The law says that motive need not be proportionate to the heinousness of the crime."

We do not perceive any substantial error of law in what the court said upon the subject motive. While, as stated, a motive exists for every act done by a person of sound mind, it is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction. 1 Bishop, Crim. Proc. § 1107, and authorities there cited. Malice may be presumed from the mere fact of killing, nothing further being shown. *Com.* v. *York*, 9 Met. 93, 114, 43 Am. Dec. 373; *Com.* v. *Hawkins*, 3 Gray. 463; 1 Greenl. Ev. § 84. The charge being murder, if the facts constituting that offense were established beyond a reasonable doubt, it was the duty of the jury to have found the defendant guilty as charged, although it may have been impossible to discover any adequate motive for the killing. As said in *Clifton* v. *State*, 73 Ala. 473: "The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry, . . . but it is not in any case indispensable to a conviction. It is not an element of the burden of proof the law devolves upon the prosecution whether the agency or connection of the accused is manifested by direct and positive evidence or only by circumstantial evidence, that a motive or inducement to commit the offense 415] *should be proved. The criminal act and the connection of the accused with it being proved beyond a reasonable doubt, the act itself furnishes the evidence that to its perpetration there was some cause or influence moving the mind." So in *McLain* v. *Com.* *99 Pa. 86, 89:* "*It was* further urged that no adequate motive was shown to induce the accused to commit the crime charged. The court well said the commonwealth was not bound to establish an adequate motive for the alleged crime, and declared, in the words of this court, 'the fact of murder being established, the inability to discover the motive does not disprove the crime.'"

There was evidence before the jury tending to show that the murders in question were committed in order that the defendant might appropriate certain property of inconsiderable value in the possession of the murdered men. Under the circumstances, the inquiry would naturally arise in the minds of jurors whether murder would be committed for reasons so trivial. The court after observing that all persons were apt to act on inadequate motives, and that the history of crime showed that murders were generally committed from motives comparatively trivial, said: "So also for the smallest plunder murders have been deliberately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car; Briggs was asleep; the watch was exposed, and Muller killed Briggs by a sudden attack and succeeded in making his escape; he was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the crime with the murder. Until the confession, the justice of the conviction was largely criticized on the ground that the stealing of a watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great." But the court added in the same connection: "But the reply to this is obvious. Crime is rarely logical. Under a government where the laws are executed with ordinary certainty, all crime is a blunder, as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found *that is rational; [416 the motive is never correlative to the crime, never accurately proportioned to it. Nor does this apply solely to the very poor; very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification it is no extenuation that the act is illogical, for when passion is once allowed to operate reason loosens its restraints."

Reference was also made to a portion of a charge delivered by a judge in New York upon the subject of motive for the commission of crime, in which it was said that a small sum of money, a word spoken in anger, an insult, wrongs, real or imaginary, revenge, jealousy, hatred, envy, and malice, often lead to the commission of the crime of murder. In that connection, the court below said: "Therefore, in finding the existence of these elements that go to characterize a killing so as to make it murder, you may find their existence, though you do not find any motive."

The defendant excepted to that part of the charge referring to the circumstances of the murder case in England as an exaggerated

statement of another case in a manner well calculated to influence the minds of the jurors against the prisoner and to convict without sufficient evidence and hope for a confession from the prisoner to prove the correctness of their verdict. We do not think the exception well founded. Although the practice of alluding to the details of other cases given in the books, while a jury is being charged upon the facts of the particular case on trial, is by no means to be commended, we cannot say that the jury in this case were misled by the reference made to what appeared, or was said by judges, in other cases. It must be assumed, if the contrary does not appear, that jurors understand that these allusions to other cases are made only for purposes of illustration. It is impracticable to prescribe the particular mode in which a judge shall express to jurors his views of the case about to be determined by their verdict. That must, of necessity, be left to his discretion. If in charging a jury a judge chooses to employ the words of others in order [417] to convey the exact *thought in his own mind, or if he prefers, for purposes merely of illustration, to read from the opinions or judgments of other courts, we cannot hold that such practice, although not be encouraged, is, in the absence of a statute prescribing a different rule, ground for the reversal of the judgment of the trial court. If a judgment should in any case be reversed upon such ground, it should only be where it appears that the jury has been misled by the particular mode in which they were charged to the prejudice of the substantial rights of the accused.

4. It is said that the record fails to show that all things were done in the court below that were necessary to be done before the sentence of death was pronounced, in this: First, the record nowhere states that the verdict was received and recorded; second, there is no record of any judgment declaring plaintiff in error to be guilty of murder.

In respect to the first of these objections it is sufficient to say that it appears from the journal entries of the trial, as well from the bill of exceptions, that the verdicts of guilty on the first and third counts, respectively, were returned into and were recorded by the court, in the presence of the accused; whereupon the jury were discharged from the further consideration of the case, and the defendant remanded to the custody of the marshal to await the final sentence.

The second of the objections above stated is based upon the following order, under the caption of the *United States* v. *John Pointer, Indictment for Murder, No. 37*, and made April 30th, 1892:

"On motion of William H. H. Clayton, Esq., attorney for the Western District of Arkansas, the said defendant John Pointer was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to say or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause on the 26th day of March, 1892, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

"Whereupon the premises being seen, and by the court well *and sufficiently un- [418] derstood, it is considered by the court that the said marshal of the district aforesaid cause the said John Pointer to be taken hence and him, the said John Pointer, safely and securely keep from the date hereof until Tuesday, the 28th day of June A. D. 1892, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Pointer to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said day of June, in the year of our Lord one thousand eight hundred and ninety-two, cause the said John Pointer to be hanged by the neck until he is dead.

"And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

"And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same."

The specific objection to the sentence is that it does not state the offense of which the defendant was found guilty, or that the defendant was guilty of any named crime. This objection is technical, rather than substantial. The record of the trial preceding the sentence shows an indictment returned into court by grand jurors duly selected, impaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas, in which, in separate counts, they, upon their oaths, charge the defendant with having within that district on a named day killed and murdered Samuel E. Vandiveer and William D. Bolding. The indictment itself is given, and it appears that the defendant was brought into court upon it; that he was arraigned, and pleaded not guilty to the charges contained in it; that he was tried upon the same indictment before a petit jury lawfully impaneled and sworn; *and [419] that a verdict of guilty of murder as charged in the first and third counts, respectively, of that indictment was returned into court March 26th, 1892, and was received and incorporated into the record of the trial. When, therefore, the defendant was brought into court and asked what he had to say "why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 26th day of March 1892, shall not now be pronounced against him," all doubt as to offense of which he was found guilty, and on account of which he was sentenced to be hanged, is removed. The sentence itself is in the record, and the record shows everything necessary to justify the punishment inflicted. While the record of a criminal case must state what will affirma-

tively show the offense, the steps, without which the sentence cannot be good, and the sentence itself, "all parts of the record are to be interpreted together, effect being given to all, if possible, and a deficiency at one place may be supplied by what appears in another." 1 Bishop, Crim. Proc. §§ 1347, 1348. For these reasons the objection last stated is not sustained.

5. Some reference should be made to an order entered on the same day, but after the sentence was passed, in these words: "Ordered by the court, that sentence be suspended on the third count of the indictment, on which the defendant was tried and convicted by the jury for the killing of William D. Bolding." The record does not state the grounds upon which this order was based. Its object, we suppose, was to restrict the sentence to one of the two charges of murder embraced in the indictment, although the defendant had been tried and found guilty upon both. Be this as it may, that order constitutes no reason in itself for the reversal of the judgment. It did not prejudice the substantial rights of the accused, because it did not prevent this court, upon the present writ of error, from reversing the judgment in its application to all the charges contained in the indictment. This court having reached the conclusion that the judgment must be affirmed, any question as to the propriety or legality of the order suspending the sentence as to the court charging the murder of Bolding, is immaterial. It is neces-
420] sary, however, *in order to avoid any misapprehension, to say that this court must not be understood as expressing any opinion upon the question suggested by the words of that order, whether a court of the United States, in the absence of authority conferred by statute, has the power, after passing sentence in a criminal case, to suspend its execution indefinitely, and until the court in its discretion removes such suspension. A decision of that question is not necessary to the disposition of this case upon its merits.

There are assignments of error other than those above examined, but they are without merit, and, therefore, need not be noticed in this opinion.

We perceive no error in the record to the prejudice of the substantial rights of the plaintiff in error. Judgment affirmed.

MARY J. GARNER (formerly Mary J. Graeffe), *Appt.*,

v.

THE SECOND NATIONAL BANK OF PROVIDENCE, Rhode Island, ET AL.

(See S. C. Reporter's ed. 420-436.)

Preference of creditors—husband, when trustee for wife—deed from husband to wife, when good.

1. Among creditors equally meritorious, a debtor may conscientiously prefer one to another, and it can make no difference that the preferred creditor is his wife.

2. Whenever a husband acquires possession of the separate property of his wife whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of any direct evidence that she intended to make a gift of it to him.

3. Where a husband purchases property as agent of his wife and with her money, under an agreement between them that the property is to be deeded to her, and then without her knowledge, causes the same to be deeded to himself, he holds the property in trust for her, and if he afterwards conveys the property to her before the rights of his attaching creditors have intervened, such conveyance is good as against his creditors, unless she has herself been guilty of fraud as to them which would estop her from claiming the property.

[No. 43.]

Argued Oct. 19, 1893. Decided Jan. 22, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Rhode Island, dismissing a suit in equity brought by Mary J. Garner to obtain an injunction against the Second National Bank *et al.*, from selling and conveying certain real property in Rhode Island, and from attempting to oust her from the possession thereof, and decreeing relief asked by cross-bill, to wit, the cancellation of the deeds to plaintiff as clouds upon the title. *Reversed, and cause remanded for further proceedings.*

Statement by *Mr. Justice* **Harlan:**

This appeal brings up for review a final decree dismissing a bill filed to obtain an injunction against the appellees, the Second National Bank, a national banking association having *its place of business in Provi-[421
dence, Rhode Island, Christopher A. Shippee, and Samuel W. K. Allen, from selling and conveying by deed or otherwise certain real property situated in that state, and from all attempts by actions at law or otherwise to oust Mary J. Garner, formerly Mary J. Graeffe, one of the appellants, from the peaceable and quiet enjoyment and possession of such property.

The case made by the bill is, substantially, as follows: In the winter of 1879 and 1880, Albert J. Graeffe, of New York, conceived the purpose of forming a joint stock company for manufacturing textile fabrics of wool and cotton. Having heard that there was certain mill property in Warwick, Rhode Island, that could be purchased and utilized at a moderate expense, he proposed to his wife, Mary J. Graeffe, who had considerable estate in her own right, that this mill property, together with other real estate and water rights adjacent and appurtenant thereto, known as the American Mills estate, be purchased, and equipped for manufacturing purposes. The husband represented to the wife, at the time, that the property could be rented to a company he proposed to form, and that

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NOTE.—*As to conveyances between husband and wife, upheld in equity*, see note to Bank of United States v. Lee, 10: 81.

As to voluntary deed to wife or child, when good or void, as to creditors, see note to Sexton v. Wheaton, 8: 773.

As to obligations of married woman, as surety or guarantor for her husband or others; rights as creditor of her husband, see note to Bein v. Heath, 12: 416.

As to wife's separate property, how charged, see note to Dodge v. Knowles, 29: 144.

such an investment of her money would be safe and remunerative. When the investment was proposed, the husband was the agent and trustee of the wife, having the care, custody, and management of her property. The wife, confiding in his representations, as well as in his judgment and good intentions, gave her assent to the proposed investment. But she expressly directed—and it was so understood between herself and her husband—that the property when purchased should be conveyed to her in fee and appear upon record in her individual name. The proposed purchase was made, the amount due for each parcel being paid out of the money of the wife which was in the hands of the husband as her agent and trustee, and was her sole and separate property. Contrary to the understanding with the wife, without her knowledge or consent, and in violation of her express directions, the husband caused the deeds and instruments of writing to be made out in his name, as if the fee was absolutely vested in him. In conformity with the original pur-
422] pose, the property was equipped *for manufacturing purposes, the money expended to that end belonging to the wife. The result was that $48,910.94 of her money, in the hands of the husband, were expended in the purchase and equipping of this property. When the deeds were executed the wife believed that the property had been conveyed to her as her sole and separate estate, in accordance with her directions to, and understanding with, her husband, at the time of the proposed investment. She never heard that this understanding had been violated, until the summer of 1880, when she ascertained from her husband that the property stood in his name. She thereupon requested him to have it conveyed to her, without further delay. This he promised, but neglected, at the time, to do.

On the 16th of October, 1880, the premises having been put in condition for manufacturing purposes, were leased for the term of four years to the American Mills Company, a New York corporation, of which the husband was a stockholder, and the treasurer. In February, 1881, the company became financially embarrassed. Its condition having become known to William H. Garner, a brother of Mrs. Graeffe, he informed her that, in case of its insolvency, the property, standing in her husband's name, was liable to be taken for its debts. The husband was thereupon again requested by the wife to convey the property to her. In accordance with that request, he conveyed to Garner, by warranty deed, dated March 1, 1881, and recorded March 3, 1881. The latter, by deed, dated March 1, 1881, and recorded August 13, 1881, conveyed to Mrs. Graeffe. The consideration recited in each of these deeds was $48,910.94, the amount of the wife's money that had been expended by the husband in and about the property.

An execution was issued November 7, 1881, upon a judgment rendered in one of the courts of Rhode Island, in favor of the Fourth National Bank of New York against Albert J. Graeffe. This execution was levied November 15, 1881, on all the estate, right, title, interest, and property he had, on March 5, 1881 (the date of the attachment in the case) in and to the property described in the deeds to him, Garner, and Mrs. Graeffe. At a sale at public auction under this execution, the interest of *Albert J. Graeffe, so levied upon, [423 was purchased, February 28, 1882, by Christopher H. Shippee, for $499. and he received a deed from the sheriff. Mrs. Graeffe, by her attorney, forbade the sale, and gave notice that the property was her sole and separate estate. Subsequently, Shippee, by quit-claim deed, conveyed an undivided half of the estate purchased by him, as above stated, to Samuel W. K. Allen, one of the appellees.

On the 7th day of January, 1882, at public sale, under an execution upon a judgment rendered in one of the courts of Rhode Island, in favor of the Second National Bank of Providence, that bank became the purchaser, for $525, of all the right, title, and interest of Albert J. Graeffe in the above real estate and premises, on the 16th of March, 1881, and received a deed from the sheriff.

The Second National Bank, Shippee and Allen having threatened to eject Mrs. Graeffe from the possession and enjoyment of the property, this suit was brought against them in the name of Graeffe and wife. A part of the relief sought was a decree canceling the deeds under which they respectively claimed, and thereby removing the cloud created by them upon her title.

The answers controvert all the allegations of the bill that tend to show an equity in favor of Mrs. Graeffe as against the judgment creditors of her husband. The special grounds of defense were sustained by the court below, and are sufficiently indicated in the following extract from the opinion of the circuit judge, made part of the record:

"This is a case as disclosed by the evidence where a wife for years allowed her husband to do as he pleased with her property, calling him to no account whatever, and where no action is taken by her until he has become insolvent, and is about to make an assignment. Property is permitted to stand in his name for months after the wife has knowledge of the actual condition of the title, and credit is given the husband on the faith that he is the real owner. Where a wife thus permits her money or property to pass into her husband's hands and possession to manage as he see fit, without any *promise by him to[424 repay it, and persons are, for this reason, induced to give credit to the husband, it neither becomes impressed with a trust in her favor, nor does she become his creditor in respect of it so as to sustain a conveyance by him to her upon the eve of his insolvency as against his general creditors"—citing *Humes* v. *Scruggs*, 94 U. S. 22 [24: 51]; *Wortman* v. *Price*, 47 Ill. 22; *Hockett* v. *Bailey*, 86 Ill. 74; *Besson* v. *Eveland*, 26 N. J. Eq. 468.

Shippee and Allen by cross bill asked a decree canceling the deeds made to Garner and Mrs. Graeffe as clouds upon their title. By the final decree the original bill was dismissed, and the relief asked by the cross-bill was given.

It is stated in the brief of appellant's coun-

sel that, pending the action below, she obtained a divorce *a vinculo* from her husband, and by a judgment of the supreme court of New York had resumed her maiden name.

Mr. **Alexander Thain,** for appellant:

Whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of any direct evidence that she intended to make a gift of it to him.

Stickney v. *Stickney*, 131 U. S. 227 (33: 136).

The taking by Graeffe of the title to the property in his own name in the first instance, the consideration having been paid by her, was in fraud of the rights of his wife, and a trust thereby resulted in her favor.

Tracy v. *Kelley*, 52 Ind. 535; *Hixon* v. *Cuppy*, 33 Ind. 210; *Minier* v. *Minier*, 4 Lans. 421; *Sweeny* v. *Damron*, 47 Ill. 450; *Wiley* v. *Gray*, 36 Miss. 510; 2 Cord, Rights of Married Women, chap. 56; 2 Story, Eq. Jur. § 1258.

The conveyance having been made to the wife for a conceded actual and bona fide indebtedness, it was, at most, only constructively and not actually, fraudulent.

Lobstein v. *Lehn*, 120 Ill. 549; *Loos* v. *Wilkinson*, 4 L. R. A. 353, 113 N. Y. 491; *United States Trust Co.* v. *Sedgwick*, 97 U. S. 304 (24: 954); *Manchester* v. *Tibbetts*, 121 N. Y. 219.

Had there been no agreement between husband and wife to buy for her in the first instance, still it was neither illegal, inequitable nor fraudulent for him to prefer her to the amount of his indebtedness to her.

Atlantic Nat. Bank v. *Tavener*, 130 Mass. 409; *Metsker* v. *Bonebrake*, 108 U. S. 66 (27: 654); *Wiley* v. *Gray*, 36 Miss. 510.

Right to prefer among creditors is a consequence of ownership.

Lampson v. *Arnold*, 19 Iowa, 479; *Wilson* v. *Forsyth*, 24 Barb. 105; *Grover* v. *Wakeman*, 11 Wend. 187, 25 Am. Dec. 624; *Lupton* v. *Cutter*, 8 Pick. 298.

And such preferences are not fraudulent.

Waterbury v. *Sturtevant*, 18 Wend. 353; *McMenomy* v. *Roosevelt*, 3 Johns. Ch. 446; *Lewis* v. *Whittemore*, 5 N. H. 364, 22 Am. Dec. 466.

A preference is not fraudulent, though others lose their debts which are equally meritorious.

Kuykendal v. *McDonald*, 15 Mo. 418, 57 Am. Dec. 212; *Waterbury* v. *Sturtevant*, 18 Wend. 353; *Hall* v. *Arnold*, 15 Barb. 599; *Waddams* v. *Humphrey*, 22 Ill. 661; *Ewing* v. *Runkle*, 20 Ill. 448.

Or though the debtor be insolvent.

Auburn Exch. Bank v. *Fitch*, 48 Barb. 344.

A preference is not fraudulent, though the creditor knew of the insolvency of the debtor.

Walsh v. *Kelly*, 42 Barb. 98, 27 How. Pr. 359; *Fromme* v. *Jones*, 18 Iowa, 474; *Hessing* v. *McCloskey*, 37 Ill. 341; *Johnson* v. *McGrew*, 11 Iowa, 151, 77 Am. Dec. 137; *Young* v. *Dumas*, 39 Ala. 60.

Nor by the fact that the debtor wishes to defeat some execution, nor that it includes all property not exempt from execution.

Holbird v. *Anderson*, 5 T. R. 235; *Hall* v. *Arnold*, 15 Barb. 599; *Weller* v. *Wayland*, 17 *Johns.* 102; *Wilder* v. *Winne*, 6 Cow. 284; *Barr* v. *Hatch*, 3 Ohio, 527; *Clemens* v. *Davis*, 7 Pa. 263.

An existing indebtedness is a good consideration within the proviso which saves the right of a bona fide purchaser.

Seymour v. *Wilson*, 19 N. Y. 417; *Adams* v. *Wheeler*, 10 Pick. 199; *Gibson* v. *Seymour*, 4 Vt. 518; *Gleason* v. *Day*, 9 Wis. 498; *Seymour* v. *Briggs*, 11 Wis. 198.

And the preference may be given for a debt to a wife.

Syracuse Chilled Plow Co. v. *Wing*, 85 N. Y. 421; *Mayfield* v. *Kilgour*, 31 Md. 240; *Hill* v. *Rogers*, Rice. Eq. 7; *Jaycox* v. *Caldwell*, 51 N. Y. 395; *McCartney* v. *Welch*, 51 N. Y. 626; *Woodworth* v. *Sweet*, 51 N. Y. 8; *Sherman* v. *Parish*, 53 N Y. 483; *Seymour* v. *Fellows*, 77 N. Y. 178; *Magniac* v. *Thompson*, 32 U. S. 7 Pet. 348 (8: 709); *Smith* v. *Allen*, 5 Allen, 454, 81 Am. Dec. 758; Wait, Fraud. Conv. § 299.

In Rhode Island, a preference of a bona fide debt is valid, except under the operation of the insolvent laws.

R. I. Pub. Stat. chap. 237, p. 660, §§ 14, 15; *Eliott* v. *Benedict*, 13 R. I. 463; *Hodges* v. *Hodges*, 9 R. I. 32, 35, 36; *Franklin Sav. Bank* v. *Greene*, 14 R. I. 1; *National Exch. Bank* v. *Watson*, 13 R. I. 91, 43 Am. Rep. 132.

Appellant as complainant is entitled to maintain this action to establish and quiet her title.

2 Story, Eq. Jur. § 826; *Fonda* v. *Sage*, 48 N. Y. 173; *Allen* v. *Buffalo*, 39 N. Y. 386; *Eldridge* v. *Smith*, 34 Vt. 484; *Lick* v. *Ray*, 43 Cal. 83; *Stout* v. *Cook*, 37 Ill. 283; *Hartford* v. *Chipman*, 21 Conn. 488; *Downing* v. *Wherrin*, 19 N. H. 9, 49 Am. Dec. 139; *Brewton* v. *Smith*, 28 Ga. 442; *Barron* v. *Robbins*, 22 Mich. 35.

Mr. **J. Langdon Ward,** for appellees:

Where a wife permits her money or property to pass into her husband's hands and possession to manage as he sees fit, without any promise by him to repay it, it neither becomes impressed with a trust in her favor, nor does she become his creditor in respect of it so as to justify and sustain as against his general creditors a conveyance by him to her upon the eve of his insolvency, in alleged repayment of it.

Humes v. *Scruggs*, 94 U. S. 22 (24: 51); *Wortman* v. *Price*, 47 Ill. 22; *Wilson* v. *Loomis*, 55 Ill. 352; *Patton* v. *Gates*, 67 Ill. 164; *Hockett* v. *Bailey*, 86 Ill. 74; *Miller* v. *Payne*, 4 Ill. App. 112; *Grover & B. S. Mach. Co.* v. *Radcliff*, 63 Md. 496; *Jenkins* v. *Middleton*, 68 Md. 540; *Besson* v. *Eveland*, 26 N. J. Eq. 468; *Roy* v. *McPherson*, 11 Neb. 197.

She is estopped from now claiming the estate as against these creditors. Their equities are superior to hers.

Sexton v. *Wheaton*, 21 U. S. 8 Wheat. 240 (5: 607); *Coates* v. *Gerlach*, 44 Pa. 43; *Spaulding* v. *Drew*, 55 Vt. 253; *Knowlton* v. *Mish*, 17 Fed. Rep. 198.

Graeffe intended to defraud his creditors by the conveyance of this property to his wife.

United States Trust Co. v. *Sedgwick*, 97 U. S. 304 (24: 954); *Smith* v. *Kennedy*, 13 Hun, 10.

As between her and her creditors, so far as their rights and remedies are concerned, the laws of New York must prevail.

Owings v. *Hull*, 34 U. S. 9 Pet. 607 (9: 246); *Suydam* v. *Broadnax*, 39 U. S. 14 Pet. 67 (10: 357); *Union Bank of Tennessee* v. *Vaiden*, 59

U. S. 18 How. 503 (15: 472); *Watson* v. *Tarpley*, 59 U. S. 18 How. 517 (15: 509); *Eliott* v. *Gower*, 12 R. I. 79.

Mr. Justice **Harlan** delivered the opinion of the court:

In the court below it was contended, in behalf of the plaintiffs that even if there were no agreement that the property in question should be taken in the name of the wife, there was nothing illegal or inequitable in preferring her to the amount of the husband's debt to her. Upon this point the court said: "The question of the legality of a preference under Rhode Island laws does not arise in this case; for our decision rests upon the principle that Mrs. Graeffe, by her own conduct or acts, by what she permitted to be done, **426**] or neglected to do, *is estopped in a court of equity from claiming this estate as against the general creditors of her husband."

We are of opinion, after a careful examination of the evidence, that there was nothing in the conduct or acts of Mrs. Graeffe that precluded the court from granting the relief sought by her. The case made by the bill was in all material particulars sustained by the proof. We do not see how this conclusion can be avoided, except by disregarding altogether the testimony of Mrs. Graeffe and her husband. And that we do not feel at liberty to do. In our judgment what they have said under oath touching the vital issues in the case must be taken as substantially true.

Mrs. Graeffe inherited from her father and uncle property, principally real estate, worth from $100,000 to $125,000. When the estates of the uncle and father were settled up, the moneys and securities belonging to her came into the husband's hands under a power of attorney, which authorized him to receive them for her. There is no claim, as under the evidence there could not be, that the wife made a gift of this property to her husband. On the contrary, it remained in his hands to be controlled for her, although he was allowed a large discretion in its management. The husband informed his wife that she could buy the property in question, stating that it could be purchased cheaply, and that a very fair return could be derived from it if improved and leased to the Mills Company. When it was concluded to make the purchase, the husband told the wife that he "would buy the property for her," and that "the title was to be vested in her." It is beyond question that she relied upon his assurance that the property would be secured to her. She certainly understood at the time, as was quite natural, that it was to be her property. The purchase was made in March, 1880. The husband, without the knowledge of the wife, and in violation of the assurances he had given her, took the title in his own name. The price paid was about $6000. Immediately after the purchase improvements costing about $40,000 were put upon the premises. The moneys paid for the property, and that expended for its improvement, belonged entire-**427**] ly to Mrs. Graeffe. *In August, 1880, the improvements being then in progress, she discovered, in the course of a conversation with her husband, that the property stood in his name. She grew excited about the matter, and insisted upon his making a conveyance to her at once. This he agreed to do. He promised that he would attend to it at once, but neglected to perform his promise. To these facts the husband testified, and we are not at liberty, upon a close scrutiny of the evidence, to doubt the substantial accuracy of his statements. Other testimony by him was to the following effect: "*Q.* After this interview in August, and before the conveyance, on the first of March following, had you any conversation with Mrs. Graeffe in which she was informed as to where the required title of the property was? *A.* What do you mean by that? *Q.* How did she know that it had not been conveyed to her? *A.* She questioned me from time to time and I was forced to make acknowledgments to her that I had not as yet attended to the transfer. *Q.* When did she first question you, after the interview of August, 1880? *A.* In that fall of 1880 and also in the spring. *Q.* When was it that you first told her that you had not transferred the title to her? *A.* August, 1880. *Q.* And then you told her you were going to do it? *A.* Yes. *Q.* After that when did you tell her you had not; or, did you tell her anything about it? *A.* Yes; I told her later, with a promise to do it, and failed to do it. *Q.* When next, prior to March first, 1881? *A.* Some time in February; I cannot tell the date, but it was at the moment when I was borrowing money from her to pay some drafts that were maturing. She then again learned that I had not made this transfer. I told her then, and she was very much excited about it."

Mrs. Graeffe testified to the following effect: "*Q.* At the time he had these conversations with you, was there anything said as to who was to take the property? *A.* I understood that it was to be my property. Of course, I understood it was to be my property. *Q.* Did you learn from time to time that purchase had been made of the property? *A.* Yes, Graeffe told me, and told me the price he could get, but I don't remember the figures at all. *Q.* What did you say *about [**428** purchasing? *A.* I left it to him. *Q.* What did you say to him? *A.* I expected that he would purchase, and talked to that effect. *Q.* When did you first learn that the title to the property was not in your name? *A.* About August of that year, I think. I think it was some time during the summer and we were talking about the property, and he gave me to understand it was not in my name. I then insisted upon it, and he said it should be put in my name. I know we had quite a little controversy at the time. He said if that would satisfy me, it should be put in my name. *Q.* When next did you have any conversation with Mr. Graeffe after this interview in August on the subject of the title to this property? *A.* I don't think we ever spoke of it again to speak of the title until he was about to fail. About that time I spoke to my brother about it, and that was the first I knew that it had not been put in my name. *Q.* What did you say to your brother? *A.* I asked him to look out for my interest, and get my money. He asked if it

was mine. I said I thought it was. I then spoke to Graeffe, and he said it had not been put in my name. My brother said immediately it must be done. I think it was he who took charge of the affair. *Q.* Immediately after this conversation, the transfer was made? *A.* Yes, I think it was the next day—just as soon as I could possibly make arrangements."

The brother of Mrs. Graeffe here referred to was William H. Garner, to whom the property was conveyed by Graeffe, and by whom it was immediately conveyed to the wife. He testified: "Some few days before the actual transfer Mrs. Graeffe, my sister, told me of the fact that this property belonging to her had been transferred to her husband, and asked me to insist on its being retransferred to her, and I did so." Under the deed from her brother, Mrs. Graeffe claims the property as against those who obtained sheriff's deeds under attachments issued and levied after the title was vested in her. These attachments, we have seen, were levied on the right, title, and interest of the husband int he property.

The proof fails to show that Mrs. Graeffe ever stated to any one that her husband owned [429] the property, or that any *one in her presence ever spoke of him as itsowner. There is some conflict in the evidence as to whether the husband represented to any creditor that he owned the property. He denies that he ever did, and we do not think the evidence authorizes us to assume that he made or intended to make any representations of that character. In any event, it must be taken that his creditors were not induced to regard him as the owner of the property by reason of any representations to that effect by, or with the knowledge of, Mrs. Graeffe.

The only omission charged against her in respect to the property is that she relied upon her husband's assurance that it would be put in her name, and did not, immediately upon learning in August, 1880, that he had deceived her, take steps to have the property conveyed to her, and thereby placed herself before the public as holding the legal title. But is that omission sufficient to justify a court of equity in denying the relief asked? Let this question be examined first with reference to the law of the state where these transactions occurred.

It is provided by the statutes of Rhode Island that "the real estate, chattels real and personal estate, which are the property of any woman before marriage, or which may become the property of any woman after marriage, or which may be acquired by her own industry, shall be absolutely secured to her sole and separate use; neither the same nor the rents, profits, or income of the same, or any part thereof, shall be liable to be attached or in any way taken for the debts of the husband, either before or after her death, and upon the death of the husband, in the lifetime of the wife, shall be and remain her sole and separate property;" further, "in case of the sale of any such property, the proceeds of such sale or any part of the same may be invested in the name of the wife, in any property, and be secured to and holden by the wife in the same manner and with the same rights and effect as the property sold." R. I. Pub. Stat. chap. 166, p. 422, §§ 1, 2. And, in that state, preferences of bona fide debts are permitted, except when they are assailed under the insolvent laws of that state, within the time limited by those laws. R. I. Pub. Stat. chap. 237, p. 660, §§ 14, 15.

*In *Steadman* v. *Wilbur*, 7 R. I. 481, [430] 486, which involved the validity, as against the husband's creditors, of a purchase alleged to have been made by the wife, with her separate estate, of property belonging to the husband, the court said: "If the title conveyed to the wife were a mere equitable one, resting in executory contract, a court of law could not set it up against a legal title by execution acquired by purchase from a creditor's levy and sale; but where, as in this case, the wife's legal title has been perfected by a deed, a court of law could deal, and ought to deal, with the wife's right to purchase, for a fair consideration, from her husband, precisely in the same way that a court of equity would. If this be so by the general law, how much more in this state, where, by statute, not only the wife's rights to her property are secured against her husband and his creditors, but her legal identity with respect to it, as a person distinct from her husband, is recognized, and her power to act and contract in the disposal of it, in the modes permitted by law, is acknowledged by legislative enactments." Observing that if the wife may contract with her husband at all for the purchase of his property with hers, it must be, in regard to his creditors, upon the same principle of good faith, and the giving of equivalent consideration, that any other purchaser might, and that if she loans him money, it must be with the same right to expect and receive security or repayment out of his estate, and even preferences of payment, that any other creditor has, the court proceeded: "She cannot, indeed, when her husband becomes insolvent, convert into debts, as against creditors, former deliveries to him of her money or other property, or permitted receipts by him of the income or proceeds of sale of her separate estate, which at the time of such delivery or receipt were intended by her as gifts, to assist him in his business, or to pay their common expenses of living; and, considering the relation between them, the law would not, merely from such delivery or receipt, imply a promise on his part to replace or repay, as in case of persons not thus related; but would require more, either in express promise or circumstances, to prove that on those matters they had dealt with each other as debtor and creditor. *It is not, however, as supposed, [431] a rule of law that at the time of each delivery or receipt of the separate property of the wife by the husband, the latter must expressly promise to repay the former, or to secure her out of his estate, to constitute the relation of debtor and creditor between them in regard to it. Such a promise, made before such transactions, and looking forward to and covering them, would, at law as in common sense, avail as well to prove the character of them, precisely as it would between other

parties who were dealing with each other on credit and in confidence. Nor is it true that an express promise to secure or repay out of the estate of the husband is requisite, in such a case, to prove that her husband received her separate property as a loan, and was therefore entitled, as against his creditors, thus to secure and repay her. Neither at law nor in equity is inferential proof to be rejected upon such a subject, more than upon any other, although, as suggested, what are proper inferences may be modified or allowed by the relation between the parties."

In *Hodges* v. *Hodges*, 9 R. I. 32, 35, it was decided that husband and wife, if they choose to do so, could treat each other as lender and borrower, and that such a contract would carry with it the usual incident of interest, the same as with other parties. And it was held, in that case, that the wife was entitled to be credited in the account between her and her husband with the proceeds of the sale of her property, although they had been applied to defray family expenses with her consent and approval. In *Elliott* v. *Benedict*, 13 R. I. 463, 465, it was held that, subject to the limitations prescribed by the insolvent laws of Rhode Island—which limitations do not affect the present case—a debtor has the right to apply the whole of his property, subject to attachment, to the payment of any one of his debts in preference to others. The court said: "At common law it is no fraud for a debtor to pay in full any debt which he owes, out of any property he has, whether attachable or not, though the result, and even the proposed result, of the payment may be that other debts will have to go unpaid. And the common law in this regard is not affected by the statute of fraudulent conveyances." And 432] *in *Franklin Sav. Bank* v. *Greene*, 14 R. I. 1, 3, 51 Am. Rep. 336, it was held that, in Rhode Island, a wife might acquire by purchase or gift from a third person the note of her husband, and enforce payment thereof as such third person might have done, she suing, if suit became necessary, by next friend in equity, or through a trustee of her estate appointed by the court on her petition under the statute. Alluding to the rule at a common law declaring that the transfer of a note of the husband to the wife extinguished the debt, the court said: "The enactment, however, of statutes recognizing the separate existence of a married woman by securing her property to her exclusive use, as against the husband and his creditors, and by conferring upon her to a greater or less extent the power of entering into contracts respecting her property and of disposing of it independently of her husband, has changed the common law in this respect, where such statutes prevail. They two are no longer one, and he that one."

The general principles thus announced by the supreme court of Rhode Island are in accord with the decisions of this court. In *Magniac* v. *Thompson*, 32 U. S. 7 Pet. 348, 397 [8: 709, 726], this court said that, among creditors equally meritorious, a debtor may conscientiously prefer one to another, and it can make no difference that the preferred creditor is his wife. So in *Bean* v. *Patterson*, 122 U. S. 496, 500 [30: 1126, 1127], which related to a conveyance of real estate by a husband for the benefit of his wife, and which conveyance was alleged to have been made in good faith to secure debts due to her for sums previously realized by him from sales of her individual property, the court said: "If, therefore, there had been no other consideration for the deed than a desire to secure for his wife provision against the necessities for the future, it could not be sustained. . . . That the property in Pennsylvania, deeds of which are mentioned above, was used for his benefit, and to pay and secure his debts, is sufficiently established. The amount realized therefrom, as we read the evidence, was greater than the sum named in the trust deed as due to her. That deed for her security stands, therefore, upon a full consideration. Had it been given to a third party for a like debt it would not be *open to[433 question that it would have been unassailable. The result is not changed because the wife is the person to whom the debt is due and not another. While transactions by way of purchase or security between husband and wife should be carefully scrutinized, when they are shown to have been upon full consideration from one to the other, or, when voluntary, that the husband was at the time free from debt and possessed of ample means, the same protection should be afforded to them as to like transactions between third parties." To the same general effect are numerous cases: *Jewell* v. *Knight*, 123 U. S. 426, 434 [31: 190, 193], and authorities cited; *Stickney* v. *Stickney*, 131 U. S. 227, 238, 240 [33: 136, 143, 144]. In the latter case it was said that "whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of any direct evidence that she intended to make a gift of it to him."

Applying the principles recognized by this court, as well as by the highest court of the state in which the property in question is situated and where the transactions in question occurred, we hold that Mrs. Graeffe is entitled to a decree canceling the deeds under which the defendants claim the property described in the deed to her. That her husband was without any means of his own and had in his possession, substantially, the entire estate of his wife, controlling and managing it for her; that the property in question was purchased and improved wholly with her money under an explicit assurance by him, before the purchase was made, that it would be put in her name; that she relied upon his compliance with that promise; that the husband, on the 1st of March, 1881, owed her a larger sum than the amounts expended in purchasing and improving the property; that the conveyance to Garner, in order that he might convey to Mrs. Graeffe, was made in good faith, for the purpose, and only for the purpose, of satisfying, to the extent of the value of the property conveyed, the debt due to the wife; and that no one became a creditor of the husband in consequence of any representation made by her, or with her

434]knowledge, that he owned *the property, are all facts clearly established by the evidence. Why should not the wife be protected under these circumstances? If the husband, in fact, had owned this property, and, in order to prefer a part of his creditors, had, in good faith, sold and conveyed it to them, with the intent to give a preference over other creditors, the right of such grantees to hold it, unless the case was brought within the insolvent laws of the state, could not be questioned. No different rule should be enforced in this case against a wife who has received a conveyance of property purchased with her money, and which should have been put in her name when so purchased. By no act or word, upon her part, was the husband discharged from the performance of his agreement to put the property in her name. The conveyance to Garner, followed by his conveyance to her, was executed for the purpose of discharging the husband's obligation to the wife, and was made before any creditor acquired a lien upon the property by attachment. As between the husband and wife, a court of equity would have compelled him to secure this property to her. If, before any rights of attaching creditors intervened, he did voluntarily what the law made it his duty to do, the transaction is not subject to impeachment by his creditors, unless the wife has been guilty of such fraudulent conduct as ought, in conscience, to estop her from claiming the property as against such creditors. If the wife had herself been guilty of deception, or if she had contributed to its success by countenancing it, she might, with justice, be charged with the consequence of her conduct. *Sexton* v. *Wheaton*, 21 U. S. 8 Wheat. 229, 240 [5: 603, 607]. But the evidence furnishes no ground for the imputation of fraud against her. That she relied upon the husband's promise to purchase the property for her and invest her with the title, and that she again relied upon his assurance, given in August, 1880, that he would have the property conveyed to her, are circumstances that do not affect the substance or good faith of the transaction. She acted with all the diligence that could reasonably have been expected or required under the circumstances. She supposed that he kept an accurate account of all transactions involving her estate as managed by him, and had no purpose 435] to give *him a false credit before the world. As subsequent developments showed, she erred in relying upon the assurances and promises of her husband as much as she appears to have done. But, as fraud cannot be imputed to her, a court of equity ought not, for such an error, to deprive her of that which is justly hers.

The cases cited in the opinion of the court below rest upon a state of facts wholly different from those here presented. For instance, in *Humes* v. *Scruggs*, 94 U. S. 22 [24: 51], which was a suit by an assignee in bankruptcy to set aside a conveyance of real estate made by a bankrupt to his wife as being in fraud of the rights of creditors—the wife alleging in her answer that the land was purchased by the husband with her money and that she believed for years that the title had been taken in her name—the court found that the proof showed a state of case the reverse of that claimed by the wife. It said: "Neither the husband nor the wife testified that there was any agreement that the husband should hold these sums as and for the estate of his wife, or that when the property in question was purchased it was agreed to be held as her estate. On the contrary, the moneys were held and used by the husband for nearly fifteen years as his own property, and mingled with his personal and partnership affairs. . . . But it is probably untrue, in fact, that this land was bought for her, as she alleges in the answer, or that she believed at any time that the title was taken in her name. . . . If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in business, and is thus used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband." The observations of the court in *Humes* v. *Scruggs* have no applicaton to *the [436 facts that we consider to be established by the proofs in the present case. The difference of opinion between this court and the circuit court arises chiefly from the conclusions of fact to be drawn from the testimony.

In our judgment, the court should have dismissed the cross-bill and given to Mrs. Graeffe the relief asked by the bill.

The decree is reversed and the cause remanded for further proceedings, in conformity with this opinion.

Mr. Justice **Brown** was not present at the argument, and took no part in the decision of this case.

THE CITY OF LINCOLN, *Plff. in Err.*,
v.
MARGARET J. POWER.

(See S. C. Reporter's ed. 436-443.)

Excessive damages—refusal to charge jury—notice of claim—injury by defective sidewalk—Carlisle Tables—expression of opinion by judge to jury—charging jury.

1. This court cannot consider an assignment of error that the damages found by the jury are excessive and given under the influence of passion and prejudice, where the complaint is only of the action of the jury.

NOTE.—*As to freedom of plaintiff from contributory negligence, necessary to entitle him to recover*, see note to Stokes v. Saltonstall, 10: 115.

As to damages for personal injury from negligence, see note to Pennsylvania v. Roy, 26: 141.

As to contributory negligence; imputed negligence;

2. The refusal of the court to charge the jury that, under all the evidence and the law in the case, the defendant is entitled to the verdict, is not error where the evidence adduced by the plaintiff, if uncontradicted, warranted the jury in finding a verdict in his favor, and defendant's evidence did not make out a clear and indisputable case.
3. In an action against a city, it is not error to permit plaintiff to show that he had given notice of his claim to defendant or to give in evidence pertinent sections of the municipal code.
4. In an action against a city for injuries by reason of a defective sidewalk, whether the plaintiff was guilty of negligence in walking upon one part of the sidewalk rather than upon another, was not a question of law, and was properly left to the jury.
5. The court can refer the Carlisle Tables to the jury to be used by them in estimating the probable length of life, where they were introduced in evidence.
6. An assignment of error cannot be sustained because the judge expresses himself as impressed in favor of the one party or the other, if the law is correctly laid down, and if the jury are left free to consider the evidence for themselves.
7. The judges of the Federal courts are not controlled in their manner of charging juries by the state regulations.

[No. 505.]

Submitted Nov. 28, 1893. Decided Jan. 29, 1894.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of Margaret J. Power, plaintiff, against the city of Lincoln, defendant, for personal injuries incurred by plaintiff through a defective sidewalk. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

This was an action brought, at January Term, 1891, in the Circuit Court of the United States for the District of Nebraska, by Margaret J. Power, a citizen of the state of Iowa, against the city of Lincoln, a municipal corporation of the state of Nebraska, for personal injuries which the plaintiff incurred while passing along a street of said city, and which she alleged had been occasioned by the carelessness and negligence of the municipal authorities in permitting a hole or broken grating to remain in a sidewalk after having been notified of its existence.

The cause was tried before the district judge, sitting as circuit judge, and a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of fifty-seven hundred dollars. The defendant, alleging error in the action of the court below in admitting certain matters in evidence offered in behalf of the plaintiff, and in rejecting others offered in behalf of the defendant, and in certain instructions to the jury, brought a writ of error to this court.

Mr. **Lionel C. Burr** for plaintiff in error.

Mr. **T. M. Marquet** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The plaintiff in error complains that the damages found by the jury were excessive, and appear to have been given under the influence of passion and prejudice.

But it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury.

*Thus it was said in *Parsons* v. *Bedford*, 28 U. S. 3 Pet. 448 [7: 737], per Story, *J.*, commenting on that clause of the 7th Amendment which declares "no fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law," that "this is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." [438

In *New York Cent. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 31 [25: 534], this court said: "No error of law appearing upon this record, this court cannot reverse the judgment, because, upon an examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefor rested with the court below, under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for a new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties." But where there is no reason to complain of the instructions, an error of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial.

In the present case such a motion was ineffectually made, the court below evidently regarding the verdict as justified by the evidence. And, apart from the question of our power to consider the subject, we find nothing presented in this record that seems to show that the jury, in the particular complained *of, acted against the rules of [439 law, or suffered their prejudices to lead them to a perverse disregard of justice.

negligence of parent or child or husband or driver; intoxication, see note to Union Pac. R. Co. v. Botsford, 35: 734.

As to act of God, what is; rights, duties and liabilities of carriers of passengers; who are passengers; measure of care required; contributory negligence; tickets; ejectment of passengers, see note to Gleeson v. Virginia M. R. Co. 35: 458.

Error is assigned to the refusal of the court to charge the jury that, under all the evidence and the law in the case, the defendant was entitled to the verdict.

Our examination of the evidence does not enable us to see error in the refusal of the court to so charge. The issues before the jury were very plain. Were the injuries of the plaintiff caused by her falling into a hole in the sidewalk? Was the existence of this hole or imperfection in the sidewalk known to the defendant in circumstances and for such a length of time as to have made it the duty of the defendant, as a municipal corporation having control over its streets, to repair the defect, or be responsible for a failure to do so? Was the plaintiff herself guilty of negligence in overlooking the hole in the walk, or in walking upon a portion of the walk where she had no right to go?

The evidence adduced by the plaintiff certainly tended to establish her side of the issue in all these questions, and if not successfully contradicted by the defendant's evidence, warranted the jury in finding a verdict in her favor. The defendants' evidence though contradictory, in some particulars, of that put in by the plaintiff, did not make out a case so clear and indisputable as would have justified the court in giving the peremptory instruction requested.

If, then, no errors were committed by the court below in the admission or exclusion of evidence, or in its charge to the jury, the verdict and judgment must be permitted to stand. Such errors are, however, assigned and will now receive our attention.

The court permitted the plaintiff to put in evidence a bill or statement of her claim against the city, which she had served on the city council, and to this the defendant excepted.

It is not easy to see what purpose was served by this evidence. The judge stated, in the charge to the jury, that such a notice is required by the law before an action is commenced, and as this assignment is not pressed in the plaintiff in error's brief we do not feel 440] constrained to give it *much importance. To permit the plaintiff to show that she made such a claim, or gave such a notice, whether required so to do by the law or not, would not seem to be reversible error.

We see no error in permitting the plaintiff to put in evidence certain sections of the municipal code. It thus appeared that the mayor and city council had the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city, and were to cause the same to be kept open and in repair, and free from nuisances. An inspector of sidewalks and street crossings was therein provided for, whose duty it was to see that the sidewalks and street crossings were kept in good repair. It is likewise made the duty of all policemen to take note of all defects in sidewalks, and to give notice of want of repair. One of the sections also contains provisions regulating the construction of cellarways and entrances to the basement in or through any sidewalk.

Why this evidence was not pertinent we are not told. These provisions of the municipal code only express and provide for what was the plain duty of the city.

Complaint is made of the first instruction given to the jury in that it is said that it made the city the insurer of the absolute safety of its sidewalks, and liable in damages for injuries caused by any defect therein, regardless of the question of negligence. This instruction is, perhaps, liable to the criticism made, and, if it stood alone, it might be fairly claimed that the jury were misled by it; but the court immediately added a further instruction, in which the jury were told to inquire whether the city officers were notified of the dangerous condition of the sidewalk, occasioned by the hole or excavation therein, before this accident happened, and whether the city, through its officers, neglected to repair the defect, or cover or protect the hole after it knew of its unsafe condition; and the right of the plaintiff to recover was made dependent on the jury finding the defendant negligent in those particulars. Read together, as the jury must have understood them, we think the instructions contained a fair exposition of the law.

It is further contended that the court erred in refusing to *give instructions prayed[441 for by the defendant, and numbered seven, nine, and twelve.

Instructions seven and nine impute negligence to the plaintiff in walking on the sidewalk too near to the building line, and on what is termed the area space. The court left it to the jury to find whether the plaintiff was negligent in walking on that part of the walk, and instructed them that if they found that the plaintiff was not negligent, and if the defendant knew of the defect, and permitted it to remain so that the plaintiff was injured, the latter was entitled to recover. Whether the plaintiff was guilty of negligence in walking upon one part of the sidewalk rather than upon another, was certainly not a question of law, and was properly left to the jury.

By the twelfth prayer the court was requested to instruct the jury that where a dangerous hole is left in a sidewalk in a public street of a city, over which there is a large amount of travel, the author will be liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury.

Such an instruction might be proper enough in an action against the person who committed the wrongful act; but the court was right in refusing it, in the present action, as irrelevant. If it was intended to mean that, because there was a liability to the plaintiff on the part of the actual wrongdoer, the city might not also be liable, it would have been plain error in the court to have given the instruction.

Error is assigned to the action of the court in referring to the Carlisle Tables as enabling the jury to find the plaintiff's prospect of life, and the force of the objection is in the allegation that those tables had not been introduced in evidence. There is high authority for the proposition that courts can take judicial notice of the Carlisle Tables,

and can use them in estimating the probable length of life, whether they were introduced in evidence or not. *McIlenry* v. *Yokum*, 27 Ill. 160; *Jackson* v. *Edwards*, 7 Paige, 387; *Eastabrook* v. *Hapgood*, 10 Mass. 313.

But it is not necessary for us, at this time, to 442] consider *whether those tables are the subject of judicial notice, because the record fails to show any exception taken at the time, and we have a right to presume that the tables were in evidence, and that the court acted regularly in referring them to the jury as a mode of enabling them to estimate the prospect of duration of the plaintiff's life.

The plaintiff in error complains of the tone of the oral charge of the court to the jury as hostile, and calculated to unduly inflame the minds of the jury.

It must be admitted that some of the expressions used by the learned judge were scarcely decorous, and showed a bias in favor of the plaintiff. But, as has often been said, as assignment of error cannot be sustained because the judge expresses himself as impressed in favor of the one party or the other, if the law is correctly laid down, and if the jury are left free to consider the evidence for themselves. *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545 [30: 257]; *Simmons* v. *United States*, 142 U. S. 148 [35: 968].

The statutes of Nebraska require that all instructions of the court to the jury shall be in writing, unless the so giving of the same s waived by counsel in the case in open ourt, and so entered in the record of said case, and it is argued that, by virtue of section 914 of the Revised Statutes of the United States, such provisions of the Nebraska laws is made obligatory on the circuit court of the United States for that district, and that hence it was reversible error in the court below to give oral instructions.

But we are of opinion that the judges of the Federal courts are not controlled in their manner of charging juries by the state regulations. Such part of their judicial action is not within the meaning of section 914.

Thus in *Nudd* v. *Burrows*, 91 U. S. 426 [23: 286], where a state statute required a judge to instruct a jury only as to the law of a case, and provided that the written instructions of the court should be taken by the jury in their retirement and returned with the verdict, and where the circuit court judge charged the jury upon the facts, and refused to permit them to take to their room the written 443] instructions given by the *court, it was held that this was not error, because the personal conduct and administration of the judge in the discharge of his separate functions were not practice or pleading, or a form or method of proceeding, within the meaning of those terms in the Act of Congress. A similar ruling was made in *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291 [23: 898]. There a state statute prescribed that the judge should require the jury to answer special interrogations in addition to finding a general verdict. This court held that such a state regulation did not apply to the courts of the United States. The doctrine of these cases was approved and applied in *Re Chateaugay Ore & I. Co.* 128 U. S. 544 [32: 508], where it was held that the practice and rules of the state court do not apply to proceedings taken in a circuit court of the United States for the purpose of reviewing in this court, a judgment of such circuit court, and that such rules and practice, regulating the preparation, settling, and signing of a bill of exceptions, are not within "the practice, pleadings, and forms and modes of proceeding" which are required by section 914 of the Revised Statutes to conform "as near as may be" to those "existing at the time in like causes in the courts of record of the state."

Upon the whole, we are of opinion that the court below committed no error, and its judgment is, accordingly, affirmed.

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*SARAH A CHAPMAN ET AL., [444
Appts.,
v.
ELIZABETH HANDLEY *et al.*

(See S. C. Reporter's ed. 444-446.)

Distribution of an estate—separate claims—jurisdictional amount.

1. Where the application to the probate court of a territory was for distribution of an estate, and the distributive shares do not reach the sum necessary to give this court jurisdiction, this court will dismiss the appeal from the decision of the territorial court.
2. The claims of distributees are several and not joint, and a joint application for distribution can only result in judgments in severalty.
3. On appeal from a decree of distribution, if the share which each distributee would receive, is less than the amount necessary to give this court jurisdiction, the appeal cannot be sustained.

[No. 206.]

Submitted Jan. 17, 1894. Decided Jan. 29, 1894.

APPEAL from a judgment of the Supreme Court of the Territory of Utah, affirming the judgment of the District Court for the Third Judicial District of that Territory, dismissing an appeal from an order of the Probate court of Salt Lake county, in said territory, denying the petition of Sarah A. Chapman *et al.*, that they may be recognized as heirs at law of George Handley, deceased, and that one half of his estate may be apportioned to said petitioners, etc. *On motion to dismiss. dismissed.*

The facts are stated in the opinion.

Mr. **J. G. Sutherland** for appellants.

Messrs. **Arthur Brown** and **E. D. Hoge** for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Ruth A. Newson, *née* Handley, Benjamin T. Handley, Harvey L. Handley, and Sarah

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7:679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

A. Chapman filed their petition in the probate court of Salt Lake county, Utah territory, in the matter of the estate of George Handley, deceased, setting forth the death of said George Handley, May 25, 1874, intestate; the appointment and qualification of Elizabeth, his widow, as administratrix of his estate, April 12, 1888; the expiration of the time for the presentation of claims after publication of notice; the filing of the inventory of said estate describing certain real property; the sale of a portion under order of court and payment of the account for which the money obtained through such sale was needed, leaving a balance on hand; the filing of a final account and the fixing of a day for hearing thereon; and proceeding thus:

"Said George Handley died, leaving him surviving the said Elizabeth Handley, his widow, and his eight children and heirs-at-law, named, respectively, John Handley, William F. Handley, Charles T. Handley, Emma Handley, Ruth A. Newsom, Benjamin T. Handley, Mary F. Handley, and Harvey L. Handley. The four first named are the children of said deceased and said Elizabeth, his lawful wife, and the last four were children of said deceased and your petitioner, Sarah A. Chapman, his plural wife according to the tenets and rites of the Mormon church; that all said children are now living except Mary Handley, who died, without issue or having been married, on the 28th day of September, 1879; that all said children are of age except said Harvey Handley, who is sixteen years of age.

"Your petitioners therefore pray that they 445] may be recognized *as heirs-at-law of said George Handley, deceased, equally with said four children of said deceased first above named, your petitioner, Sarah A. Chapman, as mother in place and as representative of said Mary Handley, deceased, and that after the hearing upon said account of said administratrix that the said estate may be divided among and distributed to said heirs-at-law according to their respective interests; that one half of said estate may be apportioned to your petitioners."

The record does not contain the order of the probate court on this petition, but it otherwise appears and is conceded that the prayer of the petitioners was denied. Thereupon an appeal was taken therefrom by petitioners to the district court for the third judicial district of the territory and the county of Salt Lake, by which special findings of fact and conclusions of law were filed, and it was ordered that the petition be dismissed.

The petitioners appealed to the supreme court of Utah territory, and the judgment of the district court was affirmed. The pending appeal was then taken to this court.

The total value of the estate in controversy was found to be $25,000, and counsel for appellants thus states his case: "George Handley died May 25, 1874, leaving Elizabeth Handley, who was his lawful wife, and their four children (the respondents) and four children by a plural wife, one of whom died in infancy, her interest, now represented by her mother as heir (the appellants). The court below distributed the entire estate to the lawful wife and her four children, holding that the children of the plural wife were not entitled to inherit. A statute enacted by the legislative assembly of Utah, in 1852, provided: 'Section 25. Illegitimate children and their mother inherit in like manner from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children' (Utah, Comp. Laws, 1876, § 677)"; that the supreme court held that this legislation was disapproved and annulled by the Act of Congress of July 1, 1862 (12 Stat. at L. 501, chap. 126) and that this was error.

*The application to the probate court [446 was, in legal effect, for distribution only, and can be given no wider scope, notwithstanding the language used in the prayer of the petition; and as the distributive shares, if the petitioners were included, could not reach the sum necessary to give this court jurisdiction, we are obliged to dismiss the appeal.

It is true that there are cases where there are several plaintiffs interested collectively under a common title where jurisdiction may be maintained, but this case does not fall within that category.

The claims of distributees are several and not joint, and a joint application for distribution can only result in judgments in severalty. By sections 4261 and 4262 of the Complied Laws of Utah (1888, vol. 2, p. 529) it is provided that upon the final settlement of the accounts of an executor or administrator, on his application or that of any heir, legatee, or devisee, the court shall proceed to distribute among the persons by law entitled thereto; and that in the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand and sue for and recover their respective shares, in any court of competent jurisdiction.

It is the distinct and separate share of each distributee that is involved in the proceeding, and although in this instance, if the children of the plural wife had been admitted to share, they would have obtained, and an amount in excess of five thousand dollars would have been withdrawn from the other children, the gain on the one side and the diminution on the other would have been proportionately as to each, and not in the aggregate as to all.

Under such circumstances it is the settled rule that the writ of error or appeal cannot be sustained. *Gibson* v. *Shufeldt*, 122 U. S. 27 [30: 1083]; *Miller* v. *Clark*, 138 U. S. 223 [34: 966]; *Henderson* v. *Carbondale Coal & C. Co.* 140 U. S. 25 [35: 332]; *New Orleans Pac. R. Co.* v. *Parker*, 143 U. S. 42 [36: 66].

Appeal dismissed.

447] *THE MAMMOTH MINING COMPANY, *Appt.*,

v.

THE SALT LAKE FOUNDRY & MACHINE COMPANY.

(See S. C. Reporter's ed. 447-452.)

Trial by court—cumulative evidence.

1. Where a suit in equity was tried by the court of a territory without a jury, this court apart from the exceptions duly taken to rulings on the admission or rejection of evidence, is limited, in reviewing the case, to the inquiry, whether the decree can be sustained upon the findings of the trial court without reference to the weight of evidence.

2. In a case in equity, where the evidence objected to was cumulative in its character and not of controlling importance, and if excluded, it is clear that the result would not have been otherwise than it was, the admission of the evidence, if erroneous, did not constitute reversible error.

[No. 181.]

Submitted Dec. 2, 1893. Decided Jan. 29, 1894.

APPEAL from a decree of the Supreme Court of the territory of Utah, affirming the decree of the District Court of the First Judicial District of that territory, for the enforcement of a mechanic's lien in favor of the Salt Lake Foundry & Machine Company, against The Mammoth Mining Company. *Affirmed.*

See same case below, 6 Utah, 351.

Statement by *Mr. Chief Justice* **Fuller:**

Taylor and another brought suit against the Mammoth Mining Company in the District Court of the First Judicial District of Utah territory to foreclose a mechanics' lien under the statute of Utah in that behalf, and the Salt Lake Foundry & Machine Company, having been made a party defendant, filed its cross complaint therein against its co-defendant, the Mammoth Mining Company, for the enforcement of a similar lien for materials furnished and work done in and about the construction of certain buildings of the mining company, and situated on its land and premises. The Mammoth Mining Company did not deny that the materials were furnished and the work done, but insisted that this was not under any contract between it and the foundry company or at its request. The cause was heard by the court, without a jury, which made the following findings of fact and conclusions of law:

"1. That at all the times hereinafter stated the said Salt Lake Foundry & Machine Company and the said Mammoth Mining Company were corporations, organized and existing under the laws of Utah territory.

"2. That on the — day of January, A. D. 1883, the said Salt Lake Foundry & Machine Company contracted with the said Mammoth Mining Company, through its agents, to fur-448]nish to *said Mammoth Mining Company castings, to construct and repair machinery at current prices, and to do other work within the scope of said machine company's business, all of which was to be used and was used by the said mining company in the erection and construction of the refineries, mills, brick kilns and smelters of the said defendant mining company, which said refineries, mills, brick kilns, and smelters were situate upon the southeast quarter of the northeast quarter of the southeast quarter of section twenty-one (21) and the northwest quarter of section twenty-two (22) in township eleven (11) south of range three (3) west of Salt Lake meridan in Juab county, Utah.

"3. That in pursuance of said contract, the said foundry and machine company from time to time from said — day of January, A. D. 1883, until the 26th day of March, A. D. 1883, furnished castings, made and repaired machinery, worked for and furnished material to the said Mammoth Mining Company to be used in the construction of the buildings, etc., above referred to, at the special instance and request of said company.

"4. That the total value of the materials furnished, and work done so as aforesaid was thirty-six hundred and six and $\frac{4}{100}$ dollars at the prices agreed upon between the said mining company and the said foundry and machine company.

"5. That no part of said sum has been paid excepting the sum of five hundred (500) dollars and the balance thereof to wit the sum of $3106.04 *dollars* remains due and unpaid, together with interest thereon at the rate of ten (10) per cent per annum from the said 26th day of March, A. D. 1883.

"6. That on the 27th day of March, A. D. 1883, the said Salt Lake Foundry & Machine Company caused to be recorded in the office of the county recorder of Juab county, Utah, their claim for a lien on the premises above described, containing a statement of its demand after deducting all just credits and offsets, with the name of the owner, to wit, the said Mammoth Mining Company, and a statement of the time given, terms and conditions of the contract and a description of the premises sought to be charged with the lien, the facts stated *in said notice of lien be [449 ing in all respects the facts set forth in the foregoing findings of facts.

"7. That this action was brought to foreclose said lien within the time allowed by law for that purpose.

"From the above findings of facts the court finds the following conclusions of law:

"1. That the said Salt Lake Foundry & Machine Company is entitled to a judgment against the said Mammoth Mining Company in the sum of three thousand one hundred and six and $\frac{4}{100}$ ($3106.04) dollars with interest thereon, from March 26, 1883, at the rate of ten per cent per annum, amounting in all to the sum of five thousand and eleven and $\frac{54}{100}$ ($5011.54) dollars, and for costs of this suit and that execution issue therefor.

"2. That said Salt Lake Foundry & Ma-

NOTE.—*In what cases equity will relieve from mistake or ignorance of material fact*, see note to M'Ferran v. Taylor, 2: 436.

As to whether equity will relieve against a mistake of law, see notes to Hunt v. Rousmanier, 7:27, 5:589.

As to when awards will be set aside by a court of equity, and when not, see note to Burchell v. Marsh, 15: 96.

As to equity jurisdiction after trial at law, see note to Smith v. M'Iver, 6: 152.

chine Company is also entitled to a decree establishing the said judgment as a lien upon the premises mentioned in the complaint and findings heretofore filed, and foreclosing the same according to the law and practice of this court."

Decree having been entered accordingly, the case was carried by appeal to the supreme court of the territory, where errors were assigned to the sufficiency of the evidence to sustain the special findings and to the admission of certain evidence, and the allowance of certain questions against defendant's objection. The supreme court held that the evidence justified the findings and that there was no error in the rulings in relation to the testimony, and affirmed the decree. *Salt Lake Foundry & M. Co.* v. *Mammoth Min. Co.* 6 Utah, 351.

Thereupon an appeal was taken to this court, and like errors assigned here.

Messrs. **C. W. Bennett** and **J. G. Sutherland** for appellant.

Mr. **Arthur Brown** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

450] *1. This proceeding to enforce a mechanics' lien under the statute of the territory of Utah was in the nature of a suit in equity, and was tried by the court without a jury. The supreme court, in affirming the judgment, has determined that the findings of the trial court were justified by the evidence, and, apart from exceptions duly taken to rulings on the admission or rejection of evidence, our examination is limited to the inquiry, without reference to the weight of evidence or its sufficiency to support the special findings, whether the decree can be sustained upon those findings. *Idaho & O. Land Imp. Co.* v. *Bradbury*, 132 U. S. 509, 515 [33:433, 436]; *Stringfellow* v. *Cain*, 99 U. S. 610 [25:421]; Act of April 7, 1874 (18 Stat. at L. 27, chap. 80). Of this there can be no doubt. Defendants contended that the material was furnished to and the work done for one Butler Johnstone, or Johnstone and one Bowers, and not to or for the defendant, or upon its credit. And the question was whether Johnstone and Bowers (either or both) were authorized to contract for and in the name of the defendant, or had such apparent authority as to justify plaintiff in the belief that they had authority in fact, and that it delivered the material and did the work, relying in good faith thereon. *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 64 [6:552]; *Townsend* v. *Chappell*, 79 U. S. 12 Wall. 681 [20:436]; *Mahoney Min. Co.* v. *Anglo-Californian Bank*, 104 U. S. 192 [26:707]. Under the special findings the conclusion of liability followed, whether resting on one ground or the other.

2. It is urged that the principal error of the courts below consisted in ignoring the operation of certain written contracts, introduced in evidence, dated January 7 and November 1, 1882, between stockholders of the company and Bowers, and assigned in part to Bowers. The first of these contracts provided for the sale of something over three hundred and ninety-two thousand of the four hundred thousand shares constituting the capital stock of the defendant corporation, to Bowers, and the second was a modification of the first. By these contracts, Bowers agreed, among other things, to build smelting furnaces and refining works and machinery at his own expense, and it is claimed that under them Bowers and Johnstone obtained possession *of the company's properties and [**451** a right to work its mines but upon their own sole credit and not that of the company. The contract of January 7 was shown to have been assented to and the transfer of the property authorized by the company, and without entering upon an examination of the contracts themselves, it is enough that the findings involve the conclusion that the plaintiff had no notice of their existence, and was not, therefore, bound by any limitations therein contained. The question remained the same, did plaintiff furnish the materials and labor to persons acting in the name of the company and upon the belief that its contract was with the company, and as the trial court found that, it necessarily found that plaintiff was unaffected by these contracts. The supreme court held to this effect, and said that "if this were a private agreement between certain stockholders of appellant as to who should pay for improvements made on its property, made in its name and for its benefit, it will not avail to defeat the claims of the respondent, unless notice of this agreement was given to respondent before the material was furnished and labor done; that it would not be liable for this material and labor, although done in its name. On this point the evidence is conflicting, and the court below found for respondent, or it could not have given judgment in its favor." Although we are bound by the findings as made, we deem it not improper to yield to the argument for appellant so far as to express our concurrence in this view.

3. As to the errors assigned in that court to the admission of evidence, the supreme court observed: "These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence. There is no question of law involved, only questions of fact; and if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does." In its assignment of errors here, appellant specifies substantially the same exceptions to the admisson of evidence, including the overruling of defendant's objections to questions. The evidence thus objected to was cumulative in its character and not of controlling importance, and if excluded, it is sufficiently clear that the result would not have *been [**452** otherwise than it was. All the evidence is in the record, and we have carefully examined it and as we are of opinion that the rulings complained of, if erroneous, did not constitute reversible error, we need not pass upon their correctness, though we are not to be understood as intimating that the objections should in any instance have been sustained.

Decree affirmed.

THE IMPERIAL FIRE INSURANCE COMPANY OF LONDON, ENGLAND, *Plff. in Err.*,

v.

THE COUNTY OF COÖS, in the State of New Hampshire.

(See S. C. Reporter's ed. 452-470.)

Policy of insurance — construction — popular sense—what violation of condition terminates insurance—erroneous instruction.

1. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.
2. When an insurance contract is fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the insured.
3. Contracts of insurance if they are clear and unambiguous, are to be taken and understood in their plain, ordinary and popular sense.
4. Where the condition in the policy is that it shall be void and of no effect if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to or permission of the insurance company, its violation by the assured terminates the contract of the insurer, and it cannot be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk.
5. An instruction of the court to the jury which gave no validity or effect to such condition and its breach, but made it depend upon the question whether the acts done in violation of it, in fact increased the risk, and whether such increased risk was operative at the date of the fire, was erroneous.

[No. 204.]

Submitted Jan. 17, 1894. Decided Jan. 29, 1894.

IN ERROR to the Circuit Court of the United States for the District of New Hampshire, to review a judgment for the plaintiff, The County of Coös, against the defendant, The Imperial Fire Insurance Company of London, for the amount of a policy issued by defendant. *Reversed, with directions for a new trial.*

The facts are stated in the opinion.

Mr. **Harry Bingham**, for plaintiff in error:

In the construction of contracts words are to be understood in their ordinary and popular sense, except in those cases in which words used have acquired by usage a peculiar sense, different from the ordinary and popular use.

Moore v. *Phœnix Ins. Co.* 62 N. H. 240; *Baldwin* v. *Hartford F. Ins. Co.* 60 N. H. 422, 49 Am. Rep. 324.

It is competent for the insurer to prescribe the terms and conditions upon which he will assume a risk.

Wood, Fire Ins. § 58.

The employment of mechanics in altering and repairing the building insured, without the insurer's written consent, avoided the policy.

Fabyan v. *Union Mut. F. Ins. Co.* 33 N. H. 203; *Shepherd* v. *Union Mut. F. Ins. Co.* 38 N. H. 232; *Gee* v. *Cheshire County Mut. F. Ins.*

NOTE.—*As to parol insurance, when valid*, see note to Relief F. Ins. Co. v. Shaw, 24: 291.

As to agreement for insurance by letter, see note to Tayloe v. Merchants F. Ins. Co. 13: 187.

As to effect of delivery of life insurance policy before payment of first premium, contrary to its conditions, see note to Brooklyn L. Ins. Co. v. Miller, 20: 398.

As to forfeiture of policy for nonpayment of premium; waiver, see note to Thompson v. Knickerbocker L. Ins. Co. 26: 765.

That misrepresentation or fraud vitiates policy, see note to M'Lanahan v. Universal Ins. Co. 7: 98; and to Columbian Ins. Co. v. Lawrence, 7: 335.

As to effect of agent's filling in untrue answers in application for insurance, without knowledge of assured, see note to Union Mut. L. Ins. Co. v. Wilkinson, 20: 617.

As to effect of provision avoiding policy of life insurance in case of suicide, see note to Mutual Life Ins. Co. v. Terry, 21: 236.

As to policy "for whom it may concern;" effect of; who may recover upon, see note to Hooper v. Robinson, 25: 219.

As to defense of suicide to an action on a life insurance policy, or of willful destruction of the property, in an action on a fire or marine policy, see note to Home Ben. Asso. v. Sargent, 35: 1160.

As to reinsurance, see note to Sun Mut. Ins. Co. v. Ocean Ins. Co. 27: 337.

Policy of fire insurance; construction warranties; representations; conditions; additional insurance; use and care of property; alterations of property; increase of risk.

Special conditions of a form written into an open policy of insurance must prevail over conflicting provisions in the body of the policy,—especially where such form is expressly referred to in the policy as embodying the terms of the insurance, and is obviously designed to cover a special class of risks to which many conditions in the policy do not attach. St. Paul, F. & M. S. R. Co. v. Kidd, 55 Fed. Rep. 238, 22 Ins. L. J. 457, 603.

An insurance company is liable under a policy providing that the insurance shall immediately cease if the building or any part thereof, fall except as the result of fire, if fire commences before the fall, although the entire building subsequently falls. London & L. F. Ins. Co. v. Crunk, 91 Tenn. 376.

An insurance company is not bound to elect to declare void or continued a policy providing that it shall be void if any change by legal process takes place in the possession of the property, upon receiving notice of the change of possession by attachment of the property. Carey v. German American Ins. Co. 20 L. R. A. 267, 84 Wis. 80; Burr v. German Ins Co. 84 Wis. 76.

Conditions of a policy of insurance prescribing formal acts on the part of the insured after loss, necessary to a recovery, will be liberally construed in his favor. McNally v. Phœnix Ins. Co. 137 N. Y. 389.

Breach by the mortgagor of a condition of a policy insuring him against loss by fire, "loss payable to the mortgagee," will destroy the mortgagee's interest, regardless of which applied for the insurance or paid the premium. Kabrich v. State Ins. Co. 48 Mo. App. 393.

A clause of a policy of fire insurance that the insurance shall immediately cease if the building or any part thereof fall, except as the result of fire, does not terminate the policy by the fall of a minute or fragmentary portion of the building, but only on the fall of an integral part of the building. London & L. F. Ins. Co. v. Crunk, 91 Tenn. 376.

Breach of a condition against other insurance, contained in a policy of insurance, is available as a

Co. 55 N. H. 65, 20 Am. Rep. 171; *Sleeper* v. *New Hampshire F. Ins. Co.* 56 N. H. 401; *Hill* v. *Equitable Mut. F. Ins. Co.* 58 N. H. 82; *Baldwin* v. *Phœnix Ins. Co.* 60 N. H. 164; *Crafts* v. *Union Mut. F. Ins. Co.* 36 N. H. 44; *Baldwin* v. *Hartford F. Ins. Co.* 60 N. H. 422, 49 Am. Rep. 324.

The facts being undisputed, it was for the court, not the jury, to declare the rights of the parties upon those undisputed facts.

Dube v. *Mascoma Mut. F. Ins. Co.* 64 N. H. 527.

The violation of the condition of the policy, avoided it.

Muck v. *Rochester German Ins. Co.* 106 N. Y. 560; *Lindsay* v. *Niagara Dist. Ins. Co.* 28 U. C Q. B. 326; *Lyman* v. *State Mut. F. Ins. Co.* 14 Allen, 329; *Lee* v. *Howard F. Ins. Co.* 3 Gray, 583; *Putman Tool Co.* v. *Fitchburg Mut. F. Ins. Co.* 145 Mass. 265; *Kyte* v. *Commercial U. Assur. Co.* 3 L. R. A. 508. 149 Mass. 116; *Gunther* v. *Liverpool & L. & G. Ins. Co.* 134 U. S. 110 (33: 857); *Newmarket Sav. Bank* v. *Royal Ins. Co. of Liverpool*, 150 Mass. 374; *Jones Mfg. Co.* v. *Manufacturers Mut. F. Ins. Co.* 8 Cush. 82, 54 Am. Dec. 742; *Harrison* v. *City F. Ins. Co.* 9 Allen, 231, 85 Am. Dec. 751; *Girard F. & M. Ins. Co.* v. *Hebard*, 95 Pa. 45; *McGowan* v. *Peoples Mut. F. Ins. Co.* 54 Vt. 211, 41 Am. Rep. 843; *Paddford* v. *Providence Mut. F. Ins. Co.* 3 R. I. 102, 67 Am. Dec. 496; *Peoria Sugar Ref. Co.* v. *Peoples F. Ins. Co.* 24 Fed. Rep. 973; *Sperry* v. *Springfield F. & M. Ins. Co.* 26 Fed. Rep. 234; *Sherwood* v. *Agricultural Ins. Co.* 73 N. Y. 447, 29 Am. Rep. 180; *Hicks* v. *Farmers Ins. Co.* 71 Iowa, 119, 60 Am. Rep. 781; *St. Paul F. & M. Ins. Co.* v. *Archibald*, 16 Ins. L. J. 153; *Havens* v. *Home Ins. Co.* 111 Ind. 90, 60 Am. Rep. 689; *Phenix Ins. Co.* v. *Lamar*, 106 Ind. 513, 55 Am. Rep. 764; *Sutherland* v. *Old Dominion Ins Co.* 31 Gratt 176; *Fireman's Ins. Co.* v. *Holt*, 35 Ohio St. 189, 35 Am. Rep. 601.

Messrs. **S. R. Bond** and **Fletcher Ladd**, for defendant in error:

Contracts of insurance are construed liberally in favor of the insured.

Crousillat v. *Ball*, 3 Yeates, 375; *Orient Mut. Ins. Co.* v. *Wright*, 68 U. S. 1 Wall. 456 (17: 505); *First Nat. Bank of Kansas City* v. *Hartford F. Ins. Co.* 95 U. S. 673 (24: 563); *Harper* v. *Albany Mut. Ins. Co.* 17 N. Y. 194.

The repairs and alterations made by the defendant in error upon the insured premises were incident to the ordinary use of the building.

James v. *Lycoming Ins. Co.* 4 Cliff. 272.

Insurable property is intended for use, and it is not the intent of a policy of insurance to impair the right of use nor to deprive the owner of the customary enjoyment of the property.

Franklin F. Ins. Co. v. *Chicago Ice Co.* 36 Md. 102, 11 Am. Rep. 469; *Kern* v. *South St. Louis Mut. Ins. Co.* 40 Mo. 19.

Such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose.

O'Neil v. *Buffalo F. Ins. Co.* 3 N. Y. 122; *Dobson* v. *Sotheby*, M. ·d. & M. 90; *Franklin F. Ins. Co.* v. *Chicago Ice Co.* 36 Md. 102, 11 Am. Rep. 469; *Billings* v. *Tolland County Mut.*

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defense to such policy, although such additional insurance had ceased to be in force when the loss occurred. Replogle v. American Ins. Co. 132 Ind. 360.

A policy of insurance conditioned against other insurance is avoided by the existence of other insurance at the time of its issuance, although such other insurance is not in effect at the time of the loss. Reed v. Equitable F. & M. Ins. Co. 18 L. R. A. 496, 17 R. I. 785, 21 Ins. L. J. 821.

Avoidance of an insurance policy for breach of a condition against other insurance by the existence of a prior policy is not prevented by the fact that the latter contains a like condition, although a void policy is not a breach of such a condition. Reed v. Equitable F. & M. Ins. Co. 18 L. R. A. 496, 17 R. I. 785, 21 Ins. L. J. 821.

An implied exception as to ordinary repairs in a reasonable and proper way is to be made from clauses of an insurance policy against changes in the situation or circumstances affecting the risk, and against the use of naphtha on premises. Rockland First Congregational Church v. Holyoke Mut. F. Ins. Co. 19 L. R. A. 587, 158 Mass. 475, 22 Ins. L. J. 449.

Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms used: and if they are clear and unambiguous their terms are to be understood in their plain, ordinary, and popular sense. Universal L. Ins. Co. v. Devore, 88 Va. 778, 21 Ins. L. J. 337.

A contract by an insurer, when capable of more than one interpretation, should be construed in the sense the insurer had reason to suppose was understood by the insured. Wadsworth v. Jewelers & T. Co. 132 N. Y. 540.

A statutory enactment that no misrepresentation or untrue statement in an application for a life insurance policy shall effect a forfeiture, unless it relates to matter material to the risk, cannot be overthrown by a provision in the policy that all representations shall be deemed warranties and shall avoid the policy if untrue, irrespective of their materiality to the risk, notwithstanding any law to the contrary. Fidelity Mut. L. Asso. v. Ficklin, 74 Md. 185, 21 Ins. L. J. 658.

Conditions involving a forfeiture of an insurance policy should be strictly construed. German Ins. Co. v. Miller, 39 Ill. App. 633.

An exception in a fire policy against liability for explosions prevents recovery for injury arising from an explosion, although it was caused by fire. Miller v. London & L. F. Ins. Co. 41 Ill. App. 395.

Indorsements upon policies of insurance in pursuance of provisions of the policies, that other insurance is permitted concurrent in form, and that loss shall be payable to a mortgagee, are not part of the policies so as to make the latter void because some of the concurrent policies are by such indorsements payable to the mortgagee and the remainder are payable to the owner. Caraher v. Royal Ins. Co. 63 Hun, 82.

Consent to additional insurance, indorsed on the policy by the agent who procured it, with the knowledge of and authority from the company, is sufficient under a policy providing that the consent of the company shall be indorsed, but silent as to by whom or where the indorsement shall be made. Grubbs v. Virginia, F. & M. Ins. Co. 110 N. C. 108, 21 Ins. L. J. 470.

A single brief violation of the terms of a fire policy for the necessary work incidental to the preservation of the property insured will not constitute a breach of a condition prescribing the use of the premises. Krug v. German F. Ins. Co. 147 Pa. 272, 21 Ins. L. J. 573.

An agreement in a fire policy that the assured shall not subsequently change the use of the build-

F. Ins. Co. 20 Conn. 139, 50 Am. Dec. 277; *Mears* v. *Humboldt Ins. Co.* 92 Pa. 15, 37 Am. Rep. 647; *Williams* v. *New England Mut. F. Ins. Co.* 31 Me. 219; *Putnam* v. *Commonwealth Ins. Co.* 18 Blatchf. 368.

Mr. Justice **Jackson** delivered the opinion of the court:

This was an action of assumpsit upon a five thousand dollar policy of insurance issued by the plaintiff in error November 21, 1882, insuring the court-house of the defendant in error at Lancaster, in the county of Coös, New Hampshire, against loss by fire, for a period of five years, from the date of the policy.

The premises insured were a two story building, having on the first floor the offices of register of deeds and probate, clerk of court, and county commissioners. The court room was on the second floor. At the date of the policy there were two brick vaults, one, 8 by 13 feet, for the use of the probate office, and the other, 16 by 13 feet, for the use of the offices of the register of deeds and clerk of court, there being a partition in the center separating the part used by the register from that used by the clerk.

453] *The fire which destroyed the insured premises occurred about two o'clock in the morning of November 4, 1886.

The policy in suit contains the following: "Payment in case of loss is upon the following terms and conditions."

Among the terms and conditions are the following:

"This policy shall be void and of no effect if, without notice to this company and permission therefor in writing indorsed hereon, . . . the premises shall be used or occupied so as to increase the risk . . . or the risk be increased . . . by any means within the knowledge or control of the assured, . . . or if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

In August, 1886, the plaintiff, without the written consent of the defendant and without its knowledge, employed wood carpenters and brick masons, and reconstructed and enlarged the vaults, making that of the office, of the register of probate 12 by 13 feet instead of 8 by 13 feet, as it was at the date of the policy, and making those of the offices of the register of deeds and clerk of court 22 by 13 instead of 16 by 13 feet, as at the date of the policy. The foundations were also reconstructed and enlarged to correspond with the enlargement of the vaults. The reconstruction and enlargement of the vaults necessitated the cutting of the floors and ceilings of the respective offices in which they were, so as to extend the vaults.

The time during which these mechanics were employed in the reconstruction and enlargement of the foundations and vaults was about five or six weeks. Some painting was also done incident to the above changes, but the extent did not distinctly appear.

In addition to the foregoing the plaintiff

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ing so as to increase the hazard is a continuing warranty, a substantial breach of which, either with or without actual fraud, will defeat the policy, although not the cause of the loss. Germania F. Ins. Co. v. Deckard, 3 Ind. App. 361.

A clause forbidding the use of open lights upon insured premises, contained in a policy permitting necessary repairs, is not violated by the use of a torch necessary for the completion of such repairs. Au Sable Lumber Co. v. Detroit Manufacturers Mut. F. Ins. Co. 89 Mich. 407, 21 Ins. L. J. 311.

If a policy of insurance contains inconsistent provisions that most favorable to the insured will be accepted and the other disregarded. Illinois Mut. Ins. Co. v. Hoffman, 31 Ill. App. 295.

Failure of the insured to disclose a fact which, if known to the company, would have caused it to demand a higher rate, or would otherwise have influenced it, will not defeat a recovery on the policy, unless he knew of such material fact and that it was material to the risk. Wytheville Ins. & Bkg. Co. v. Stultz, 87 Va. 629, 20 Ins. L. J. 481.

The assent of an assured to a provision in the policy is conclusively presumed from his acceptance of the policy. Allen v. German American Ins. Co. 123 N. Y. 6, 19 Ins. L. J. 979.

Warranties and conditions inserted in a renewal policy without the knowledge or assent of the assured, who is informed by the agent and understands that it is to be an exact renewal of the terms of the old policy, are not binding on the assured. Burson v. Philadelphia Fire Asso. 136 Pa. 267, 48 Phila. Leg. Int. 97, 20 Ins. L. J. 144.

Where an insured person has made the truth of the statements contained in his application the basis of his contract of insurance, the question whether or not a false statement is actually material to the risk is unimportant, as is also the question whether or not the falsehood was intentional. To avoid liability on the policy, it is sufficient for defendant to show that a statement was actually untrue. Cobb v. Covenant Mut. Ben. Asso. 10 L. R. A. 666, 153 Mass. 176, 20 Ins. L. J. 215.

A violation by a tenant of an assured of any of the prohibitions of the policy of fire insurance is a violation by the assured himself, and whether with or without the knowledge or consent of the assured is wholly immaterial. LaForce v. Williams City F. Ins. Co. 43 Mo. App. 518.

Representations as to the age and value of buildings, in an application for insurance, are mere expressions of opinion, although by the terms of the policy all answers are declared to be warranties. Phœnix Ins. Co. v. Wilson, 132 Ind. 449, 20 Ins. L. J. 73.

Recovery may be had upon a policy of fire insurance, notwithstanding the building is detached less than the distance warranted in the policy, when the risk is not thereby increased. Baldwin v. Citizens Ins. Co. 60 Hun, 389.

A policy containing a clause that notice of other insurance must be given or the policy will be avoided is void, if upon obtaining other insurance no such notice is given. Marshall v. Insurance Co. of North America, 48 Phila. Leg. Int. 264, 28 W. N. C. 283.

A condition in a policy against other insurance is violated by the existence of a prior policy which, although void, appears valid on its face. Phœnix Ins. Co. v. Copeland, 90 Ala. 386, 19 Ins. L. J. 961.

A condition against additional insurance in a policy in the name of a mortgagor payable to the mortgagee is not violated by a policy procured by the wife of the mortgagor as his devisee and executrix in another company, in her name, payable to the mortgagee as his interest may appear. Burke v. Niagara F. Ins. Co. 34 N. Y. S. R. 701.

A contract of insurance upon a building, made

below also changed the method of heating the offices of the register of probate and clerk of court, placing a hot-water coil in the furnace in the basement, from which ran pipes through the floors and were attached to radiators in those offices. This work was commenced November 2, and completed about midnight 454] *November 3, 1886. No permission to make this change in the method of heating was either obtained or requested, and the defendant had no knowledge of its being done. In the evening of November 3 a fire was built in the furnace to test the heating apparatus, and heat the radiators so they might be bronzed, and the fire was left burning at about midnight, when the mechanics and some of the county officers left the building.

From the time work began upon the vaults, early in August, until the fire, the papers and records of the offices of the clerk of court and registers of probate and deeds were in the court-room or in the respective offices, unprotected by any safes or vaults.

The expense of the labor and raw material of the foregoing alterations was about $3000.

The defendant contended that the foregoing alterations, rebuilding, and repairs were extraordinary and not ordinary repairs, such as were necessary in the use of the premises insured, and such as might have been contemplated by the parties when the contract was made, and following request for a ruling was made to the presiding judge, viz:

"The defendants request the court to rule that the building, altering, and repairing of the premises to the extent of tearing down several partitions, cutting away a portion of the floors in several rooms, tearing down the vault and enlarging and rebuilding it, and by changing the method of heating a portion of its building by putting in piping and radiators for hot water or steam—all at the expense of several thousand dollars, for the labor of mechanics, for raw materials—was a building, altering, or repairing of the premises which increased the risk, and the policy thereby became void."

The court declined to rule as requested, and the defendant excepted.

Upon the conclusion of the testimony, which proved the foregoing facts, the defendant made the following motion that a verdict be directed, viz:

"The defendants move that a verdict be directed for them on the ground that there is no evidence competent to be *submit- [455 ted to the jury that the building, altering, and repairing shown by the evidence was not such building, altering, and repairing as avoided the policy."

The motion was denied by the court, and the defendant excepted.

The defendant requested the court to instruct the jury—

"That if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover."

The court refused to give this instruction, and the defendant excepted. The court in the course of its charge to the jury instructed them as follows:

"The identical question before you is whether at the time the fire took place what the county of Coös had done in the way of alterations and repairs increased the risk at that time—that is, at the time of the fire—that is, on the night of November 4—that the

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before its completion, authorizes its use in any common business for which its construction is adapted, and does not prohibit the keeping of hazardous articles for sale in such business, though it prohibits their "storing." Renshaw v. Missouri State, Mut. F. & M. Ins. Co. 103 Mo. 595, 20 Ins. L. J. 385.

Forfeitures in insurance policies are not favored in law, and will be enforced only when the facts establishing them are clearly established by the proofs. True v. Bankers L. Asso. 78 Wis. 287, 20 Ins. L. J. 197.

If a policy is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. Thompson v. Phenix Ins. Co. 136 U. S. 287 (34: 408), 19 Ins. L. J. 481; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 226, 25 W. N. C. 370, 47 Phila. Leg. Int. 248; Illinois Mut. Ins. Co. v. Hoffman, 31 Ill. App. 295, 19 Ins. L. J. 72, affirmed in 132 Ill. 522, 19 Ins. L. J. 663; Rogers v. Phenix Ins. Co. 121 Ind. 570, 19 Ins. L. J. 492; Wallace v. German American Ins. Co. 41 Fed. Rep. 742, 19 Ins. L. J. 623; Meyer v. Queen Ins. Co. 41 La. Ann. 1000, 19 Ins. L. J. 45; Pettit v. State Ins. Co. 41 Minn. 299; Kratzenstein v. Western Assur. Co. 5 L. R. A. 799, 116 N. Y. 54.

False statements made in an application for fire insurance, which is made a part of the policy, are warranties and will bar a recovery. Roberts v. State Ins. Co. 26 Mo. App. 92.

A breach of an immaterial provision does not avoid the policy. Waterbury v. Dakota F. & M. Ins. Co. 6 Dak. 468.

A breach of warranty as to a portion, if separately insured, *does not vitiate* a policy as to the whole of the subject of insurance. Smith v. Home Ins. Co. 47 Hun. 30.

A misrepresentation by mistake as to the ownership of a barn in which his wife also had an interest with the assured, does not bar a recovery for personal property. Insurance Co. of North America v. Hofing, 29 Ill. App. 180.

The breach of a warranty in an insurance policy against incumbrances on realty avoids the policy as to the realty, but not as to personalty, where it covers both kinds of property, though for a gross sum and on payment of a gross premium. Crook v. Phœnix Ins. Co. 38 Mo. App. 582.

A misrepresentation or breach of warranty relating to one of several buildings insured in the same policy, stipulating a separate amount on each, will not defeat a recovery on another. Rogers v. Phenix Ins. Co. 121 Ind. 570, 19 Ins. L. J. 492.

A policy containing a condition that it shall be void in case of other insurance, although inoperative when first issued because of other insurance, attaches immediately on the expiration of the former policy. Germania F. Ins. Co. v. Klewer, 129 Ill. 599, 19 Ins. L. J. 126.

Where an applicant for insurance, on being asked if there is $1000 incumbrance on the property, answers, "Over $2000," whereas there is $5000, there is a material misrepresentation. Smith v. Agricultural Ins. Co. 118 N. Y. 518, 19 Ins. L. J. 374.

An addition or extension to an insured building does not of itself operate an increase of risk, and such risk may be decreased by improvements made to the building in connection with the extension. Meyer v. Queen Ins. Co. 41 La. Ann. 100, 19 Ins. L. J. 45.

county of Coös had done in the way of repairs, changing the vaults, putting in additional heating apparatus—did those things increase the risk at that particular time? Not whether mechanics two days previously or three days previously or a week previously had worked in that building. What was the condition of the building on the night of the fire? Had what the county of Coös did in making those repairs increased the risk or had it not? Were the repairs ordinary or necessary and accompanied by no increase of risk, or were they of such an extraordinary and material character upon that particular night—that is, the condition in which the building was upon that particular night—that the risk was increased, and therefore the assured, the county, violated this condition in the policy, and consequently the defendant company should not be held liable."

To this instruction the defendant excepted. There was a verdict and judgment for the plaintiff below for the sum of $5505, and the present writ of error is prosecuted to reverse that judgment.

461] *In the view we take of the case it will be necessary to notice only the exceptions based upon the refusal of the court to instruct the jury, as requested by the defendant, "that if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recovery;" and the exception to the instruction given, to the effect that the question was whether the work and repairs done upon the building increased the risk at the time of the fire.

It is contended on behalf of the plaintiff in error that these exceptions present the following legal propositions:

(1) The court should have instructed the jury that if the work done by the mechanics increased the hazard, while the work was in progress, then the assured would not be entitled to recover, because when the hazard was increased and the risk changed, by the acts of the assured, and without the knowledge or consent of the insurer, in that event the contract came to an end by virtue of its own expressed, unambiguous terms.

(2) The assured, the county of Coös, having made extensive repairs upon the insured premises, and having neither notified the plaintiff in error, the insurer thereof, nor obtained its consent, in writing, therefor, the conditions of the policy were violated, and, by its terms, the contract terminated.

(3) It was error to instruct the jury that it was immaterial what had occurred to increase the hazard during the repairs, unless such increased hazard existed at the time of the fire.

On behalf of the defendant in error it is claimed that under a proper construction of the policy, the question on which the case turns is, did the repairs and alterations, made by the defendant in error upon its courthouse, and completed when the fire occurred, result in an increase of risk at that time, or were they in any way the cause of the fire? The proposition is that unless such repairs and alterations had the effect of either causing the fire, or of increasing the risk at the time it occurred, *then there was no breach of [462 the condition contained in the contract, that "this policy shall be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, . . . mechanics are employed in building, altering, or repairing the premises named herein."

Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

It is settled, as laid down by this court in *Thompson* v. *Phenix Ins. Co. of Brooklyn*, 136 U. S. 287 [34: 408], that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that *construction will be [463 adopted which is most favorable to the insured.

But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.

It is entirely competent for the parties to stipulate, as they did in this case, "that this policy should be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, . . . the premises shall be used or occupied so as to increase the risk, or cease to be used or occupied for the purposes stated herein; . . . or the risk be increased by any means within the knowledge or control of the assured;

. . . or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

These provisions are not unreasonable. The insurer may have been willing to carry the risk at the rate charged and paid, so long as the premises continued in the condition in which they were at the date of the contract; but the company may have been unwilling to continue the contract under other and different conditions, and so it had a right to make the above stipulations and conditions on which the policy or the contract should terminate. These terms and conditions of the policy present no ambiguity whatever. The several conditions are separate and distinct, and wholly independent of each other. The first three of the above conditions depend upon an actual increase of risk by some act or conduct on the part of the insured; but the last condition is disconnected entirely from the former, whether the risk be increased or not. The last condition may properly be construed as if it stood alone, and a material alteration and repair of the building beyond what was incidental to the ordinary repairing necessary for its preservation, without the consent of the insurer, would be a violation 464] of the condition of the policy, *even though the risk might not have been, in fact, increased thereby. The condition that the policy should be void and of no effect if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to or permission of the insurance company, being a separate and valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived that condition, merely because in the opinion of the court and the jury the alterations and repairs of the building did not, in fact, increase the risk. The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk.

If the last stipulation had been so framed as to require the element of an increased risk to be incorporated into the condition that if "mechanics are employed in building, altering, or repairing the premises named herein," without notice to the company and its permission in writing indorsed on the policy, then there would have been presented a question of fact for the jury whether such alterations and repairs constituted an increase of the risk. But this condition, being wholly independent of any increase of risk, its violation without the consent of the insurer, or waiver of the breach, annulled the policy.

This being the proper construction, as we think, of the terms and conditions of the policy, and it being shown that the insured in August, 1886, without the knowledge or written consent of the insurer, employed carpenters and brick masons, and reconstructed and enlarged the vaults and offices of the court-house—reconstructing the foundations corresponding to the enlargement of the vaults, which necessitated the cutting of the floors and ceilings of the different offices—and that this work occupied five or six weeks; and in connection therewith necessitated painting, and a new method of *heating the [465 offices of the register of probate and the clerk of the court (this change in the method of heating being completed about midnight of November 3, 1886, and the fire which destroyed the building occurring some two hours thereafter) clearly entitled the plaintiff in error to the instruction requested, that "if the work done by the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover." This instruction, which the court declined to give, presented the question of fact whether there had been any violation of the condition that the premises should not be so used or occupied as to increase the risk, or that the risk should not be increased by any means within the knowledge or control of the assured.

The court not only refused this instruction, but in its charge to the jury so construed the condition that if "mechanics are employed in building, altering, or repairing the premises named herein," without the consent of the insurer, as to make it mean that such alterations and repairs must be shown to have increased the risk in point of fact, and that such increase of risk must have existed at the time of the fire.

If the mechanics were employed in altering and repairing the building in a manner beyond what was required for its ordinary repair and preservation, and in such a material way as constituted a breach of the condition of the contract, it is difficult to understand upon what principle the charge of the court can be sustained. The condition which was violated did not, in any way, depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed. The instruction of the court gave no validity or effect to the condition and its breach, but made it depend upon the question whether the acts done in violation of it, in fact, increased the risk, and whether such increased risk was operative at the date of the fire.

The court below proceeded upon the theory that the fire having occurred after the employment of the mechanics had ceased, such employment, and the making of the alterations *and repairs described, did not [466 constitute a breach at the time of the fire; that the increased risk, which was necessary to render the policy void, must be found to have existed at the time of the fire, and not at any preceding date.

But aside from the error of the court in refusing to give the specific charges requested, and in the general charge, as given, it appears, by the bill of exceptions, that upon the conclusion of the testimony establishing the foregoing facts, and about which there is

no controversy, the defendant made the following motion: "That a verdict be directed for it on the ground that there is no evidence competent to be submitted to the jury that the building, altering, and repairing shown by the evidence was not such altering and repairing as avoided the policy." This motion was denied by the court, and the defendant excepted. Under the construction we have placed upon the last condition, above quoted, we are of opinion that the defendant was entitled, on the conceded facts to have a verdict directed in its favor on the ground that the employment of mechanics to make such material alterations and repairs as were made, without the knowledge or consent of the plaintiff in error, was in and of itself such a violation of the terms of the policy as rendered it void, without reference to the question whether such alterations and repairs had increased the risk or not. The principles of law applicable to this question are stated and illustrated in the following authorities:

In *Ferree* v. *Oxford Fire & L. Ins. A. & T. Co.* 67 Pa. 373, 5 Am. Rep. 436, the policy of insurance contained the provision that it should not "be assignable without the consent of the company expressed thereon. In case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of said policy shall thenceforth cease." The assured assigned the policy, and the court held that the condition was a perfect legal one, and that the company was not liable, although the plaintiff had redeemed the policy previously assigned, and was the holder thereof at the time of the suit.

In *Fabyan* v. *Union Mut F. Ins. Co.* 33 N. 467] H. 203, *the policy provided that procuring other insurance without the consent of the company would avoid the policy. Other insurance was procured, and the court held "that by the terms of the policy, this discharged the defendant from liability—its promise contained in the policy to pay the plaintiff in case of loss, being upon the condition that in case of double insurance its assent thereto should be indorsed on the policy."

In *Moore* v. *Phœnix Ins. Co.* 62 N. H. 240, the policy contained, among other provisions the following conditions: "If the above mentioned premises shall become vacant and unoccupied for a period of more than ten days . . . without the assent of the company indorsed hereon, . . . then, and in every such case, this policy shall be void." At the time the premises were destroyed they were occupied, but for a period of at least three months prior to that time they were unoccupied, although without the knowledge of either the assured or the insurer. The court held that the conditions of the policy had been broken by the unoccupancy of the premises, and that "the contract being once terminated could not be revived without the consent of both of the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause."

In other New Hampshire decisions it is held that a departure from the conditions, without the written consent of the insurer, avoided the policy and terminated the contract. *Shepherd* v. *Union Mut. F. Ins. Co.* 38 N. H. 232; *Gee* v. *Cheshire County Mut. F. Ins. Co.* 55 N. H. 65, 20 Am. Rep. 171; *Sleeper* v. *New Hampshire F. Ins. Co.* 56 N. H. 401; *Hill* v. *Equitable Mut. F. Ins Co.* 58 N. H. 82; *Baldwin* v. *Phœnix Ins. Co.* 60 N. H. 164; *Crafts* v. *Union Mut. F. Ins. Co.* 36 N. H. 44; *Dube* v. *Mascoma Mut. F. Ins. Co.* 1 L. R. A. 57, 64 N. H. 527.

It is competent for the parties to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the category of changes which by agreement shall work a forfeiture. May, Insurance (1st ed.) § 223, citing *Lee* v. *Howard F. Ins. Co.* 3 Gray, 583; *Glenn* v. *Lewis*, 8 Exch. 607.

*In *Frost's Detroit L. & W. W. Works* [468 v. *Millers & M. Mut. Ins. Co.* 37 Minn. 300, 302, the court was called upon to construe a contract of insurance which contained the following provision: "Such ordinary repairs as may be necessary to keep the premises in good condition are permitted by this policy; but if the buildings hereby insured be altered, added to, or enlarged, due notice must be given and consent indorsed hereon." The building insured was subsequently materially enlarged, and the court held, inasmuch as notice was not given to the company, that under the construction given to the clause the policy was avoided, although the risk was not increased by the alterations which had been made to the building.

In *Mack* v. *Rochester German Ins. Co.* 106 N. Y. 560, the policy contained a condition similar to the one in the policy in this case, providing that the working of mechanics in building, altering, or repairing any building covered by the policy, without the written consent of the company indorsed thereon would cause a forfeiture of all claim under the policy. Mechanics were at work making changes in the building at the time of the fire, without the consent of the insurer, and the court held that this effected an avoidance of the policy. The court said that "certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for extra risks, are usually intended to be excluded from the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. These conditions when plainly expressed in a policy, are binding upon the parties and should be enforced by the courts, if the evidence brings the case clearly within their meaning and intent. It tends to bring the law itself into disrepute, when, by astute and subtile distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract."

The principle announced in the last cited

469] case was also *enunciated in *Lyman v. State Mut. F. Ins. Co.* 14 Allen, 329.

In *Kyte* v. *Commercial U. Assur. Co.*, 3 L. R. A. 508, 149 Mass. 116, a policy was sued upon containing the provision that it should become void if the circumstances effecting the risk should be altered so as to increase the risk; or, if articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law. When the premises were insured they were used as a common victualing place, and subsequently intoxicating liquors were sold illegally. The judge before whom the case was tried instructed the jury in substance that if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises during the time covered by the policy would not deprive the plaintiff of the right to maintain the action; and that his right under the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. The supreme judicial court of Massachusetts, in considering this instruction, said: "The question is thus presented whether the provision of the policy shall be void in case of an increase of risk, means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk."

"The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured, by his voluntary act, increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid." And again: "An increase of risk which is substantial, and which is continued for a considerable period of time, changes the basis upon which the contract of insurance rests, and since there is a provision that in case of an increase of risk which is consented to, or known by the assured and not disclosed, and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the 470] continuance of such increase." *The decision of the supreme court reversed the lower court, which had proceeded exactly upon the same theory adopted by the circuit court in the case under consideration. The principle laid down in this and the other cases cited clearly establish that the general instruction to the jury complained of in the present case was erroneous.

Judgment reversed and case remanded with instructions to set aside the verdict and to order a new trial.

Mr. Justice **Brewer** dissents.

THE COLUMBUS SOUTHERN RAILWAY COMPANY, *Plff. in Err.*, v. WILLIAM A. WRIGHT, Comptroller General of the State of Georgia.

(See S. C. Reporter's ed. 470-483.)

Taxation of railroad—law of Georgia.

1. The law of Georgia, approved October 16, 1889, entitled "An act to provide a system of taxation of railroad property in each of the counties of this state through which said railroads run, and to provide a mode of assessing and collecting the same, and for other purposes," does not violate that clause of the 14th Amendment of the Constitution of the United States which declares that "no state shall deny to any person within its jurisdiction the equal protection of its laws."
2. A railroad company has not any constitutional right to have its transitory property assessed for taxation in the county in which is its principal office; the distribution, among the several counties, of such property, for taxation, is not such a discrimination against the railroad as denies to it the equal protection of the laws.
3. The mode of distribution of the unlocated or transitory personal property of a railroad company, for the purpose of taxation, is a matter of regulation by the state legislature, which in no way involves a violation of the 14th Amendment.

[No. 758.]

Argued Jan. 15, 1894. Decided Jan. 29, 1894.

IN ERROR to the Supreme Court of the State of Georgia, to review the judgment of that court affirming the judgment of the Superior Court of Fulton County in that State, sustaining a demurrer, and dismissing a suit brought by the Columbus Southern Railway Company, plaintiff, against William A. Wright, Comptroller General of that state, for an injunction and relief against the payment of certain county taxes assessed upon the property of the railway company. *Affirmed.*

See same case below, 89 Ga. 574.

Mr. **Wiliam A. Wimbish**, for plaintiff in error:

The last clause of the 1st section of the 14th Amendment was designed to protect all persons within a state in the equal enjoyment of rights established or recognized by law.

Strauder v. *West Virginia*, 100 U. S. 303 (25: 664); *Civil Rights Cases*, 109 U. S. 3 (27: 836).

To secure to every person equality of legal protection in the enjoyment of rights, privileges and immunities arising out of or under state laws, was the leading purpose of the Amendment.

Butchers Benev. Asso. v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 36 (21: 394); *Ex parte Virginia* ("*Virginia* v. *Rives*") 100 U. S. 313 (25: 667); *Ex parte Virginia*, 100 U. S. 339 (25: 676);

NOTE.—*As to what is "due process of law,"* see note to Pearson v. Yewdall, 24: 436.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to Providence Bank v. Billings, 7: 989.

United States v. *Cruikshank*, 92 U. S. 542 (23: 588).

Equal protection of the laws is a pledge of the protection of equal laws.

Minneapolis & St. L. R. Co. v. *Beckwith*, 129 U. S. 26 (32: 585); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Soon Hing* v. *Crowley*, 113 U. S. 703 (28: 1145); *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Strauder* v. *West Virginia*, 100 U. S. 303 (25: 664); *Ex parte Virginia*, 100 U. S. 339 (25: 676); *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 (25: 989); *Civil Rights Cases*, 109 U. S. 3 (27: 836); *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110 (30: 342); *Hayes* v. *Missouri*, 120 U. S. 68 (30: 578); *Minneapolis & St. L. R. Co.* v. *Herrick*, 127 U. S. 210 (32: 109); *Walston* v. *Nevin*, 128 U. S. 578 (32: 544); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Dent* v. *West Virginia*, 129 U. S. 114 (32: 623).

This clause of the Amendment has been extended so as to include all persons, both natural and artificial, without reference to age, sex, race or condition. Corporations are persons within its meaning and may invoke its protection.

Santa Clara County v. *Southern Pac. R. Co.* 118 U. S. 394 (30: 118); *Pembina Consol. S. Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650); *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 (32: 585); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051).

The statute complained of denied to the defendant the equal enjoyment of a right resting solely upon the constitution of the state. Trial by jury, while an ancient institution of the common law, is not essential to due process of law, nor is it a right secured by the Constitution of the United States to persons accused of crime in the state courts, unless demanded by the laws of the state.

Edwards v. *Elliott*, 88 U. S. 21 Wall. 532 (22: 487); *Pearson* v. *Yewdall*, 95 U. S. 294 (24: 436); *Walker* v. *Sauvinet*, 92 U. S. 92 (23: 679); *Kennard* v. *Louisiana*, 92 U. S. 480 (23: 478); *Hurtado* v. *California*, 110 U. S. 516 (28: 232); *Ex parte Spies*, 123 U. S. 131 (31: 80); *Brooks* v. *Missouri*, 124 U. S. 394 (31: 454); *Baldwin* v. *Kansas*, 129 U. S. 56 (32: 641); *McNulty* v. *California*, 149 U. S. 645 (37: 882).

The mere construction of a state statute, in a case not involving any question re-examinable under the 25th section of the Judiciary Act, is within the province of the state court.

Morley v. *Lake Shore & M. S. R. Co.* 146 U. S. 162 (36: 925); *Stryker* v. *Crane* ("*Stryker* v. *Goodnow*") 123 U. S. 527 (31: 194); *Louisiana* v. *Pilsbury*, 105 U. S. 294 (26: 1095); *Glenn* v. *Garth*, 147 U. S. 360 (37: 203).

Whether the statute so construed denies to the person complaining equality of legal protection, is a Federal question.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418 (33: 970), 3 Inters. Com. Rep. 209.

When a Federal question is involved, this court will exercise its independent judgment in all matters appropriate to a correct decision of the case; and to this end may declare that a statute of the state denies to the person complaining the equal enjoyment of rights and immunities guaranteed by the state constitution to all members of the particular class. Otherwise the right of review would be a shadow without substance.

Yick Wo v. *Hopkins*, 118 U. S. 356 (30: 220); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 (17: 173); *Butz* v. *Muscatine*, 75 U. S. 8 Wall. 575 (19: 490); *Wright* v. *Nagle*, 101 U. S 791 (25: 921); *Strauder* v. *West Virginia*, 100 U. S. 303 (25: 664); *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304 (4: 97); *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 (29: 414); *Gormley* v. *Clark*, 134 U. S. 338 (33: 909); *Carpenter* v. *Strange*, 141 U. S. 87 (35: 640); *Stutsman County* v. *Wallace*, 142 U. S. 293 (35: 1018); *Huntington* v. *Attrill*, 146 U. S. 657 (36: 1123); *Northwestern University* v. *People*, 99 U. S. 309 (25: 387); *Williams* v. *Louisiana*, 103 U. S. 637 (26: 595); *Durkee* v. *Louisiana Board of Liquidation*, 103 U. S. 646 (26: 598); *Home Ins. Co.* v. *Augusta*, 93 U. S. 116 (23: 825); *Hayes* v. *Missouri*, 120 U. S. 68 (30: 578); *Bohanan* v. *Nebraska*, 118 U. S. 231 (30: 71); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Trebilcock* v. *Wilson*, 79 U. S. 12 Wall. 687 (20: 460); *McGuire* v. *Massachusetts*, 70 U. S. 3 Wall. 382 (18: 164); *Kirtland* v. *Hotchkiss*, 100 U. S. 491 (25: 558).

The tax is not uniform with that imposed by the general law upon other property subject to be taxed.

Gilman v. *Sheboygan*, 67 U. S. 2 Black, 510 (17: 305); *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 15; *Knowlton* v. *Rock County Supvrs.* 9 Wis. 410; *Puitt* v. *Gaston County Comrs.* 94 N. C. 709, 55 Am. Rep. 638; *Pike* v. *State*, 5 Ark. 204; *Verdery* v. *Summerville*, 82 Ga. 138; *Savannah* v. *Weed*, 8 L. R. A. 270, 84 Ga. 683; *San Mateo County* v. *Southern Pac. R. Co.* ("*Railroad Tax Cases*") 13 Fed. Rep. 732; *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153 (25: 903).

Court declined to hear counsel for defendant in error.

Messrs. Clifford Anderson and *J. M. Terrell*, for defendant in error, filed a brief which contained the following point and authorities:

The validity of said act under the constitution of the state is a question for the courts of the state to determine, and their decision on these questions will be followed by this court.

Games v. *Stiles*, 39 U. S. 14 Pet. 322 (10: 476); *Gilman* v. *Sheboygan*, 67 U. S. 3 Black, 510 (17: 305); *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492 (22: 595); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*The Delaware R. Tax*"), 85 U. S. 18 Wall. 231 (21: 896); *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 (18: 339); *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 633 (18: 904); *Lane County* v. *Oregon*, 74 U. S. 7 Wall. 71 (19: 101); *Bailey* v. *Magwire*, 89 U. S. 22 Wall. 215 (22: 850); *Louisiana* v. *Pilsbury*, 105 U. S. 294 (26: 1096); *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 (17: 261); *Provident Inst. for Savings* v. *Massachusetts*, 73 U. S. 6 Wall. 611 (18: 907); *Randall* v. *Brigham*, 74 U. S. 7 Wall. 523 (19: 285); *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162 (36: 925); *Pullman Palace Car Co.* v. *Pennsylvania*,

141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595.

Mr. Justice **Jackson** delivered the opinion of the court:

The question presented by the record in this case is whether an act of the legislature of **471**]Georgia, approved October 16, *1889, entitled "An act to provide a system of taxation of railroad property in each of the counties of this state through which said railroads run, and to provide a mode of assessing and collecting the same, and for other purposes," violates that clause of the 14th Amendment of the Constitution of the United States which declares that "no state shall deny to any person within its jurisdiction the equal protection of its laws."

The act complained of provides as follows:

"Section I. *Be it enacted by the General Assembly of this state, and it is hereby enacted by authority of the same*, That hereafter in each and every year, on or before the first day of May, each and every railroad company in this state shall make an annual return to the comptroller general of this state, for the purposes of county taxation in each of the counties through which said road runs, in the following manner: Said return shall be under the oath of the president or other chief executive officer, and shall show the following facts as they existed on the first day of April preceding, to wit: First, showing the aggregate value of the whole property of said railroad company; second, showing the value of the real estate and track bed of said company; third, showing the value of the rolling stock and all other personal property of said company; fourth, showing the value of the company's property in each county through which it runs.

"Sec. II. *Be it further enacted, etc.*, That, whenever the amount of the tax levy of any county through which the said railroad runs is assessed by the authority of such county, it shall be the duty of the ordinary thereof to certify the same and transmit such certificate to the comptroller general; and the property of such railroad company shall be subject to taxation in each and every county through which the same passes to the same extent and in the same manner that all other property is taxed, in the manner hereafter set out.

"Sec. III. *Be it further enacted, etc.*, That, whenever such certificate is received by the comptroller general, it shall be his duty to proceed to assess the amount of each and every railroad company's property, in each and every **472**] of said counties *in the following manner: First, it shall be assessed upon the property located in each county upon the basis of the value given by the returns required by section first of this act; second, the amount of tax to be assessed upon the rolling stock and other personal property is as follows: As the value of the property located in the particular county is to the value of the whole property, real and personal, of the said company, such shall be the amount of rolling stock and other personal property to be distributed for taxing purposes to each county. These two, the value of the property located in the county and the share of the rolling stock and personal property thus ascertained and apportioned to each of such counties, shall be the amount to be taxed to the extent of the assessment in each county.

"Sec. IV. *Be it further enacted, etc.*, That, should the property of any railroad company in this state be not subject to taxation, as hereinbefore provided, but taxable upon its net income, such railroad company shall report to the comptroller general the entire length of its road, the different counties through which such road runs, and the number of miles in each county, which report shall be made at the time that railroad companies are required to return their property for taxation. When the income of such road is returned to the comptroller general he shall estimate the amount of income for each county through which such road runs, upon which shall be levied for such county a tax to be ascertained in the following manner: In the proportion that the road in each county bears to the whole length of the road, in that proportion shall the income returned by said road be taxed by each county through which it passes. Such income shall be taxed at the rate fixed by the charter of such railroad company, which tax shall be assessed and collected by the comptroller general, and by him paid over to the county entitled to such tax. If any railroad company refuses to pay such tax the comptroller shall issue execution for the amount of said tax due to each county which shall be levied on any property of said company. The railroad company may resist such tax as is herein provided in case of tax on property of railroad companies.

*"Sec. V. *Be it further enacted, etc.*, [**473** That, whenever the comptroller general shall ascertain and levy in the manner specified in the preceding section, the amount of tax due by such company to each of such counties, it shall be his duty at once to notify the president and treasurer of such railroad company of the amount due each of said counties for county taxes of said railroads, and each and every road is hereby required, within sixty days from the receipt of such notice, to pay to the tax collector of each county through which the railroad runs the amount mentioned by the comptroller general as the tax due to such county.

"Sec. VI. *Be it further enacted, etc.*, If any railroad company shall refuse to pay, within sixty days, the amount thus ascertained and due by it to the tax collector of any county to which the same is due and payable, it shall be the duty of the comptroller general to at once issue a *fi. fa.* in the name of the state of Georgia against such railroad company for the same; to be issued, levied, and returned in the same manner as tax *fi. fas.* are issued for state taxes due in the state by said companies.

"Sec. VII. *Be it further enacted, etc.*, If any railroad company shall dispute the liability to such county tax, it may be done by an affidavit of illegality, to be made by the president of said railroad in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county of Fulton, where such cases shall be

given precedence for trial over all other cases, except tax cases, in which the state shall be a party.

"Sec. VIII. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with this act be, and the same are hereby, repealed."

By an act approved in 1874 provision was made for the taxation of railroad property for state purposes, but this act of 1889 was the first statute enacted providing for the taxation of railroad property for county purposes.

The plaintiff in error is a corporation organized and existing under the laws of the state of 474] Georgia, having its principal *office or domicil in the city of Columbus, Muscogee county, in that state, with its line of railway extending through the counties of Chattahoochee, Stewart, Terrell, Webster and Lee, to the city of Albany in the county of Dougherty. With the exception of its right of way, road-bed, superstructure, depots, and usual appurtenances along the line of its road, the undistributed property of the corporation, such as its choses in action, etc., is situated in Muscogee county.

Under the provisions of the first section of the act, set out above, the railroad company made return of its property for the year 1890. Upon the basis of that return the comptroller general of the state assessed and levied taxes for the benefit of the several counties through which the railroad extended (after such counties had certified to him their respective tax rate and levies) and on October 27, 1890, notified the company that the taxes so levied must be paid to the respective tax collectors of the several counties within sixty days from that date of the notice.

The tax rate upon the property thus assessed, as stated in the notice of the comptroller general, was different in the different counties. For Muscogee county it was 2¼ mills; for Chattahoochee it was 8 mills; for Stewart it was 5 mills; for Terrell it was 5.34 mills; and for Webster county it was 8.47 mills, these rates of taxation being imposed by the respective counties on other property situated therein, and subject to taxation.

Before the expiration of the sixty days, within which the railroad company was required to make payment of the taxes thus assessed, it filed its bill, or equitable petition, in the superior court of Fulton county against William A. Wright, comptroller general, for an injunction and relief against the payment of these county taxes.

In the petition it was alleged that the act was repugnant to the constitution of the state of Georgia, for various reasons: First, that it was inconsistent with that provision of the constitution which required that "all taxation shall be uniform upon the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the au- 475]thority *levying the tax;" second, that the act was a special one, whereas the constitution required that all taxes should be levied and collected under general laws; third, that the act provided for a tax to be levied and collected by the state for the benefit of the counties, when the state had no authority under the constitution to tax for such a purpose; fourth, that the act embraced two subject-matters, viz, the "property of certain railroads," and also the "net incomes as to certain other railroads," while the constitution declares that "no law or ordinance shall pass which refers to more than one subject matter;" fifth, because the affidavit of illegality which a railroad company was authorized to file against an execution to collect the taxes authorized by the statute was required to be filed and tried in the superior court of Fulton county without reference to the domicil of the company, thereby conferring upon that court a greater jurisdiction than the constitution allowed; and, sixth, that the act violated the Constitution of the United States, in that it conflicts with the clause of the 14th Amendment, which declares that "no state shall deny to any person within its jurisdiction the equal protection of its laws."

The defendant interposed a general demurrer to the petition, which the superior court of Fulton county sustained, and dismissed the petition, holding that the act was not repugnant to the provisions of either the state or the Federal Constitution in any of the respects alleged. From that judgment the railroad company prosecuted a writ of error to the supreme court of the state, which court fully reviewed and considered the questions, and in affirming the judgment of the court below held that the act of 1889 in no way violated the constitution of the state and in no way discriminated against the railway company so as to deny it the equal protection of the laws, and was not, therefore, repugnant to the 14th Amendment of the Constitution of the United States. 89 Ga. 574. The present writ of error was sued out to reverse this judgment.

Upon this writ of error we cannot, of course, review the construction which the supreme court of the state has placed *upon its [476 own constitution and the act in question. The Federal question sought to be raised by the plaintiff in error is embodied in the two general propositions that "the rolling stock and other unlocated personal property owned by the railway company is, by the provisions of the act, distributed for taxation purposes to and for the benefit of the several counties traversed by the railroad, while personal property of all other persons and companies is taxed in and by the county in which the owner resides; and secondly, that the unlocated, intangible personal property of railroad companies is distributed for taxing purposes to the several counties, while the intangible personal property of all other persons follows the domicil of the owner, and is there taxable."

These two objections embody substantially the single proposition that the act in question discriminated against the railroad company in not taxing its unlocated or intangible personal property at the place of the railroad company's domicil or principal office; in other words, in the county of Muscogee. This proposition was disposed of by the supreme court of the state as follows:

"The next objection made by the petition is that the requirement of the constitution as to uniformity in taxation is violated because certain personal property of railroads is taxed for the benefit of counties, though not situated therein, while as to other corporations and in-

dividuals county taxation is imposed, so far as any particular county is concerned, only on property within its territorial limits. This objection is disposed of by what has already been said. We have shown that in each county its rate of taxation is applied to the property of the railroad actually located therein, and that it is perfectly just and proper to distribute the unlocated personalty of the road for taxing purposes in fair proportion among the several counties, the corporations residing *sub modo* in all the counties along its line of road, and therefore in one as much as in another.

"In the next place, it is contended that the same paragraph of the constitution is violated because the act prescribes a different rate of 477] taxation in each of the several *counties through which a railroad passes. The obvious answer to this objection is that the act does not thus impose any tax substantially different from the county taxes imposed on all other taxpayers. Certainly it does not, in any view of the question, impose any tax for state purposes. It merely provides a means for the county to apply to railroad property its own rate of taxation and collect the tax for county purposes. The vital thing is the rate, and the state has nothing to do with fixing it in any county beyond general regulations restricting its amount and the like. It is entirely immaterial whether mere ministerial acts and calculations, which when correctly done and made can have but one possible result, are the work of the comptroller general or of the county authorities. If the act provides, as we think it does, a constitutional scheme of taxation, what possible difference can it make whether the amounts upon which taxes are to be paid are arrived at by one officer or another, such amounts being necessarily the same in either event? As the tax is for the exclusive benefit of the county, and it fixes the rate, it is a county tax, and so long as a county taxes all property within its jurisdiction *ad valorem* and at the same rate the uniformity required by the constitution is observed, and this is true no matter what functionary acting by law for the county does the necessary ministerial acts. The question is all the more free from difficulty because under our system each taxpayer values his own property for taxation and makes his own returns. So under the present law the railroad can and does make returns to the comptroller general, which serves the same purpose as if it made separate returns to the tax receivers. It fixes the amounts on which it must pay taxes, and each county fixes its own rate. Hence under this law a railroad would not have to pay more tax than if each county by its own officials attended to the whole business. Not being therefore really injured, the railroads have in this respect no ground of complaint. Indeed, under this law these corporations have one advantage over other taxpayers. Returns made to tax receivers are overlooked by the grand juries, and a system is provided for increasing the valuation 478] of a taxpayer's property *when he undervalues it. Code, § 923*b et seq.* No such rule is applied to railroads by this act, but their returns stand as they make them, whatever may be the law as to their returns for state taxation. We will only add that as the act allows corporations whose property is taxable under it to designate in their returns what part of their property (real and personal) is located in a particular county, there is no ground for the complaint that the law may subject property located in one county to the rate of taxation prescribed by some other county. If, for example, the plaintiff in error returns a switch engine as a part of its property located in Muscogee county, it will be taxed at the rate prescribed by the authorities of that county and none other."

This decision of the supreme court of the state establishes, what is conceded by plaintiff in error, that the rate of taxation and the mode of valuing the railroad property for assessment was in all respects the same as the rate and mode prescribed for other taxpayers. So, that, the only difference between the county taxation upon railroad property, real and personal, and that of other persons or companies, consisted in the method of distributing the transitory or unlocated personal property of the railroad company, as valued by itself, among the several counties entitled to share therein, for the purposes of taxation. In other words, the question is whether the railroad company has any constitutional right to have its transitory property assessed for taxation alone in Muscogee county, and whether the distribution, among the several counties, of such property is such a discrimination against the railroad as denies to it the equal protection of the laws?

This is hardly an open question. Various modes of taxing railroad property are adopted by the different states. In some, railroad companies are taxed upon their property as a unit. In others, the road and the property in each county is separately assessed, and in still other states, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective states, and do not ordinarily present any Federal *question[479 whatever. But the mode of distribution of the unlocated or transitory personal property is a matter of regulation by the state legislature, which in no way involves a violation of the 14th Amendment.

In *State* v. *Severance*, 55 Mo. 379, 388, the supreme court of Missouri, in dealing with this question said: "The rolling stock of a railroad company, as a general principle, should be assessed and taxed where the corporation has its residence; but the principle of law may be modified by the legislature. The notion of the situs of personal property following the personal residence of the corporation is a legal fiction, but is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of a railroad company has no more local existence in one county than another. This machinery by which the road is operated is constantly passing from one terminus to the other of the entire road, and to save all cavil and dispute in respect to it, it was perfectly competent for the legislature to say that it should become a part of the road itself and become property the same as the road, and that for the purpose

of taxation it should be equally distributed through the counties, cities or towns through which it passed in proportion to its length in these respective localities."

The principle here announced is repeated in the well considered case of *Nashville, C. & St. L. R. Co.* v. *Franklin County*, 12 Lea, 522, 537, 538, 539, which involved substantially the same question of the situs for the purpose of taxation of the rolling stock and personal property of railway companies. It was there said by the supreme court of Tennessee: "The property of a railroad company for purposes of taxation consists of its realty, its local personalty, its rolling stock, its choses in action, and its franchise. The franchise is the privilege conferred by the charter of incorporation, namely, the right to exercise all the powers granted in the mode prescribed for the purpose of profit. It is a unit, not confined to any one county in which it may be exercised. The principal part of the franchise is the right **480**]to charge for freight and *passengers, the charge being limited within a prescribed or reasonable rate for carriage in the proportion of the distance of transportation. Obviously, after ascertaining the value of the entire franchise in the state as a unit, no more approximate or just division of the value can be made for purposes of taxation than to allot it among the counties through which the track runs in the proportion of the length of the track in the county to the entire length of the road in the state. And this is what was done by the acts under consideration. The choses in action of a corporation, its rolling stock, and personal property, according to the principles of the common law, have their situs at the domicil or place of business of the company. *Gallatin* v. *Alexander*, 10 Lea, 475; *Nashville* v. *Thomas*, 5 Coldw. 607; Cooley, Taxn. 273. But the legislature may change the situs of such property. *McLaughlin* v. *Chadwell*, 7 Heisk. 389, 406; *Bedford* v. *Nashville*, 7 Heisk. 409; *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575, 607 [23:663,671]; Cooley, Taxn. 274. . . . The rolling stock of a corporation, used in transporting passengers and freight over any and all parts of its line of road, cannot be said to have a situs which would give a preference to any county through which the road may run over any other county in like situation. The choses in action of a railroad company, created by the exercise of its franchises, on every part of the track, may be equally said to be without a situs so as to give a preference. The legislature might well treat them as the franchise itself, for, or by, the exercise of which they are created, and proportion the general valuation among the counties through which the road may run according to the length of road in each county. The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross ties thereon. The value of the roadway at any time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the road assessed **481**] *at the market price of adjacent lands, and adding the value of the cross ties, rails and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The accessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all trustworthy, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

The principle set out in the above quoted authorities is clearly sanctioned by this court in *Taylor* v. *Secor* ("*State R. Tax Cases*"), 92 U. S. 575, 607 [23:663,671]; where the same objection to the system of taxation by the state, as here presented, was made that the rolling stock, etc., was personal property, and that it and other personal property had a situs at the principal place of business of the corporation, and could be taxed in no other county but the one where it was situated. This court met that objection by saying: "It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the state which recognizes it. . . . Like all other laws of a state, it is, therefore, subject to legislative repeal, modification, or limitation, and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad corporations for taxation, it simply exercised an ordinary function of legislation. Whether allowing the rule to stand as to taxation of individuals, and changing it as to railroads or other corporations, it violated any rule of uniformity prescribed by the constitution of the state, we will consider when we come to the constitutional objections to the statute."

In its further consideration of that case the court held that changing the situs of such unlocated property of a *railroad company, [**482** and distributing it to the counties through which the road extended, in no way violated the rule of uniformity or discriminated against the railroad company. In that case, as in this, there was no claim that the rate of taxation levied by any county on the assessed value of the property within its limits was greater than on other property; nor was the valuation different from that placed upon other property. In the present case the railroad company, like other property owners, placed its own valuation upon the property. It was also held, in the case just cited, that taxes are uniform when the rate of taxation is the same on assessments ascertained by the same method.

Without reviewing authorities on this subject, the principle involved in the case under consideration is not distinguishable from the principle involved in *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 [23: 663]; and in *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321, 339 [29:414,419]; *Minneapolis & St. L. R. Co.*

v. *Beckwith*, 129 U. S. 26 [32:585]; and in *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 [35: 1051].

The whole complaint made by the plaintiff in error is that it had a constitutional right to have its rolling stock, and other unlocated personal property, taxed in the county of Muscogee, where it had its principal office, and to give such property a different situs, under the act complained of, by distributing it among the counties through which the road extended, was an unjust discrimination, and violated its constitutional rights. This proposition cannot be entertained for a moment, for the reason already stated, that it was clearly within the province of the legislature of Georgia to give such personal property a different situs, for purposes of taxation, from that of the company's principal office. The act in question having apportioned the transitory and unlocated property of the railroad company among the several counties through which the road extends for the purpose of taxation, and having subjected such property to the same rate of taxation imposed upon all other property in the respective counties, the fact that the rate of taxation varied in the different counties, according to their respective wants **483** [and necessities, *involved no discrimination against the railroad company. The state having the undoubted authority to fix the situs of such property, and having lawfully distributed it proportionately between the several counties traversed by the road, it thereby became subject to the same rate of taxation as other property in the respective counties. This involved no inequality, and violated no provision of either the state or Federal Constitution. It certainly did not involve a failure to extend to the plaintiff in error the equal protection of the laws.

The Federal question involved in the case was correctly decided by the supreme court of the state, and the judgment of that court is therefore affirmed.

CHARLES DE ARNAUD, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 483-496.)

Receipt in full—claim against United States—statute of limitations—subsequent disability.

1. A receipt in full, unless given in ignorance of its purport, or in circumstances constituting duress, is an acquittance in bar of any further demand.
2. By the statute of limitations a claim against the United States, cognizable by the Court of Claims, is forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it as provided by law, within six years after the claim first accrues.
3. Officers of the government cannot waive the limitation imposed by statute upon suits against the United States in the Court of Claims.
4. When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability.

[No. 550.]

Submitted Jan. 8, 1894. Decided Jan. 29, 1894.

APPEAL from a judgment of the Court of Claims, dismissing the petition of Charles de Arnaud, for judgment in his favor, against the United States, for services as a military expert for and on behalf of the United States. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

This is an appeal from a judgment of the Court of Claims, dismissing the petition of Charles de Arnaud, in which he sought for a judgment in his favor against the United States for the sum of $100,000, for services the petitioner alleged he had rendered as a "military expert," employed for "special and important duties," by General Fremont for and on behalf of the United States.

The facts of the case, as found by the court below, are as follows:

*The claimant is a native subject of [**484** Russia, residing in the United States. The following is a translation of the provisions of the law of Russia, according to citizens of the United States the right to prosecute claims against such government in its courts:

"Sec. 1292. The decision of the court is announced to both parties according to general rules, but independently thereof a copy of the decision is forwarded to the local government institution spoken of in section 2084.

"Sec. 1296. In the execution of a judgment against a government institution the claimant presents a certified abstract of the decision to the institution, which is bound to execute the judgment accordingly.

"Sec. 1519. Aliens residing in Russia are subject to Russian laws, as well personally as in regard to property, and enjoy the common defense of safeguards and protection thereof.

"Sec. 1288. Claims of private persons against the government institutions are governed by general rules, and are brought according to the location of the property or according to the place where the loss was sustained by the private person, or according to the place where the government institution or where the government officer is situated or resides who represents the government in court."

The claimant came to this country about the year 1860, and was, prior to that time, an officer in the Russian army, where he served in the Crimean war as lieutenant of engineers, and was serving as such when the armistice was concluded between Russia and the contending allies.

In the year 1861 John C. Fremont was a major general in the United States Army, in command of the western department of Missouri. In the month of August, 1861, he entered into an agreement with the claimant, by which the claimant was employed by him to go within the Confederate line, make observations of the country in the states of Kentucky,

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NOTE.—*As to receipts, their effect and conclusiveness*, see note to Baker v. Nachtrieb, 15: 528.

As to payment of part of a debt, no satisfaction of the whole; exceptions to the rule, see note to Clarke v. White, 9: 1046.

As to compromise of a disputed claim, binding; payment of less sum for greater, see note to Oglesby v. Attrill, 26: 1188.

Tennessee, and Missouri, to observe the position of the rebel forces, the strategic positions occupied by them, and advise him (General Fremont) of the movements necessary to be made by the Union forces to counteract the move-[485]ments of the enemy, *and to facilitate the advance of our troops and aid them in attacking and repulsing the Confederate forces.

In consequence of that arrangement he did go within the Confederate lines, and, agreeably to what he was instructed to do, brought back to General Fremont full information of the kind desired, maps of the country, of various roads, the number of troops, their stations, conditions, and, as far as he could judge and find out, their projected movements.

He was absent on that business a number of days, came back, and reported in St. Louis about the 12th of August, 1861, to General Fremont, who was so satisfied with the information that he brought, with the intelligence and sagacity he displayed in collecting it, and the usefulness of his information, that he (Fremont) then made an arrangement for him to continue in the service of the department. About the 12th of the month of August, 1861, he again left for the country occupied by the Confederate forces to collect information. The most important part of the services rendered by him was in the beginning of the next month, September, when, with the information that he had collected, he was returning to report to General Fremont a movement of the Confederate forces upon Paducah. On reaching Cairo, he found that he had only time to report to Fremont by telegraph, and reported forthwith personally to General Grant, informing him that troops were advancing upon Paducah, and that it was necessary to move immediately in order to occupy the place. Gen. Grant did move instantly and took possession of Paducah, Kentucky, solely on information given by the claimant, and to the effect that the rebels were moving upon that city with a large force.

The claimant was paid $600 on the following orders and receipts:

"Headquarters Western Department,
"Camp Near Jefferson City, Oct. 6, 1861.
"Major Phinney, U. S. A., Paymaster, etc.:
"Will pay to Charles de Arnaud the sum of three hundred dollars ($300) for secret service.
"J. C. Fremont, "Major General."

[486] *"Received, Warsaw, Mo., October 23, 1861, of Major Jas. H. Phinney, paymaster U. S. A., the sum of three hundred ($300) 'for account of secret service rendered to the U. States' by special order of Major Gen'l Fremont, dated near Warsaw, Mo., Oct. 23, 1861.
"Chas. de Arnaud."

"In the Field.
"Headquarters Western Department, Oct. 23, 1861.
"Major Phinney will pay to the bearer, Mr. Charles de Arnaud, three hundred dollars for secret service to the United States.
"J. C. Fremont,
"Major General Comm'n'd'g."

"Received, Jefferson City, October 6, 1861, from Major J. H. Phinney, three hundred dollars for secret service as per special order of Major Gen'l J. C. Fremont of this date. $300.
"(Signed duplicate) Chas. de Arnaud."

On January 6, 1862, the claimant presented his claim to the War Department, and it was reported upon by the quartermaster as follows:

"No. 22.—The United States to Charles de Arnaud, Dr.
"January 6, 1862.—For special services rendered to the United States government in traveling through the rebel parts of Kentucky, Tennessee, etc., and procuring information concerning the enemy's movements, etc., which led to successful results (as per certificate hereunto appended) $3600.
"Q. M. Gen'l's Office, 9th Jan'y, 1862.
"In view of the certificate of Gen. Grant of 30th Nov. and the more general certificate of Maj. Gen. Fremont of 2d Jan'y, herewith, covering all of Mr. Arnaud's services, the sum of thirty-six hundred dollars appears to me to be a not unreasonable compensation. I state this at Mr. Arnaud's earnest request.
"M. C. Meigs, Q. M. Gen'l."

*On the 13th of January the claimant [487] went to President Lincoln and laid before him his claim with the following letters:

Cairo, Ill., January 6, 1862.
"Hon. A. Lincoln, President U. S. A.:
"The bearer, Charles de Arnaud, has to my knowledge rendered important services to the government. He, at the risk of his life, gave information which led to our capture of Paducah, Ky., in advance of the rebels; thereby he saved the country thousands of lives and millions of dollars. I fully indorse his certificate of Maj. Gen. J. C. Fremont. He is entitled to the largest remuneration the government pays for such services.
"Respectfully, etc., A. H. Foote,
"Flag Officer."

"Headquarters District Southeast Missouri,
"Cairo, November 31, 1861.
"Chas. de Arnaud:
"Sir: In reply to your request, and the note from Major General Halleck presented me by yourself, I can state I took possession of Paducah, Ky., solely on information given by yourself, and to the effect that the rebels were marching upon that city with a large force. This information I afterwards had reason to believe was fully verified: First, because as we approached the city secession flags were flying and the citizens seemed much disappointed that Southern troops expected by them were not in advance of us. It was understood that they would arrive that day. I also understood afterwards that a force of some four thousand Confederate troops were actually on their way for Paducah when taken possession of by my order. A point through which many valuable supplies were obtained for the Southern army was cut off by this move, and a large quantity of provisions, leather, etc., supposed to be for the use of the Southern army, captured. For the value and use to which these were put I refer you to *General Paine, whom [488] I left in command. Only remaining in Paducah a few hours, and being busily engaged with other matters during that time, I can make no estimate of the cash value of the stores captured.
"Yours, etc., U. S. Grant, Brig. Gen."
"Astor House, New York, January 2, 1862.
"This is to certify that Mr. Charles de Ar-

naud was employed by me from about the first of August in traveling throughout the rebel parts of Tennessee and Kentucky, with the object of ascertaining the strength, condition and probable movements of the rebel forces. He made under my directions many such journeys, reporting fully and in detail upon the force of the various encampments and the condition and strength of garrisons and various works in Tennessee and along the Mississippi river. He obtained this information at much personal risk and with singular intelligence, and performed the duties entrusted to him entirely to my satisfaction. He continued on this duty until the termination of my command in the western department. His services were valuable to the government, and I consider entitled to the largest consideration that the government allows in such cases or to such agents. J. C. Fremont,

"Maj. Gen. U. S. A."

President Lincoln folded the letters together and wrote on the back of General Grant's letter the following:

"I have no time to investigate this claim; but I desire the accounting officers to investigate it, and if it be found just and equitable to pay it, notwithstanding any want of technical legality or form.

"Jan. 13, 1862. A. Lincoln."

Thereafter, on the next day, January 14, the Secretary of War made the following indorsement on said claim:

"I have considered this claim and cannot bring my mind to the conclusion that the sum [489] charged is not exorbitant. I *am willing to allow $2000 in full of the claim, and the dis. clerk, War Dep't, is authorized to pay Charles de Arnaud that sum.

"War Dept., Jan'y 14, 1862.

"Simon Cameron, Sec. War."

The claimant was thereupon paid, under protest, by said disbursing clerk of the War Department, out of appropriation for "contingencies of the army," $2000 and gave the following receipt:

"The United States to Charles de Arnaud, Dr.

"January 14, 1862.

"For services and expenses as special agent of the gov't, $2000.

"Received, Washington, January 21, 1862, from John Potts, disbursing clerk for the War Department, two thousand dollars, in full, for the above account. Chas. de Arnaud."

At the time of giving the receipt in full, January 14, 1862, he was not in a state of dementia, and was able to comprehend the terms of the receipt; but the effects of his wounds in the head were beginning to affect him mentally, and he was in a condition of nervous apprehension, and unnaturally desirous of securing his personal safety by getting out of the country, and he accepted the money paid by the War Department in order that he might do so.

While engaged in the military service of the government, as aforesaid, he received a wound in his head in the fall of 1861, from which afterwards, in the same year, he became insane, and did not recover prior to February, 1886.

About September 4, 1886, the claimant presented his claim to the Treasury Department, without naming the specific amount claimed, but incidentally claimed $50,000, because he was told by General Fremont that during the Mexican war one McGoffin, a secret agent, had been paid that sum. The auditor reported to the Second Comptroller as follows:

*"Act of July 17, 1861, appropriated [490] $200,000 'for contingencies of the army' (12 Stat. at L. 263).

"This claim was paid out of above fund.

"Accounting officers have no jurisdiction to open up a settlement made by War Dep't from secret service fund and determine unliquidated damages."

The Second Comptroller made the following indorsement thereon:

"June 29, 1888.

"The within recommendation is approved. De Arnaud seems to have rendered unmistakable valuable services as a secret agent, and there appears to have been provision made for the payment of services of that nature. But this claim must be rejected pursuant to the recommendation of the 2nd Auditor, because payment in full seems to have been made and accepted years ago, and because this office has no means or jurisdiction to consider so plain a case of unliquidated damages.

"That the officer was not paid commensurately with his services and deserves recognition at the hands of Congress seems to be amply evidenced by President Lincoln's memorandum and by the testimony of Generals Grant and Fremont. Sigourney Butler,

"2nd Comptroller."

The claimant was informed of the action of the Comptroller by the following letter:

"Washington, D. C., July 10, 1888.

"Captain Charles de Arnaud, Washington, D. C.:

"Sir: I have the honor to inform you that your claim for compensation for services as a military expert in 1861 has been disallowed by the Second Comptroller without prejudice, because payment in full seems to have been made and accepted years ago, and because the accounting officers have no means or jurisdiction to consider so plain a case of unliquidated damages. . . . William A. Day,

"Auditor."

*On the 20th of October, 1888, the [491] claimant renewed his application to the Treasury Department, and asked that the case be referred to the Court of Claims. This communication was indorsed by the Second Comptroller as follows: "January 9th, 1889.

"Respectfully referred to the Second Auditor.

"The application of the claimant, Charles de Arnaud, seems to have merit. The case is plainly beyond the jurisdiction of the accounting officers, but it bears upon its face distinct marks that should give it a fuller consideration than can be accorded by the accounting officers. Furthermore, there is no adequate machinery in the accounting officers for properly sifting the very extraordinary evidence in this case. This can only be done by the Court of Claims.

"With your reply, which the claimant asks be made special, stating your views on this case, please forward all the papers pertinent thereto. Sigourney Butler,

"Comptroller."

On January 12, 1889, the Second Auditor transmitted all the papers on file in his office to the Second Comptroller, stating that his views had been fully expressed in previous communications hereinbefore set out. The Comptroller made a recommendation to the Secretary of the Treasury that the case be transmitted to the Court of Claims, which was accordingly done by the following letter of transmission:

"Treasury Department,
"Office of the Secretary,
"Washington, D. C., January 25, 1889.

"To the Honorable the Chief Justice and Judges of the Court of Claims:

"Under the provisions of section 1063 of the Revised Statutes of the United States I transmit herewith to your honorable court, upon the recommendation and certificate of the Second Comptroller, the claim of Charles de Arnaud for services as military expert, now pending in the department and involving disputed facts and controverted questions of law, 492] *with all the vouchers, papers, and documents pertaining to said claim, for trial and adjudication by your honorable court, as provided by law. Respectfully yours,

"Hugh S. Thompson,
"Acting Secretary."

Messrs. **Horatio J. Lauck** and **H. O. Claughton** for appellant.

Messrs. **J. E. Dodge**, *Assistant Atty. Gen.*, and **Conway Robinson** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The court below, passing by other grounds of defense, dismissed the petition upon the proposition that it disclosed a case within the ruling of this court in the case of *Totten* v. *United States*, 92 U. S. 105 [23: 605].

That was the case where one Lloyd asserted that, under a contract with President Lincoln, he was to proceed south and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts, and gain such other information as might be beneficial to the government of the United States, and report the facts to the President; for which services he was to be paid $200 a month.

The Court of Claims found that Lloyd had performed the services mentioned, but the members of that court being equally divided in opinion as to the authority of the President to bind the United States by the contract in question, the court decided against the claim and dismissed the petition.

On appeal, this court found no difficulty as to the authority of the President in the matter. As commander-in-chief of the armies of the United States he was undoubtedly authorized to employ secret agents to enter the rebel lines and obtain information respecting the strength and movements of the enemy; and it was also said that contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.

493] *But the court was of opinion that the service stipulated for in the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. And the court held that a secret service, with liability to publicity in a suit subsequently brought against the government, would be impossible; that, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award; that the secrecy which such contracts impose precludes any action for their enforcement; that the publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

The counsel of the appellant do not impugn the doctrine of the Totten case, but they contend that the Court of Claims erred, in the present case, in treating the contract and services of Arnaud as being of a character that brings the case within such doctrine. It is denied that Arnaud's functions were those of a spy, but were those of a "military expert."

If it were necessary for us to enter in the question thus suggested, it might be difficult for us to point out any substantial difference in character between the services rendered by Lloyd and those rendered by Arnaud; but the record discloses other defenses so plainly applicable that we are relieved from considering whether the new-fangled term "military expert" is only old "spy," "writ large."

On January 6, 1862, after the claimant had performed all the services described in his petition, he presented a claim to the War Department, in the following form:

"No. 22—The United States to Charles de Arnaud, Dr.

"January 6, 1862.

"For special services rendered the United States government in traveling through the rebel parts of Kentucky, Tennessee, etc., and procuring information concerning the enemy's *movements, etc., which lead to success- [494 ful results (as per certificate hereto appended), $3600."

On this claim the Quartermaster General, on January 9, 1862, indorsed the following:

"In view of the certificate of General Grant of 30th Nov. and the more general certificate of Major General Fremont, of 2d January, herewith, covering all Mr. Arnaud's services, the sum of thirty-six hundred dollars appears to me a not unreasonable compensation. I state this at Mr. Arnaud's earnest request.

"M. C. Meigs, Q. M. Gen'l."

Thereafter, on January 14, 1862, the Secretary of War made the following indorsement on said claim:

"I have considered this claim, and cannot bring my mind to the conclusion that the sum charged is not exorbitant. I am willing to allow $2000 in full of the claim, and the dis. clerk, War Depart. is authorized to pay Charles de Arnaud that sum.

"Simon Cameron, Sec. War."

The claimant was thereupon paid by said disbursing clerk of the War Department $2000, and gave the following receipt:

"The United States to Charles de Arnaud, Dr.
"January 14, 1862.

"For services and expenses as special agent of the gov't, $2000.

"Received, Washington, January 21, 1862, from John Potts, disbursing clerk for the War Department, two thousand dollars, in full, for the above account. Chas. de Arnaud."

In the absence of allegation and evidence that this receipt was given in ignorance of its purport, or in circumstances constituting duress, it must be regarded as an acquittance in bar of any further demand. *Baker* v. *Nachtrieb*, 60 U. S. 19 How. 126, [15:528]; *United States* v. *Childs*, 79 U. S. 12 Wall. 243 [20:362].

495] *No further or other claim was made by the petitioner until September 4, 1886—a period of twenty-four years. Even, therefore, if the claimant was not effectually barred by his voluntary acquittance, his claim was assuredly barred by the statute of limitations, which provides that every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition, setting forth a statement thereof, is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. Rev. Stat. § 1069.

In Finn's case, in many respects resembling the present one, this court construed and applied that statute in the following terms:

"In any view this claim belonged to the class which, under the express words of the Act of 1863 (Rev. Stat. § 1069), were 'forever barred,' so far, at least, as the claimant had the right to a judgment in that court against the United States. The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that, etc., the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the government. Under the appellant's theory of the case the Second Comptroller could open the case twenty years hence, and upon the claim being transmitted by the Secretary of the Treasury to the Court of Claims, that court could give judgment upon it against the United States. We do not assent to any such interpretation of the statute defining the powers of that court.

"The general rule that limitation does not operate by its own force as a bar, but as a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United
496]States. An individual may waive *such a defense, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by the statute upon suits against the United States in the Court of Claims." *Finn* v. *United States*, 123 U. S. 232, 233 [31:130].

The claimant cannot avail himself of the saving clause in the statute suspending its operation in favor of idiots, lunatics, insane persons, and persons beyond the seas, because such suspension is only in favor of those laboring under the specified disabilities at the time the claim accrued; and it is conceded that plaintiff's mental incapacity did not begin until after his claim had accrued.

Nor can it be successfully claimed that a disability subsequently arising would suspend the operation of the statute. See *Bauserman* v. *Blunt*, 147 U. S. 657 [37: 320], and cases therein cited.

In no view that we can take of this case can we find any just foundation for a claim against the government, and the judgment of the court below, dismissing the claimant's petition, is accordingly affirmed.

THE GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, *Plff. in Err.*,

v.

VICTOR GONZALES.

(See S. C. Reporter's ed. 496-520.)

What constitutes a railroad an inhabitant—Texas statute.

1. A railway company, incorporated under the laws of a state, and having its principal offices within one district of such state, is not an inhabitant of another district of the same state through which it operates its line of road and in which it maintains freight and ticket offices and depots.
2. The provision of the Texas statute which gives to a special appearance made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the Federal courts in that state.

[No. 158.]

Argued Dec. 11, 1893. Decided Jan. 29, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Texas, to review a judgment, in favor of the plaintiff Victor Gonzales, against defendant, The Galveston, Harrisburg & San Antonio Railway Company, for damages, for personal injuries. *Reversed, and case remanded for further proceedings.*

Statement by *Mr. Justice* **Brown:**

This was an action at law instituted in the Circuit Court for the Western District of Texas at El Paso by the defendant in error, Victor Gonzales, alleged to be "a citizen of the state of Chihuahua, in the republic of Mexico," against the Galveston, Harrisburg

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NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute, see note to Schunk v. Moline M. & S. Co. 37: 256.

& San Antonio Railway Company, to recover damages to the amount of $4999 for personal injuries.

The petition alleged the plaintiff to be "a citizen of the state of Chihuahua, in the republic of Mexico, and that the defendant is a corporation duly incorporated under the laws of the state of Texas and is a citizen thereof, operating and running cars on the Galveston, Harrisburg & San Antonio railway track from the city of Houston to the city of El Paso in the state of Texas, and is a common carrier of freight and passengers for hire, . . . and has and keeps an office and an agent in the said city of El Paso, Texas, for the transaction of its business, with W. E. Jesup as its local agent in said El Paso." The petition further alleged that "on and prior to the 29th day of July, 1889, and ever since that time, the defendant has been engaged in propelling trains and cars on said railway track for the transportation of freight and passengers for hire, as aforesaid, from the city of Houston, in the state of Texas, into and through the county of Jeff Davis, in said state, and through the county of El Paso into the city of El Paso, Texas." The petition further alleged as the cause of plaintiff's action that after having paid his [498] fare to an agent *of the defendant, and entered as a passenger on its train from Valentine station to El Paso, he was forcibly and violently ejected from the train while moving at the rate of fifteen miles an hour, thereby causing him to fall to the ground with such force that his leg was broken, and he was thereby crippled for life; for which he prayed judgment in the sum of $4999.

Defendant appeared specially for the purpose of objecting to the jurisdiction of the court, and pleaded in abatement "that nevertheless, while it admits that defendant operates a line of railway through the county where this suit is pending, and maintains a ticket and freight office and depot, and has an agent on whom process, under the laws of Texas, may be served there, the said defendant is not an inhabitant of the judicial district in which the suit is pending: that it is a corporation duly incorporated and existing under the laws of Texas, having its principal office, habitat, and domicil in the city of Houston, Harris county, Texas, and beyond and not within this judicial district, but within the eastern district of Texas." Wherefore the defendant prayed judgment whether the court had jurisdiction, etc.

Plaintiff demurred to this plea, setting up that the defendant is an inhabitant of the eastern district of Texas.

The case came on to be heard upon this plea in abatement and demurrer, and the court, being of the opinion that the law was for the plaintiff, and that the court had jurisdiction, sustained the demurrer, proceeded to a trial of the case upon the merits, and submitted it to a jury, who rendered a verdict for the plaintiff in the sum of $900.

Defendant sued out this writ of error under the authority of the Act of February 25, 1889, authorizing this court to review questions of jurisdiction of the circuit court without reference to amount. 25 Stat. at L. 693.

Messrs. **J. Hubley Ashton** and *Charles H. Tweed* for plaintiff in error.

No counsel for defendant in error.

Mr. Justice* **Brown delivered the [499] opinion of the court:

This case raises the question whether a railway company, incorporated under the laws of a certain state, and having its principal offices within one district of such state, can be said to be an inhabitant of another district of the same state, through which it operates its line of road and in which it maintains freight and ticket offices and depots.

We have no doubt of our authority under the Act of February 25, 1889, to review the decision of the court below sustaining its jurisdiction over the case; and we have already held that the provision of the Texas statute which gives to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the Federal courts in that state. *Southern Pacific R. Co.* v. *Denton*, 146 U. S. 202 [36: 942]; *Mexican Cent. R. Co.* v. *Pinkney*, 149 U. S. 194 [37: 699].

By section 1 of the Act of August 13, 1888, revising the jurisdiction of the circuit courts (25 Stat. at L. 433) it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;" and by Rev. Stat. § 740, "when a state contains more than one district, every suit not of a local nature, in the circuit or districts courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides." The above provision of the Act of 1888 is manifestly a restriction upon the jurisdiction conferred by the Act of 1875, which contained a similar provision, but with the additional privilege of bringing such suit within any district "in which he," the defendant, "shall be found at the time of serving such process or commencing such proceeding."

*It will be noticed that in this as [500] well as in prior acts regulating the jurisdiction of the circuit courts a distinction is made between citizens of states and inhabitants of districts. This distinction has been carefully observed in all the principal adjudications upon the construction of these statutes, and, for the purpose of determining the habitancy of a railway corporation, it is pertinent to refer to some of these cases. In one of the earliest, viz. *Picquet* v. *Swan*, 5 Mason, 35, a suit was begun by trustee process or writ of garnishment sued out by an alien against a defendant, described as "now commorant of the city of Paris in the kingdom of France, of the city of Boston in the commonwealth of Massachusetts, one of the United States of America, and a citizen of the said United States." The process was

served by the attachment of a lot of land in Boston belonging to the defendant, and by summoning his agent to appear and show cause. The defendant never appeared as a party to the suit; and it was contended that the plaintiff was entitled to consider him in default, and to have judgment. It was held, however, by *Mr. Justice* Story, that where a party defendant was a citizen of the United States, but resident in a foreign country, having no inhabitancy in any state of the Union, the circuit courts had no jurisdiction over him in a suit brought by an alien, though his property were attached in the district. The case involved the construction of that clause of the eleventh section of the Judiciary Act of 1789, which provided that "no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It will be noticed that the words used are "inhabitant of the United States," not "inhabitant of a district," and, in speaking of these words, *Mr. Justice* Story said: "I lay no particular stress upon the word 'inhabitant,' and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties." That he meant the word "inhabitant" as "inhabitant of the United States" is evident from what follows: 501] "A person *might be an inhabitant without being a citizen; and a citizen might not be an inhabitant, though he retain his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, *animo manendi*, quite another. I read, then, the clause thus: 'No civil suit shall be brought before either of said courts against an alien or a citizen, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ.' It cannot be presumed that Congress meant to say, that if an alien or a citizen were not an inhabitant of, or commorant in, the United States, a suit might be maintained against him in any district, and process served abroad upon him, or judgment given against him without any notice or process served upon him." There is nothing here which indicates that *Mr. Justice* Story confounded citizenship of a state with inhabitancy of a district.

In *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768], a citizen of Massachusetts sought to maintain a bill in equity in the Circuit Court for the Southern District of New York against the Quincy Mining Company, a corporation organized under the laws of Michigan, and having a usual place of business in the city of New York, and the question arose whether the court had jurisdiction over such a suit. It was held that it did not. In the opinion of the court it was said that the word "inhabitant" in the Act of 1789 was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a state, when the intention was to cover not only a district which included a whole state, but also two districts in one state.

In construing the acts of 1887 and 1888 it was held that they could not be considered as giving jurisdiction to a circuit court held in a state of which neither party was a citizen, and that "in the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated, or in the state of which the other party is a citizen." It was further held that the domicil, the home, the habitat, the residence, the citizenship of a corporation, could only be in *the state [502 by which it was created, although it might do business in other states whose laws permitted it; and it was finally decided that under these acts of Congress "a corporation incorporated in one state only, cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state."

In the *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942], it was further held that a citizen of Texas, and a resident of the eastern district of Texas, could not maintain a suit in the western district of Texas against a railroad incorporated under the laws of the state of Kentucky. It was said to have been long settled that an allegation that a party is a "resident" does to show that he is a "citizen" within the meaning of the judiciary acts, and to hold otherwise in this case would be to construe the petition as alleging that the defendant was a citizen of the same state as the plaintiff, and thus utterly defeat the jurisdiction. The case was held to be covered by the decision in the case of *Shaw* v. *Quincy Min. Co.* It was contended that the railroad company had consented to be sued in the western district of Texas by doing business and appointing an agent there, under a statute requiring foreign corporations desiring to transact business in Texas to file with the secretary of state a certified copy of its articles of incorporation, and authorizing service of process to be made upon any of its officers and agents engaged in transacting its business. This act also forfeited any permit issued to a foreign corporation to transact business which should remove a case into a Federal court on account of its nonresidency. It was held, however, that this statute requiring a corporation to surrender a right and privilege secured to it by the Constitution and laws of the United States was unconstitutional and void, and could give no validity or effect to any agreement made by the corporation in obedience to its provisions. The ruling in this case was that the plaintiff should have brought his suit either in Kentucky, of which defendant was a citizen, or in the eastern district of Texas, of which he, the plaintiff, was a resident: and the fact that the defendant was operating a road and doing business and *having agents in the western district [503 of Texas was insufficient to authorize a suit to be begun against it there, in the Federal

court, although under the laws of the state such action might have been maintained.

In *Re Hohorst*, 150 U. S. 653 [37: 1211], decided at the present term, it was held that the clause in question, that no civil suit should be brought against any person in any other district than that whereof he was an inhabitant, was manifestly inapplicable to a suit brought by a citizen of one of the United States against an alien, and that the words of the provision evidently looked to those persons, and those persons only, who were inhabitants of some district within the United States. "Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the early part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole." And hence that an alien or foreign corporation might be sued by a citizen of a state in any district in which valid service could be made upon the defendant. It was further held that a service upon the financial agent of a foreign corporation in the city of New York was a sufficient service upon the corporation.

Neither this case nor any other to which our attention has been called makes any distinction between cases where citizens and aliens are plaintiffs, though in Hohorst's case, to prevent a manifest failure of justice, in the inability to sue any foreign corporation whatever, it was held that where an alien corporation was defendant it might be sued in any district wherein it might be found. These cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an inhabitant of the state in which it is incorporated; but in none of them is there any intimation that, where a state is divided into two districts, a corpora-
504] tion shall be treated as an *inhabitant of every district of such state, or of every district in which it does business, or, indeed, of any district other than that in which it has its headquarters, or such offices as answer in the case of a corporation to the dwelling of an individual.

We are, therefore, compelled to determine the question of the domicil of a corporation either by a resort to general principles of law, or to local statutes fixing such domicil. An individual is almost universally held to be an inhabitant of the place in which he dwells, and though he do business for a long time in another place, he will not be regarded as changing his domicil so long as the *animus revertendi* continues. Thus in *Jopp v. Wood*, 34 Beav. 88, 4 DeG. J. & S. 616, it was held that a Scotchman engaged in business in India for twenty-five years did not thereby change his domicil. And in *Re Capdevielle*, 2 Hurlst. & C. 985, it was similarly held with regard to a Frenchman who had resided and engaged in business in England for twenty-nine years. In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place. It is but a corollary of the proposition laid down in the three cases above referred to, that if the corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done.

If there were any doubt upon this subject, it would be removed by reference to the following provisions of the Texas statutes upon the domicil of railway corporations:

"Art. 4115. Every railroad corporation shall have and maintain a public office at some place upon the line of its road in this state. Const. Art. 10, § 3; Act August 15, 1876.

"4115*a*. Sec. 1. Every railroad or other corporation organized or doing business in this state under the laws or authority thereof, shall have and maintain a public office in the locality *where its principal business [505 is carried on in this state for the transaction of its business, where transfers of stock shall be made, where the auditor, treasurer, general traffic manager, and general superintendent of such roads, or where an agent of such corporation, duly authorized to adjust and settle all claims against such corporation for damages, shall have their respective offices, and where shall be kept for the inspection of stockholders of such corporation books in which shall be recorded:

"1st. The amount of capital stock subscribed;

"2d. The names of the owners of the stock, and the amounts owned by them respectively;

* * * * * * * *

"6th. The names and places of residence of each of its officers; provided, that a railroad corporation shall be required to keep such office at some place on the line of its road in this state.

"Art. 4116. All meetings of stockholders and directors of such corporation shall be held at such public office, and all transfers of stock in such corporation shall be made at such office, and the general business of such corporation shall be transacted at such office."

"Art. 4118. Every railroad corporation may change at its pleasure its public office by publishing a notice of such change in some newspaper published on the line of its road, if any there be, and if not, then in some newspaper in the state, and having a general circulation in the state, for four successive weeks prior to such change.

"Art. 4119. Every railroad corporation shall, also, as soon as it has in the first instance established its public office, give notice of such establishment by a like publication, as required in the preceding article.

"Art. 4120. The public office of a railroad

corporation shall be considered the domicil of such corporation." 2 Savles, Tex. Civ. Stat. art. 4115, 4116, 4118, 4120.

Language stronger than that used in the last article could scarcely have been chosen to express the idea that a railway corporation should be considered an inhabitant of the place in which its public office is located, and 506] of no other. It is true *that article 1195 provides that "suits against a railroad corporation, or against any assignee, trustee, or receiver operating its railway, may be brought in any county through or into which the railway of such corporation extends or is operated;" but it is manifest that, so far as the Federal courts are concerned, this provision is subordinate to the first section of the Act of 1888, requiring civil suits to be brought within the district of which the defendant is an inhabitant. There are doubtless reasons of convenience for saying that a corporation should be considered an inhabitant of every district in which it does business, and so the statutes of the several states generally provide; but the law contemplates that every person or corporation shall have but one domicil, and in the case of the latter, it shall be in that state by whose laws it was created, and in that district where its general offices are located.

This court having held, in the cases heretofore referred to, that a corporation cannot be considered an inhabitant of any state in which it is not incorporated, by reason of the fact that it does business, or in the case of a railroad, that it runs its road through such state, it would seem inconsistent to hold that it is an inhabitant of a district by reason of the same facts, unless the distinction between citizenship and inhabitancy is to be wholly abolished. As said by *Mr. Justice* Story in *Picquet* v. *Swan*, 5 Mason, 35, alienage or citizenship is one thing, and inhabitancy quite another. In the Constitution and laws of the United States citizenship is affirmed of a state, or of the United States; inhabitancy may be affirmed either of the United States, a state, or a subordinate locality. Nor in our view does it make any difference that the plaintiff is an alien instead of a citizen. The provision that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, is of universal application, except, that, if the plaintiff be also a citizen, he may bring it in his own district, if he can obtain service upon the defendant in that district. The purpose of this is, that the plaintiff may have the same advantage of litigation in his own district that the defendant has. An alien, however, is assumed not to 507] *reside in the United States, and hence must resort to the domicil of the defendant. On the other hand, if the suit be against the alien, he may doubtless, under Hohorst's case, be sued in any district, wherein he is found. It was not meant nor intimated, however, in that case that the clause in question had no application to cases where an alien was plaintiff, but only where he was defendant.

On the contrary, both the decision and the *reasoning in that* case were carefully limited to a suit brought by a citizen against an alien. At the conclusion of the discussion of that question, the point decided was stated to be "that the provision of the existing statute, which prohibits suit to be brought against any person 'in any other district than that whereof he is an inhabitant,' is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant." The provision in terms relates to defendants only; and the reasoning that it could not include an alien defendant, because he was not an inhabitant of any district in the United States, has no application to a defendant citizen, who is confessedly and necessarily an inhabitant of some one of those districts.

Irrespective of any statute, such as that of Texas above referred to, the rulings of the state courts generally favor the position that a corporation can only be considered as resident in the jurisdiction in which its principal offices are located, though it may run a railway and have local agents in other jurisdictions. Thus in *Thorn* v. *Central R. Co.*, 26 N. J. L. 121, it was held that in a suit brought against a railroad corporation the venue should be laid in the county where its principal office was located, that being considered its place of residence within the meaning of the statutes. In that case the corporation ran its railway and exercised its franchises both in Essex county and Somerset county, but its principal office was in the former, while the suit was brought in the latter; and upon a motion to change *the [508 venue the court held that the corporation must be deemed to be a resident of Essex county, and the venue should be changed to that county. "The only question," said the court, "is whether a railroad corporation can be said to reside, within the meaning of the act of the legislature, in as many counties as it happens to traverse with its road, or whether, if it can be properly said to have any residence, that residence is not to be taken to be in the county where it keeps its principal office of business. . . . The course of legislation on the subject of corporations would indicate that they are to be considered as having a residence where their office or place of business is located."

In the case of the *Connecticut & P. R. R. Co.* v. *Cooper*, 30 Vt. 476, 73 Am. Dec. 319, it was declared that, where a corporation is not located by the terms of its charter, its residence and location are regarded as being in the place where it keeps its principal office and does its corporate business. The fact that the railway ran through another county was regarded as unimportant and not constituting a residence of the corporation. In the case of the *Western Transp. Co.* v. *Scheu*, 19 N. Y. 408, a corporation organized to navigate the lakes was declared to have its domicil, for the purposes of taxation, in the city or town in which the principal office for managing the affairs of the company was located, as evidenced by its certificate of or-

ganization, although it had an office elsewhere, employing the services of twenty times as many agents, and where a much larger proportion of its moneys was received and disbursed, and where its principal officers resided during the business season. See also *Pelton* v. *Northern Transp. Co.* 37 Ohio St. 450; *Jenkins* v. *California Stage Co.* 22 Cal. 537; *Sangamon & M. R. Co.* v. *Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; and to the contrary, *Sherwood* v. *Saratoga & W. R. Co.* 15 Barb. 650; *Bristol* v. *Chicago & A. R. Co.* 15 Ill. 436; *Stavens* v. *South Pacific R. Co.* 51 Mo. 308.

The judgment of the court below must, therefore, be reversed, and the case remanded for further proceedings in conformity to this opinion.

509] **Mr. Justice* **Jackson** dissented from the opinion of the court delivered in this case:

I cannot concur in the opinion and judgment of the court in this case. The jurisdictional averments set out in the petition are that the plaintiff below was a citizen of the state of Chihuahua, in the republic of Mexico, and that the defendant was a corporation duly organized under the laws of the state of Texas, and was a citizen thereof, with its railway, on which its cars were run and operated, extending from the city of Houston to the city of El Paso, in that state. These averments brought the case directly within the fifth class of civil suits described in the first section of the acts of March 3, 1887, and August 13, 1888, of "a controversy between citizens of a state and foreign states, citizens, or subjects," the matter in dispute being in excess of $2000, exclusive of interest and costs.

The defendant appeared specially and interposed the following plea in abatement:

"That, nevertheless, while it admits that the defendant operates a line of railroad through the county where this suit is pending, and maintains a ticket and freight office and depot, and has an agent on whom process, under the law of Texas, may be served there, the said defendant is not an inhabitant of the judicial district in which the suit is pending; that it is a corporation duly incorporated and existing under the laws of Texas, having its principal office, habitat, and domicil in the city of Houston, Harris county, Texas, and beyond and not within this judicial district, but within the eastern district of Texas."

This presents the question whether the fact that the defendant's principal office is located at Houston in the eastern district of Texas prevents the railway company from being sued by an alien in the United States Circuit Court for the Western District of that State, held at El Paso, the western terminus of the railroad. The opinion of the court answers this question affirmatively, upon the ground that the location of the company's principal office fixes the domicil or residence 510] *of the corporation, so that it cannot be treated or regarded as an inhabitant of any other district in the state of its creation, although by the laws of that state it is liable and subject to be sued in every county through which its lines extend.

This conclusion is rested upon the doctrine announced in *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768], and *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942], that a corporation, incorporated in one state only and doing business in another state, was not an inhabitant of the latter within the meaning of the Judiciary acts, and liable to be sued in the circuit courts of the United States held therein, if objection is properly made.

The present case is clearly distinguishable from these authorities in two respects, first, that the defendant corporation is a citizen of the state of Texas in which it is sued; and, second, that the parties to the controversy are not citizens of different states of the Union, as was the case in those decisions. In other words *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768], and *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942], dealt with cases where the controversy was between citizens of different states, while the present case involves a controversy between an alien and a citizen, and presents the question whether the citizenship of the defendant corporation is coextensive with the line of its road, and the actual exercise of its franchise within the state of its creation, or is limited and restricted to the place where its chief office is located.

Neither the plea in abatement nor the opinion of the court question the fact that the railway company was and is a citizen of the state of Texas, for purposes of Federal jurisdiction at the suit of an alien, but the opinion, in effect, if not in express terms, restricts and confines that citizenship to the county or place in which the principal office of the company is located. There are two serious objections to this conclusion of the court. First, there is no warrant for giving the railway company a domicil or residence confined to one of its termini in the state of its creation; and, second, the present case is not controlled by that provision of the Judiciary acts of 1887 and 1888, which provide that "where the jurisdiction is *found [511 ed only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or defendant."

In respect to the first objection: While the statute of Texas (art. 4120) referred to in the opinion, provides that the principal office of a railway company shall be considered the domicil of such corporation, it is also provided by article 1198, subdivision 21, that suits against any private corporation may be commenced in any county where the cause of action arose, or in which such corporation has an agent or representative, and that "suits against a railroad corporation may also be brought in any county through or into which its railroad extends."

In *St. Louis & S. F. R. Co.* v. *Traweek*, 84 Tex. 65, the supreme court of Texas, in considering this provision of the Revised Statutes, held that a railway company was a private corporation, within the meaning of

the act, and that it could be sued in any county through which the road extended, or in which it had an agent for the transaction of its business, thus extending the residence of the corporation and its liability to be sued beyond the place of its principal office.

In *Bristol* v. *Chicago & A. R. Co.* 15 Ill. 437, it was held that "the residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised. It is present where it is engaged in the prosecution of the corporate enterprise. This corporation has a legal residence in any county in which it operates the road or exercises corporate powers and privileges. In legal contemplation, it resides in the counties through which its road passes, and in which it transacts its business."

The same principal was announced in *Slavens* v. *South Pacific R. Co.* 51 Mo. 308, 310, where it was held that "a residence of a railroad corporation is in any county through which its line of road passes, and in which it has an agent upon whom process can be served."

512] *So, in *Locomotive Engine Safety Truck Co.* v. *Erie R. Co.* 10 Blatchf. 292, 306, it was held that a corporation, if it can be properly said to reside at all, resides in all of the districts of the states creating it, and that the legal existence of the defendant railroad company under its incorporation by the state of New York was coextensive with the territorial limits of that state.

In *Davis* v. *Central R. & Bkg. Co.* 17 Ga. 323, the same question was presented in a somewhat different form. The constitution of Georgia provided that "the inferior courts shall have also concurrent jurisdiction in all civil cases, excepting cases respecting titles to lands, which shall be tried in the county where the defendant resides." By an act passed in 1854, railroad companies of the state were subject to suit in the counties in which injuries to stock, etc., may have been committed. The plaintiff in that case, under this Act of 1854, sued the railroad company in the county in which the injury was committed, and the railroad company filed a plea to the jurisdiction, on the ground that the corporation had its principal office and residence in a different county, and was not, therefore, under the constitution, suable in any other county. But, after a full consideration of the question, the supreme court of Georgia held that the railroad company was a resident of every county through which its line of railroad extended.

The statute of Texas, however, even if it gave to the defendant corporation in this case a residence confined to the locality of its principal office, does not control the question here presented. The opinion proceeds upon the theory that the question of jurisdiction depends upon the residence of the defendant corporation, and is controlled by the first section of the Act of 1887 providing that "where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either the plaintiff or defendant."

This, however, is a misapprehension of the statute. That clause of the act relates alone to suits between citizens of different states of the Union, and has no application to a case *like the present, where the suit is [513 between an alien and a citizen. Suits of the latter character are controlled by the previous portion of the section, as this court has declared in one or more cases.

Thus in *McCormick Harvesting Mach. Co.* v. *Walthers*, 134 U. S. 41, 43 [33: 833, 834], where the court had under consideration that portion of the first section of the acts of 1887 and 1888, which provides "but no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant," gave to the provision the following construction: "The jurisdiction common to all the circuit courts of the United States in respect to the subject-matter of the suit and the character of the parties who might sustain suits in those courts, is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought. Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides."

This construction, thus placed upon these clauses of the act, was recognized and reaffirmed in *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768].

In the recent case of *Re Hohorst*, where the suit was between a citizen and a foreign corporation (decided at the present term of this court, 150 U. S. 653 [37:1211]) it was expressly held that of the two provisions above quoted, "the latter relates only to suits between citizens of different states of the Union, and is, therefore, manifestly inapplicable to a suit brought by a citizen of one of these states against an alien; and the former *of [514 these two cannot reasonably be construed to apply to such a suit." In that case jurisdiction was maintained against the foreign corporation, which was brought before the court by service upon a resident agent of the state of New York.

Following the provision of the Constitution in reference to the extent of the judicial power of the Federal courts, the acts of 1887 and 1888 conferred upon the circuit courts of the United States original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute

exceeds, exclusive of interest and costs, the sum or value of $2000, in certain enumerated cases, the fifth class of such cases being "a controversy between citizens of a state and foreign states, citizens, or subjects." This jurisdiction, based upon the alienage of one party and the citizenship of the other, was not intended to be restricted by the subsequent provisions of the act above referred to. This is clearly announced in the Hohorst case, which went so far as to declare that the subsequent provision of the statute, providing that "no civil suit shall be brought before either of said courts against any person by any original process or proceedings in any other district than that whereof he is an inhabitant," had no application to a suit between a citizen and an alien.

It cannot be doubted that the first section of the acts of 1887 and 1888, standing alone, gave jurisdiction to the circuit courts of a controversy between a citizen of a state and an alien, and that such jurisdiction may be exercised whether the suit is by or against any alien in any circuit court of the United States, sitting in any district thereof, before which the defendant may be legally brought by service or process. Jurisdiction of the pending suit of an alien against the Texas railroad corporation cannot be restricted by the laws of Texas to the circuit court of the district in which the defendant's principal office is located, unless the last clause of section one, referring to suits between citizens of different states of the Union, is applicable to such a case. But, as already shown, that clause is not applicable, because it has reference only to suits between citizens of different states of the Union.

515] *The reasoning on which the opinion in the present case proceeds cannot be reconciled with the Hohorst case, because the grounds on which the alien is denied the right to maintain this suit against the Texas corporation must govern and control when the suit is against the alien.

If, as held in Hohorst's case, the clause that "no civil suit shall be brought before either of said courts against any person by any original process or proceedings in any other district than that whereof he is an inhabitant," has no application to controversies between a citizen and an alien, it is impossible to escape the conclusion that the plea in abatement in the present case presented no valid objection to the jurisdiction of the United States Circuit Court for the Western District of Texas; for the service upon the defendant in the county of El Paso was a valid service, which brought the corporation before the court in a district of the state whereof it was a citizen, within the meaning of the judiciary acts; and, being a citizen of the state in which suit was brought by the alien, the circuit court for the western district acquired jurisdiction over the person of the defendant, just as effectually as jurisdiction was acquired over the foreign corporation in Hohorst's case at the suit of a citizen.

The opinion of the court attempts to distinguish this from Hohorst's case, on the ground that in the latter the suit was by a citizen against an alien, while here the suit is by an alien against a citizen. This is making a purely arbitrary distinction without any substantial difference. The provision of the Constitution and the laws enacted for carrying the grant of judicial power into effect makes no distinction as to the position, whether as plaintiffs or defendants, which may be occupied by either the citizen or the alien. The jurisdiction is given where the alien is a party on one side of the controversy and a citizen of some one state of the Union is on the other side, without regard to which may be plaintiff or defendant. It was never before held or suggested that if the citizen was plaintiff and the alien defendant the jurisdiction would attach, but that if the position of the parties was changed so that the alien would be the plaintiff and the citizen the defendant, the jurisdiction would be defeated.

*If the railroad company, in the present case, were an alien corporation, with its line extending from El Paso, in the western district of the state of Texas, to Houston in the eastern district of that state, and with its principal office at the latter place, a citizen of that state could have sued the corporation in the circuit court of the United States in either the western or the eastern district of that state. [516

So, too, if the position of the parties in this case were changed and the railroad company had sued the alien in the Circuit Court of the United States for the Western District of Texas, and had obtained personal service on him, no question could have been raised as to the jurisdiction of the court. The corporation having a localized existence and citizenship in the western district of the state, is equally liable to the suit of an alien in that district. It cannot properly be held that the principle which applies to a suit against an alien does not apply to a suit by an alien.

The Judiciary Act, in declaring that circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, between citizens of a state and foreign states, citizens or subjects, when the matter in dispute exceeds, exclusive of interest and costs, the sum of $2000, means, as I understand its language, that the circuit courts of the United States shall have the same jurisdiction as the state courts, otherwise it could not be concurrent. Now, the state court at El Paso would have had undoubted jurisdiction of the present suit, and although the United States circuit court, held at the same place, has concurrent (the same jurisdiction) over the subject-matter and the parties, the result of the court's opinion is to deny the jurisdiction of the Federal court. *Postmaster General* v. *Early*, 25 U. S. 12 Wheat. 147, 148 [6: 581, 582].

It cannot be questioned that under the authorities of this court, commencing with *Louisville, C. & C. R. Co.* v. *Letson*, 43 U. S. 2 How. 497 [11: 353], a corporation, for the purpose of Federal jurisdiction, is not merely a resident, but a citizen of the state

517] of its creation, and such *citizenship subjects it to the jurisdiction of the Federal courts in the state of its creation at the suit of an alien.

Corporations have been gradually brought within the provision which extends the judicial power to controversies "between citizens of different states." The ground originally taken by the court was that the corporation's citizenship depended upon, and was determined by, the citizenship of the members of the individual corporators, and while that rule prevailed it was necessary to aver this citizenship of the members on the record.

Thus, as late as *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286 [17: 130], it was said by this court that "a corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it was created, and it must dwell in the place of its creation." And further, that "a corporation is not a citizen within the meaning of the Constitution, and cannot maintain a suit in the courts of the United States against a citizen of a different state from that by which it was created, unless the persons who composed the corporate body are all citizens of that state. In such cases they (the citizen corporators) may sue by their corporate name, averring the citizenship of all the members, and such a suit would be regarded as a joint suit of individual persons, united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against the citizens of another state."

In the subsequent case of *Muller* v. *Dows*, 94 U. S. 444 [24: 207], it was held that "where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence." It was further said in that case that "a suit by or against a corporation, in its corporate name, may be presumed to be a suit by or against citizens of the state which created the corporate body, and no averment or denial is admissible for the purpose of withdrawing the suit from the jurisdiction of the courts of the United States." This is 518] now the established rule on the *subject in respect to jurisdiction in suits by or against corporations in the Federal courts.

The laws of Texas, requiring a railroad corporation to have a principal office where its books shall be kept, can in no way affect the jurisdiction of the Federal courts over such corporate body, founded as it is upon the conclusive presumption that the members of such corporation are citizens of the state which created the body corporate. Having a principal office does not restrict the citizenship of the corporation, or of its members, to the particular locality where such office is kept. Neither does it raise any presumption, prima facie or conclusive, that the members of such corporation, citizens of the state, reside at that particular place.

The members of a corporation, created by a state, being conclusively presumed to be citizens of the same state, so as to confer upon the Federal courts the jurisdiction to entertain suits by or against the corporate body, upon what theory or principle heretofore ever suggested can it be maintained that the state citizenship of the members of such corporation is to be confined or restricted to the locality of the principal office of the corporate body? There is no presumption that this citizenship, "united together in a corporate body, and acting under the authority conferred upon them for the more convenient transaction of business, and consequently entitled to maintain suits in the courts of the United States," has its separate, or aggregate, residence in the particular locality or place where the corporate body keeps its principal office.

The opinion of the court, while compelled to recognize the presumption of the citizenship of the members of the corporate body, on which the jurisdiction of the court over the corporation rests, or upon which it depends, in effect confines that citizenship to a particular locality within the state creating the corporation, when there is no presumption, either of fact or law, that the citizenship composing the corporate body is so restricted. In other words, the legal presumption that the members of the corporation are citizens of the state under which the corporate body is created, is, by the opinion of the court, restricted, so as to give that citizenship a legal residence *confined to [519] the place where the corporate body has its principal office. I know of no authority or principle upon which this can be done.

But suppose the clause that "no civil suit shall be brought before either of said courts against any person by any original process or proceedings in any other district than that whereof he is an inhabitant," can have no application to the suit of an alien against a citizen, or of a citizen against an alien, what is the meaning of the word "inhabitant," as used in that clause of the Act? The word has, of course, a great variety of meanings, dependent upon the connection in which it is used. It is not used in the judiciary acts of 1887 and 1888, or in any previous judiciary act, in a sense that was intended to limit and restrict the jurisdiction conferred by the previous clause of section one. Congress did not mean to broadly confer jurisdiction of a controversy between an alien and a citizen in the first clause of the Act, and then in the subsequent clause restrict that jurisdiction by the word "inhabitant," so as to limit such jurisdiction to the residence of the alien or of the citizen. The meaning of the word, as used in the Judiciary Act, is to be taken in the sense of "citizen" or "alien."

This was the meaning given to the word as it was used in the eleventh section of the Act of 1789. Thus in *Picquet* v. *Swan*, 5 Mason, 35, 46, *Mr. Justice* Story had occasion to construe the meaning of the word "inhabitant," as used in the first Judiciary Act, and said: "But I lay no particular stress upon the word 'inhabitant,' and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties."

In *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768], *Mr. Justice* Gray, speaking for the court, said in effect that the word "inhabitant" in the Act of 1887 was apparently used in no larger or different meaning than "citizen."

If, as already shown, the latter clause of the first section of the Act of 1887, declaring that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the 520]plaintiff or the defendant," has no *application to the present suit; and, if the prior clause, containing the word "inhabitant," is in applicable to suits between an alien and a citizen, as held in Hohorst's case, or if the word "inhabitant" is used in the sense of "citizen," or "alien," then it is clear that the plea in abatement, interposed in the present case by the Texas corporation, is not a valid objection to the jurisdiction of the circuit court.

The opinion of the court, holding to the contrary, rests upon grounds which have no application to this case.

Mr. Justice **Harlan** concurs in this dissent.

EDWARD L. HEDDEN, Collector of the Port of New York, *Plff. in Err.*,
v.
WILLIAM ROBERTSON.

(See S. C. Reporter's ed. 520-527.)

Tariff Act of 1883—duty on cotton cloth.

1. Schedule I, paragraphs 319, 320, 321, of the Tariff Act of 1883, fixes the rate of duty by a classification, based on the number of threads in a square inch of cotton cloth, without reference to the mode by which the count shall be made, and without regard to the incidental ornamentation of the fabric.
2. The ornamentation placed upon the groundwork of the fabric does not change its character as cotton cloth, subject to the countable clause of the statute, and dutiable under paragraphs 319, 320 and 321 of the Act of 1883.

[No. 212.]

Argued Jan. 25, 1894. Decided Feb. 5, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of William Robertson, plaintiff, against Edward L. Hedden, Collector of Customs at the port of New York, for an excess of duties paid by him on importations of cotton cloths. *Reversed and case remanded.*

See same case below, 40 Fed. Rep. 323.

The facts are stated in the opinion.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for plaintiff in error.

Mr. **Edwin B. Smith** for defendant in error.

Mr. Justice **Jackson** delivered the [521 opinion of the court

This is an action brought by William Robertson, the defendant in error, in the United States Circuit Court for the Southern District of New York, to recover from the plaintiff in error, Edward L. Hedden, collector of customs at the port of New York, the sum of $1016.34, alleged to have been illegally exacted in excess of lawful duties on a number of importations of cotton cloths brought into the port of New York in the year 1886 by the defendant in error.

The alleged illegal duties were levied by the collector under the provisions of Schedule I, paragraphs 319, 320 and 321, of the Tariff Act of 1883. These paragraphs are similar, so far as concerns the present question, and the language of 320 alone is necessary to be quoted. It reads as follows:

"On all cotton cloth, not bleached, dyed, colored, stained, painted, or printed, exceeding one hundred and not exceeding two hundred threads to the square inch, counting the warp and filling, three cents per square yard; if bleached, four cents per square yard; if dyed, colored, stained, painted, or printed, five cents per square yard; *Provided*, That on all cotton cloth not exceeding two hundred threads to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, valued at over eight cents per square yard; bleached, valued at over ten cents per square yard; dyed, colored, stained, painted, or printed, valued at over thirteen cents per square yard, there shall be levied, collected, and paid a duty of forty per centum *ad valorem*."

The defendant in error claimed that the cotton cloth imported by him should not be classified under the provisions of either of these paragraphs, but that the goods were dutiable only under paragraph 324, which reads as follows:

"Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not specially *enu [522 merated or provided for in this Act, and corsets, of whatever material composed, thirty-five per centum *ad valorem*."

It was shown by the evidence that the difference in the rate of duty exacted by the collector and that claimed by the importer was $983.93.

The goods in question were called Madras mull, and consisted of woven cotton cloth, the groundwork of which was uniform, and upon which were figures or patterns woven contemporaneously with the weaving of the fabric. These figures or patterns were woven into the groundwork by means of a machine called the Jacquard attachment. When the fabric was taken from the loom it was not in a finished state. The threads forming the weft or filling, furnished by the Jacquard attachment—used entirely for the figures or patterns—loosely connected the figures in a horizontal line, and were raised above the smooth surface of the groundwork. In order to bring out the figures or pattern more distinctly the whole fabric was run through a clipping machine two or more times, and the loose threads, together with the raised parts of the pattern were cut off; so as to make the

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NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

fabric smooth and even. After stating the method of weaving the cloth, and thereafter clipping it, so as to bring out the figures, the manufacturer, Nicol Paton Brown, a witness of the plaintiff below, thus describes the fabric:

"In the groundwork of the fabric as distinguished from the figure or pattern the number of threads to the square inch is uniform throughout the fabric, but when the fabric leaves the loom and before it goes into the clipping machine the count of the fabric as a whole differs from the count after it has been passed through the clipping machine. Before the fabric is put in the clipping machine the number of threads to the square inch in the groundwork of the fabric as distinguished from the colored threads which form the figure is uniform throughout the fabric, so that if in any one of these fabrics a square inch is selected for the purpose of the count, in which there is no figure or part of a figure, the number of threads in that square inch will be the [523] number of threads in any *square inch of the groundwork of the fabric. The terms weft and filling are synonymous, and I have so used them in my testimony. The Jacquard machine gives the indication to the threads of the warp which forms the figure, but the loom is instrumental in leaving both the groundwork and the figure. . . . The weft threads make the figure, but require to be woven in by the warp in order to retain them in position in the fabric when being passed thorough the clipping machine after being woven."

The warp threads, which lock into the weft threads, are continuous from end to end throughout the fabric, but the weft threads after the fabric has gone through the clipping process do not extend continuously from side to side or selvage to selvage.

The number of threads to the square inch are counted by the use of a magnifying glass. In the goods in question the number of threads to the square inch was determined by counting the threads in a square inch of the groundwork alone, and there is no dispute that the groundwork of the cloth, independently of the figures, contained the number of threads designated in the provision of the statute which warranted the duty imposed thereon by the collector.

The defendant in error claimed, however, that the goods imported, although composed of cotton and constituting cotton cloth, were dutiable only at the rate of thirty-five per centum *ad valorem* as "manufactures of cotton not specially enumerated and provided for."

The duties imposed by the collector were paid under protest, and the importer thereafter made due and timely appeal to the Secretary of the Treasury, who affirmed the decision of the collector. The importer within the time prescribed by law brought his action against the collector to recover the duties which he claimed to have paid in excess of the amount required by the Tariff Act of 1883. His complaint set out the fact of the payment of the duties, his protest, and the adverse decision of the Secretary of the Treasury, and that the sum alleged to have been improperly exacted from him had never been repaid.

*The answer of the collector denied [524] that the plaintiff had paid anything in excess of the proper and lawful duty.

Upon the hearing of the cause the court directed the jury to return a verdict for the plaintiff below for the sum of $983.93; upon which verdict the court rendered a judgment for that amount, with interest and costs, aggregating the amount of $1044.06. *Robertson* v. *Hedden*, 40 Fed. Rep. 323. From this judgment the defendant below prosecuted his present writ of error.

The court below while conceding that the goods in question were cotton cloth, within the meaning of that term, held that they did not come within the countable clause of paragraphs 319, 320, 321, of Schedule I, above quoted, for the reason that those provisions of the Tariff Act of 1883 implied that the cloth should be homogeneous, so that the number of threads per square inch will not differ in different parts of the fabric; and inasmuch as this was not true in reference to the figures of the fabric, the goods did not come within the meaning of the above mentioned paragraphs, but came within the provision of paragraph 324 of the same schedule relating to "manufactures of cotton not specially enumerated or provided for."

We think this was not a correct view of the subject. The provisions in question are substantially the same as those of Schedule A of cotton and cotton goods, in section 2504, Revised Statutes, which reads as follows:

"1. Sec. 2504. On all manufactures of cotton, except jeans, denims, drillings, bedtickings, ginghams, plaids, cottonades, pantaloon stuff, and goods of like description, not bleached, colored, stained, painted, or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, and exceeding in weight five ounces per square yard; if bleached, five cents and a half per square yard; if colored, stained, painted, or printed, five cents and a half per square yard, and, in addition thereto, ten per centum *ad valorem*.

"2. On finer and lighter goods of like description, not exceeding two hundred threads to the square inch, counting the warp and filling, unbleached, five cents per yard; if bleached, five and a half cents per square yard; if colored, stained, *painted, or printed, five [525] and a half cents per square yard, and, in addition thereto, twenty per centum *ad valorem*.

"12. Cotton braids, insertings, lace, trimming, or bobbinet, and all other manufactures of cotton, not otherwise provided for, thirty-five per centum *ad valorem*."

In *Newman* v. *Arthur*, 109 U. S. 132 [27:883], these provisions just quoted came before the court for construction and application. The imported goods were cotton Italians, which were twilled and had upon them different figures and designs made in the weaving. The goods had more than one hundred, and less than two hundred, threads to the square inch, counting the warp and filling. It was contended in that case, as in this, that the goods were not dutiable under the countable clause of the statute, but were dutiable as "manufactures of cotton, not otherwise provided for." This court held, however, that

the goods were dutiable under the countable clause, although the number of threads constituting the warp and woof could only be counted by cutting out a square inch of the cloth and counting the unraveled threads. It was sought to show by proof that it was not the custom of merchants to buy and sell such goods, or to determine the value thereof, partially or wholly, by the number of threads to the square inch, as ascertained by means of a magnifying glass or otherwise; but *Mr. Justice* Matthews, speaking for the court, said that such custom would throw no light whatever on the meaning of the law, "because the law fixes the rate of duty by a classification based on the number of threads in a square inch, without reference to the mode in which the count is to be made. It might be quite convenient for dealers not to count the threads except when they could do so without unraveling, but it is a pure conjecture that Congress intended so to stop the count by collectors at the same limit. There appears to be no difficulty in counting threads no matter how fine the fabric, as long as the goods are plain woven; and the necessity of unraveling for the purpose of counting seems to exist only in case of twilled goods; and yet this very Act requires a count of threads in the case of jeans, denims, drillings, bed-tickings, etc., which are **526**] twilled, and bases a *difference of duty upon them according to the number of threads to the square inch so ascertained."

There is no such substantial difference between the Act construed in *Newman* v. *Arthur* and the provisions of the Act of 1883, now under consideration, as would authorize the court to place upon the latter a different construction from that placed upon the former. The practice of determining the number of threads in both cases was the same, and the acts are so nearly alike in their provisions that a different interpretation cannot be given by this court to the last Act, which contains no substantial change in phraseology. *McDonald* v. *Hovey*, 110 U. S. 620 [28:269].

The provisions of the Act of 1883, like the provisions of section 2504, fixes the rate of duty by a classification, based on the number of threads in a square inch of cotton cloth, without reference to the mode by which the count shall be made, and without regard to the incidental ornamentation of the fabric.

We have no authority, where the duty is thus specifically declared, to make an exception, based upon something that might be added to the cloth in the way of figures or patterns placed upon the groundwork of the fabric. The groundwork being cotton cloth, within the terms and provisions of the statute, and the threads thereof being countable, the goods were dutiable, by the express language of the statute, at the rate which was exacted by the collector from the defendant in error.

The mode of weaving the goods and of subsequently clipping the fabric so as to bring out the figures, even though that operation did pare the weft or filling at the figures, does not change the character of the fabric so as to make it a manufacture of "cotton, not specially enumerated or provided for." In other words, the ornamentation placed upon the groundwork of the fabric does not change its character as cotton cloth, subject to the countable clause of the statute, and dutiable under paragraphs 319, 320 and 321 of the Act of 1883.

We are, therefore, of opinion that there was error in the action of the court below, and that the undisputed facts of *the case [**527** establish that a verdict should have been directed for the defendant.

The judgment of the court below is, therefore, reversed, and the case remanded for further proceedings in conformity with this opinion.

Mr. Justice **Brewer** did not hear the argument in this case, and took no part in the decision of the court.

THE NEWPORT LIGHT COMPANY, *Plff. in Err.*, *v.* CITY OF NEWPORT ET AL.

(See S. C. Reporter's ed. 527-542.)

Federal question—order in case of contempt—construction of state judgment—reasons of state court.

1. This court must determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under section 709 of the Revised Statutes.
2. The decision of the highest court of a state ordering a lower state court to discharge a rule for contempt, is not a final judgment nor does it present a Federal question, such as would entitle a party to have the judgment re-examined in this court.
3. The construction which the highest court of a state places upon its own judgment, and under which construction it holds that a party thereto has not been guilty of contempt, presents no Federal question.
4. This court is not called upon to review the correctness or incorrectness of the reasoning on which the state court of appeals reached its conclusion that the order of the lower state court was erroneous.

[No. 1022.]

Submitted Jan. 22, 1894. Decided Feb. 5, 1894.

IN ERROR to the Court of Appeals for the State of Kentucky, to review a judgment of that court, reversing the judgment of the Louisville Law and Equity Court, adjudging the city of Newport and its board of counselmen, guilty of contempt of court, for a viola-

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution*, see notes to Martin v. Hunter, 4: 97. Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question, see note to Hamblin v. Western Land Co. 37: 267.

tion of a decree in a former suit, etc. *On motion to dismiss, dismissed.*

The facts are stated in the opinion.

Messrs. **Wm. Lindsay** and **Chas. J. Helm** for defendant in error, in favor of motion.

Messrs. **R. W. Nelson, E. A. Ferguson, J. B. Foraker, Wm. Stone Abert** and *Lucius Desha* for plaintiff in error, in opposition.

Mr. Justice **Jackson** delivered the opinion of the court:

This case is before the court on motion of defendants in error to dismiss the writ of error for want of jurisdiction.

In 1880 the board of counselmen of the city of Newport, state of Kentucky, entered into a contract with the Newport Light Company to light the streets and public places of that city with gas for a term of twenty-five years to the exclusion of all others, and it was agreed that the company should also have the exclusive privilege of using the streets and public places for the purpose of laying pipes in which to convey the gas.

In 1885, while the Newport Light Company was in the actual performance of its contract, the city of Newport entered into another contract with the Dueber Light Company, by which the latter corporation agreed to undertake to furnish gas for lighting the city of of Newport for a designated period. Before this latter contract was carried into execution, the Newport Light Company instituted suit in the Louisville law and equity court against the city of Newport and the Dueber Light Company to restrain the city, its officers and agents, from carrying into effect the contract with the Dueber Light Company during the existence of the contract between the Newport Light Company and the city of Newport. The court rendered a judgment, which, in substance, enjoined the city from making or carrying into execution a contract with any person for lighting the streets, alleys, public buildings, and public places of the city with gas during the continuance of its contract with the Newport Light Company. The case was carried to the court of appeals of the state of Kentucky, and in May, 1886, the judgment of the lower court was affirmed. *Newport* v. *Newport Light Co.* 89 Ky. 454.

In March, 1887, the city of Newport and the 529]Newport *Light Company entered into a compromise agreement for the settlement of differences between them, one of the provisions of which was that "the amount of gas consumed to be paid for by meter measurement, and that when the city shall determine that a gas post shall be removed from one point to another, or to be discontinued, the gas company shall remove the same at the expense of the city, and if discontinued, the same, including the requisite fixtures for the posts, shall be purchased by said city at their original cost." The compromise, however, was not to be understood as in any way waiving any existing rights or privileges granted the Newport Light Company by the existing contract.

By an act of the legislature, passed in 1890, the Suburban Electric Illuminating, Heating & Power Company, of Newport, Kentucky, was incorporated. Among other provisions of the incorporating act it was provided:

"Sec. 7. The general nature of the business of the corporation shall be the erecting, operating, and maintaining a general system of electrical dynamos and other apparatus for the purpose of generating, furnishing, and selling electricity for light, heat, and power, and for any other purpose that the electric current may be applied in the city of Newport, and furnishing and supplying said city and its inhabitants, and other persons and corporations, and municipal corporations, located in or near said city, with light, heat, and power by the electric current.

"Sec. 8. Said corporation is authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, lighting, and heating, in, under, on, and over the streets, alleys, and by-ways of said city and adjacent thereto: *Provided*, It shall in no way permanently obstruct the use of the same to the public or any individual; and it is hereby required to place in repair any street or highway under which it may lay its conduits, or in which it may erect its poles, or do such other work consistent with the general nature of the business of the corporation; but it may temporarily obstruct the same."

*On April 17, 1890, the legislature [530 amended the charter of the city of Newport as follows:

"The board of councilmen are hereby authorized to contract for lighting the city of Newport and [supplying] its inhabitants in any mode now known or which may hereafter be discovered, and in so doing grant the use of the public places and of the streets of the city for such purposes: *Provided*, That said contract shall not interfere with any existing right or contract.

"Sec. 7. All acts in conflict with this act are hereby repealed.

"Sec. 8. This act shall take effect from and after its passage."

It was assumed by the city of Newport that the act incorporating the Electric Illuminating Company, and the act amending the charter of the city, in connection with the modification of the original contract between the city and the Newport Light Company, operated to suspend or abrogate the injunction granted in the suit of the Newport Light Company against the city of Newport and the Dueber Company; and, acting upon this theory, the city of Newport, after proper resolution had been passed in April, 1891, by its board of councilmen, entered into a contract with the Suburban Electric Illuminating, Heating & Power Company for furnishing the city with electric lights. In connection with this contract the board of councilmen resolved "that the city discontinue the use of the lamp posts now in use for both gas and gasoline, and the gas light thereby furnished, on July 1, 1891, and the city clerk is directed to notify the Newport Light Company thereof, and request that it send the city a statement of the original cost of the lamp posts, including the requisite fixtures thereof."

Thereafter, on July 7, 1891, the Newport Light Company procured a rule from the

Louisville law and equity court to issue against the city of Newport and its board of councilmen to show cause why they should not be punished for contempt of court for a violation of the decree in the former suit of the *Newport Light Co.* v. *Newport and The Dueber Company.*

531] *The affidavit of the president of the Newport Light Company, upon which the rule issued, set forth that the contract entered into by the city of Newport with the Suburban Electric Illuminating, Heating & Power Company to light the city of Newport by electricity for the term of fifteen years, which went into effect on July 1, 1891, and at which time the Electric Illuminating Company commenced to furnish electric light under the contract, was an attempt on the part of the city of Newport to annul and set aside the contract made June 3, 1880, between the city and the Newport Light Company; and that this, with all other acts attending the making of the contract with the Electric Illuminating Company, was a violation on the part of the city of the injunction granted in the former suit of the *Newport Light Co.* v. *Newport and The Dueber Co.*, and in contempt of the authority of the court.

To this affidavit, on which the rule was issued, a demurrer was interposed by the defendants in error, which was overruled, and a response was then filed thereto, in which it was claimed that by the compromise of 1887 it was agreed that when the city should determine that a gas post was to be discontinued, the same, including the requisite fixtures for the post, should be purchased by the city at their original cost, and that this new modified contract was in force from that date until the doing of the several acts complained of, and was in lieu of the original contract, wherein the injunction was granted, and was a novation between the parties of the rights as to the lighting and discontinuance of the lamp posts, gas and gas lights.

The response further stated that after the decree, granting the injunction, had been rendered, the general assembly, by an act passed in 1890, had invested the city of Newport with full power to provide for the lighting of its streets and public places with improved lights, and that the Suburban Electric Illuminating, Heating & Power Company was by the general assembly invested with full power to enter the streets of the city of Newport for the purpose of supplying electric lights to all such persons and corporations, including the city of Newport, as might contract for the same.

532] *It also averred that the city entered into its contract with the Electric Illuminating Company under the authority conferred by these two acts of the legislature.

The Newport Light Company interposed its demurrer and exceptions to the response, which were sustained by the court, its ruling being that "the said response is adjudged insufficient, to which said respondents except, and, the respondents to the rule failing to make further response, it is adjudged that the acts set forth in the affidavit herein constitute a violation of the injunction heretofore granted in these causes, to which said respondents except; and the said respondents are allowed until the twenty-fourth day of July, eighteen hundred and ninety-one, to purge themselves of their contempt herein by setting aside and annulling the contract with the Suburban Electric Illuminating, Heating & Power Company, dated April 23, 1891, and ceasing to light or have lighted the streets, lanes, alleys, public buildings, or places of the city of Newport under said contract; and the said respondents are hereby ordered to rescind and set aside, before the said twenty-fourth day of July, eighteen hundred and ninety-one, the resolution passed on the twenty-third day of April, 1891, to discontinue the lamp posts and the light furnished thereby by the Newport Light Company, to which said respondents except; and the city of Newport is ordered to continue to take gas from the said company for the lighting of the places aforesaid as may be required for that purpose according to the contract between said city of Newport and the said company, dated June third, 1880, to which said respondents except."

From this judgment the respondents below appealed to the court of appeals of the state, which court on March 4, 1893, rendered a decision reversing the judgment of the Louisville law and equity court. The grounds on which the court of appeals rested its reversal of the action of the lower court were that the contract between the Newport Light Company and the city of Newport, which was construed and sustained in 1885, in the suit between those parties, did not preclude the city from making a contract for lighting its streets and *public [533 places with electricity, as long as the contract for furnishing it with gas remained in force; that the legislative enactments, authorizing the city to contract with the Electric Illuminating Company for electric light, did not authorize the violation of the contract between the city and the Newport Light Company, as those acts provided that existing contracts should not be interfered with; that while the Newport Light Company, under its contract, had the right to supply the city with gas, to which alone its contract had reference, it had no unlimited power over the streets for the purpose of lighting them, and had no right to restrict the city in the use of other and superior lights; that its contract with the city authorized it to furnish gas or other light equally as good; that it could not be required to furnish, or the city to receive from it, electric light because its contract had reference to gas only, and could not have been construed in any other way by the court below, or by the court of appeals in the suit between the Newport Light Company and the city of Newport, decided in 1886; that the contention between the two corporations in that litigation was as to which gas light company should furnish the gas, the Dueber Light Company or the Newport Light Company; that that decision did not go to the extent of adjudging that no other company should furnish light of a different character, when, in the judgment of the city, the public interests required it.

It was also held that the original decree under which the injunction was made perpetual was in reference to the supply of gas alone, and could only be considered in that light, and the word "otherwise," used in the

restraining order, could not be construed as giving the Newport Light Company the absolute right to furnish gas or any other light during the existence of its contract with the city; that the Newport Light Company had its legal remedy, and must resort to that remedy if it shall have sustained damages by reason of the refusal of the city to have its streets and public places lighted by gas.

It was accordingly held by the court of appeals "that a court of equity will not interfere [534] to prevent the city from *lighting the streets and public places with electric lights," and that the defendants in error had not violated the injunction in the original suit of the Newport Light Company against the city of Newport and the Dueber Company, and was not guilty of contempt. The court therefore directed the lower court to discharge the rule against the defendants in error.

At the request of the Newport Light Company, the court of appeals certified "that on the trial and hearing of this suit and case in this court the validity of said act of the general assembly incorporating the said Suburban Electric Illuminating, Heating & Power Company, and the authority exercised under the same in making said contract between said appellant and said last named company as aforesaid, was drawn in question on the ground that the same impaired the obligation of the contract between the appellant and the appellee, before mentioned, and was repugnant to the Constitution of the United States, and that the decision of this the highest court of law and equity of this state in which a decision of this suit could be had was in favor of the validity of said last mentioned act of the said general assembly and of the authority exercised thereunder by said appellant in making said contract with said Suburban Electric Illuminating, Heating & Power Company.

A writ of error having been sued out from this court to the court of appeals, the motion is now made by the defendants in error to dismiss that writ on the ground that the case presents no Federal question.

The above certificate of the chief justice of the court of appeals of Kentucky, while entitled to respectful consideration, does not in itself establish the existence of a Federal question in this case, and confer jurisdiction upon this court to re examine the judgment complained [537] of. This court must *determine for itself whether the suit really involves any Federal question which will entitle it to review the judgment of the state court under section 709 of the Revised Statutes. *Parmalee* v. *Lawrence*, 78 U. S. 11 Wall. 36 [20: 48]; *Brown* v. *Atwell*, 92 U.S. 327 [23: 511]; *Gross* v. *United States Mortg. Co.* 108 U. S. 477 [27: 795]; *Felix* v. *Scharnweber*, 125 U. S. 54 [31: 687]; *Roby* v. *Colehour*, 146 U. S. 153 [36: 922]; *Powell* v. *Brunswick County Suprs.* 150 U. S. 433 [37: 1134].

Looking, therefore, as we must, to the record in the cause to ascertain whether any Federal question is really involved, we are clearly of opinion that no such question is presented, and that the writ of error should be dismissed for want of jurisdiction in this court to review the judgment complained of.

It is shown by the record that this was a proceeding in contempt, and the sole question presented in the Louisville law and equity court, as well as in the court of appeals, was whether the defendants in error were in contempt for violating the injunction granted in the suit of the Newport Light Company against the city of Newport and the Dueber Company. The judgment in that suit enjoined and restrained the city of Newport, its officers and agents, "from making or entering into any contract with any person, company, partnership, or corporation, for the lighting of the streets, lanes, alleys, public buildings, or places of the city with gas or otherwise, and from discontinuing the taking of gas from the Newport Light Company for the lighting of said places in such quantities as may be required for that purpose until the further orders of the court."

The contract entered into by the city with the Suburban Electric Illuminating, Heating & Power Company for lighting the city with electric lights was held by the Louisville law and equity court to be a violation of the original injunction of that court, and so the city, its mayor, and board of councilmen were adjudged to be in contempt. The court of appeals of Kentucky reversed this order and remanded the cause to the lower court, with directions to discharge the rule. In making this order the court of appeals placed a construction *upon the original decree granting the [538] injunction, which limited its operation to a restraint upon the city against entering into any contract with other parties for the lighting of the city with gas, and held that the word "otherwise," used in the restraining order, could not be construed as giving to the Newport Light Company the absolute right to furnish gas and any other light during the existence of its contract with the city.

The court of appeals of Kentucky had an undoubted right to construe its own decision rendered in the case of the Newport Light Company against the city of Newport and the Dueber Company, and to declare what the judgment rendered therein really meant, and to define the scope thereof. This neither raised nor presented any Federal question whatever.

The contention on the part of the plaintiff in error really comes to this: That the state court of appeals erred in ordering the Louisville law and equity court to discharge the rule for contempt. This is, in fact, the only question presented in the case. The reasons assigned by the court of appeals for reversing the action of the lower court did not of themselves present any Federal question; nor are they subject to review here. If this court could hold that the plaintiff in error was entitled to reverse the judgment of the court of appeals, the result would be that its mandate would issue to the court of appeals of Kentucky, directing that court to set aside its judgment of reversal and thereby affirm the order of the Louisville law and equity court, which would have the effect of holding the defendants in error guilty of contempt, and subject them to punishment as directed by that court.

This court has never gone to the extent of holding that such an order as is here sought to be reviewed, was either a final judgment of

the highest court of a state, or presented a Federal question, such as would entitle a party to have the judgment re-examined here. The case presented both in the lower court and the appellate court of Kentucky was simply whether the acts of the defendants in error 539 |could be properly *considered a violation of the injunction granted in the original cause.

In *McMicken* v. *Perin*, 61 U. S. 20 How. 135 [15: 854], the plaintiff in error was attached for contempt in refusing to make a conveyance after a tender and deposit of money in court had been made in compliance with a mandate of this court. He appealed to this court, and it was held that the proceedings in contempt involved no new question or decision, but were the ordinary means of enforcing the original decree, and in no sense was it a final decree upon which an appeal could be sustained. It was, in effect, the same as ordering an execution on a judgment of law which had been affirmed on error and remanded for execution to the circuit court.

In *Hayes* v. *Fischer*, 102 U. S. 121, 122 [26: 95, 96], an injunction was granted. Complaint was made against Hayes for a violation thereof, and proceedings were instituted against him for contempt, which resulted in an order by the court that he pay a certain fine, and stand committed until the order was obeyed. To reverse this order, Hayes sued out a writ of error to this court, which the defendant in error moved to dismiss, on the ground that such proceedings in the circuit court could not be re-examined by this court. The court, speaking by *Mr. Chief Justice* Waite, said: "If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 20 U. S. 7 Wheat. 38 [5: 391], and the rule then established was followed as late as *New Orleans* v. *New York Mail SS. Co.* 87 U. S. 20 Wall. 387 [22: 354.]" The court held that it had no jurisdiction, and dismisssed the writ of error.

No decision of this court has gone so far as to hold that the construction which the highest court of a state places upon its own judgment, and under which construction it holds that a 540 |*party thereto has not been guilty of contempt, presents a Federal question, such as would confer jurisdiction upon this court to re-examine or reverse such a judgment.

Again, if we look to the grounds upon which the court of appeals reversed the action of the lower court in the matter of contempt, we find that they involve no Federal question. That court held that the amendment of the city's charter did not authorize the violation of its contract with the Newport Light Company. While it was held that the city could contract for electric lights in addition to gas, if it chose to pay for both, it could not dispense with the use of gas under its contract with the Newport Light Company without violating its contract with that company; and, further, that if the contract for lighting the city by means of electricity had the effect of displacing the use of gas, the city would be responsible in damages for any breach of its contract with the Newport Light Company, just as it would be if it were to discontinue the use of gas without adopting any other means or method for lighting the city. It is clear that no such breach of the city's contract with the Newport Light Company would in any way bring the case within the operation of the Federal Constitution relating to the impairment of the obligation of contracts. It would be simply a violation of contract obligations such as involved no Federal question whatever.

Furthermore, it is not and cannot be questioned that the legislature of Kentucky had authority to incorporate the Suburban Electric Illuminating, Heating & Power Company, and to authorize it to contract with the city of Newport to light that city by electricity. It is equally clear that the legislature had the right, in amending the charter of the city of Newport, to authorize it to make a contract with the Electric Illuminating Company to light the city by electricity, providing that such contract should not interfere with the rights covered by any existing contract.

Under these two acts the city proposed to make a contract with the Electric Illuminating Company, not in lieu of its contract with the Newport Light Company but in addition thereto. *Now, whether that contract violated [541 the existing one between the city and the Newport Light Company was a question which could not be decided without the presence of the Suburban Electric Illuminating, Heating & Power Company, and that company was in no sense a party to the original suit, nor to the contempt proceedings had thereon; and the validity of its contract with the city was in no way involved in the contempt proceedings.

Again, the court of appeals construed the contract between the city and the Newport Light Company to mean that the latter had the right to supply the city with gas alone, and possessed no exclusive privilege of supplying other and different lights; and, further, that the city was not confined or restricted by that contract to the use of gas for lighting purposes, but had the authority, particularly under the legislation of 1890, to adopt electric lights, that it might, therefore, lawfully contract for the latter description of lights, and that such a contract for a different mode of lighting from that of gas would not, in and of itself, violate its contract with the Newport Light Company. But if that were otherwise, the Newport Light Company would have its claim against the city for damages for adopting such electric lights if they effected the discontinuation of the use of gas. In other words, if the adoption of the electric lights involved a breach of the city's contract with the Newport Light Company, that company had its remedy at law by an action for damages.

It was further held by the court of appeals that there was nothing in the legislation of 1890, amending the charter of the city, or in incorporating the Suburban Electric Illumi-

nating, Heating & Power Company, which in any way violated the contract between the Newport Light Company and the city, and that if any contract entered into between the city and the Electric Illuminating Company had the effect of abrogating or violating the contract between the city and the Newport Light Company, it did not arise from the legislation of the state, but from the act of the city, which act, at most, could not be anything more than a breach of its contract with the Newport Light Company, for which the lat-[542] ter had its *appropriate remedy by way of damages; that the subject-matter of the two contracts on the part of the city (one with the Newport Light Company and the other with the Suburban Electric Illuminating, Heating & Power Company) related to two different methods of lighting the city; and that the latter contract was not covered by the gas contract.

This court is not called upon to review the correctness or incorrectness of this reasoning on which the court of appeals reached its conclusion that the order of the lower court was erroneous. The judgment of the court of appeals, whatever may have been the reasons assigned therefor, merely reversed the action of the lower court, declaring that the defendants in error were in contempt, and directed that court to discharge the rule against them.

For the foregoing reasons we think no Federal question is presented by the writ of error, and the motion to dismiss the same is hereby granted.

UNITED STATES, *Appt.*,
v.
CHARLES F. HUTCHINS.

(See S. C. Reporter's ed. 542-545.)

Mileage of naval officer—travel within the United States—nearest traveled route.

1. A naval officer traveling under orders from San Francisco to New York, by the way of the Isthmus of Panama, is to be considered as traveling under orders in the United States, for which he is entitled to mileage.
2. The question whether travel is abroad or within the United States should be determined by the termini of the journey rather than by the route actually taken.
3. Where a naval officer is ordered to proceed from one place in the United States to another, and the government for its own purpose requires him to proceed by sea rather than by land, he is entitled to his mileage by the nearest traveled route.

[No. 729.]

Submitted Jan. 8, 1894. Decided Jan. 29, 1894.

APPEAL from a judgment of the Court of Claims, in favor of Charles F. Hutchins, a naval officer, for his fees for mileage, while traveling under orders from San Francisco to New York. *Affirmed.*

NOTE.—*As to extra pay or compensation to officers, see* note to United States v. Macdaniel, 8: 567.

Statement by *Mr. Justice* **Brown:**

This was a petition for mileage from the navy yard at Mare Island, in the harbor of San Francisco, to New York.

The Court of Claims found the following to be the facts:

(1) The claimant is an officer in the navy, to wit, a lieutenant commander. He was serving as such on the 22d day of May, 1890, when he was ordered to proceed by steamer from San Francisco to New York *via* the Isthmus of Panama, in charge of a detachment of men.

*(2) He did so proceed from San Fran-[543 cisco to New York, a distance of 6186 statute miles, and paid his own transportation and expenses, which were afterwards refunded to him, in the sum of ninety-seven dollars ($97) but he was not allowed or paid anything on account of mileage.

(3) The distance from San Francisco to New York by the shortest usually traveled route is 3266 miles.

Upon the foregoing facts, the court held as matter of law that claimant was entitled to recover mileage at the rate of eight (8) cents a mile for 3266 miles, deducting therefrom the sum of $97 paid to him for expenses; and a judgment was accordingly rendered in his favor for the sum of $162.28, and the United States appealed.

Mr. **J. E. Dodge,** *Assistant Atty. Gen.*, and **Charles C. Binney** for appellant.

Mr. **John Paul Jones** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

By Rev. Stat. § 1566, "An allowance of ten cents" (subsequently reduced to eight cents, 19 Stat. at L. 65) "a mile may be made to officers in the naval service, . . . for traveling expenses when under orders," but by the Act of August 5, 1882 (22 Stat. at L. 286) "officers of the navy traveling abroad under orders . . . shall receive, in lieu of the mileage now allowed by law, only their actual and reasonable expenses," etc.

The same Act and every subsequent Navy Appropriation Act provides for the traveling expenses of naval officers under orders in the following words: "For mileage to officers while traveling under orders in the United States, and for actual personal expenses of officers while traveling abroad under orders."

The sole question presented in this case is whether a naval *officer traveling under [544 orders from San Francisco to New York, by the way of the Isthmus of Panama, is to be considered under the acts above cited as traveling *abroad*, for which he is to be entitled only to his actual expenses, or as traveling under orders *in the United States*, for which he is entitled to eight cents per mile. Why officers are allowed by Congress mileage in one case and not in the other is not altogether clear, but probably the view suggested by the court below is correct, viz, that traveling at home is ordinarily for such short distances, and the disbursements therefor are generally for such petty amounts, that to save the necessity of the officer keeping a minute account of each outlay and the accounting officers of the Treasury passing upon the reasonableness of every small item, it was

thought better to allow the officer a fixed mileage by the shortest traveled route, leaving him at liberty, under certain circumstances, and where his orders are not to proceed by a particular route, to choose his own. For instance, if he were ordered from Boston to New Orleans, and for his own purposes he elected to travel by way of Chicago, it might be difficult for him to determine what his expenses would have been if he had taken the direct route, whereas the computation of mileage by such route would be an easy matter.

We think the Court of Claims was correct in its conclusion that the question whether travel is abroad or within the United States should be determined by the termini of the journey rather than by the route actually taken. Instances are frequent where an officer ordered from one place to another within the United States is obliged to perform the whole or a substantial part of his journey either upon the high seas or upon foreign soil. If, for example, he were ordered from Buffalo to Detroit, or from New York to Galveston by sea, it would be sticking in the bark to speak of either as "travel abroad," because in one case the most direct route lies through Canada, and in the other the voyage is made upon the high seas. While the voyage in question was not literally "in the United States," it was such within the intent and spirit of the enactment. 545] An officer is to be understood as *traveling *abroad* when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port. But where he is ordered to proceed from one place in the United States to another, and the government for its own purpose requires him to proceed by sea rather than by land, he ought not thereby to be disentitled to his mileage by the nearest traveled route. It may be conceded in this case that, if the petitioner had been ordered to Panama, and upon arrival there had found orders awaiting him to proceed to New York, he would have been entitled only to his expenses; but where he is ordered from San Francisco to New York by way of Panama, he should be considered as making but a single journey, and that within the United States. Whether, if his actual expenses in such case had exceeded his mileage by the nearest route, he would have been entitled to such expenses, is not presented by the record in this case, and we express no opinion upon the point.

There was no error in the judgment of the court below, and it is, therefore, affirmed.

J. S. LEWIS, *Plff. in Err.*,
v.
A. C. MONSON, Executor of DAVID WITHERS, deceased.

(See S. C. Reporter's ed. 545-550.)

Tax laws—payment of taxes.

1. The determination of any questions arising under the tax laws is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded.
2. Where the owner of lands intended in good faith to pay all the taxes on them, but made a mistake, relying on the old descriptions and map, not knowing that a new map had been followed in making the assessment, and thereby omitted to pay the taxes on part of his lands, a sale of such lands for the taxes and the tax deed are invalid.

[No. 385].

Submitted Jan. 22, 1894. Decided Feb. 5, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of Mississippi, to review a judgment in favor of the defendant, David D. Withers, in an action brought by J. S. Lewis, plaintiff, to recover possession of a tract of land, in Wilkinson county, Mississippi; the defendant having died, A. C. Monson, has been substituted as executor in his place. *Affirmed.*

*Statement by *Mr. Justice* **Brewer:** [546

This was an action brought by the plaintiff in error, plaintiff below, against David D. Withers to recover possession of a tract of land containing 80 acres, and described as follows: Lots 5 and 6, of section 22, township 3, range west, Wilkinson county, Mississippi. A jury was waived and the case tried by the court. Findings of fact were made and a judgment entered thereon in favor of the defendant, which judgment is now before us on error. Since the record was filed in this court, the defendant Withers has died, and the suit been revived in the name of his executor. The facts are these: Plaintiff's title was based on a tax deed, and the single question in the case is as to the sufficiency of that deed, for the defendant was in possession by his tenants, and, as is not disputed, held prior thereto the fee simple title. The tax deed was for the delinquent taxes of the year 1887, which amounted to $4.84, while the land was of the value of $6000. At the time of the entry and patent of these lands in 1833 and 1835 they were included in lots 3 and 4, of section 22, and the whole section, as shown by the tract book of original entries, was subdivided into four lots: Lot 1 containing 88 acres; lot 2, 62 acres; lot 3, 80 acres, and lot 4, 120 acres. And such was the description in all the defendant's muniments of title. In 1884 an act passed the legislature authorizing the board of supervisors to purchase a new and complete set of maps of the several townships of the county. In pursuance of this law and soon after its passage new maps were purchased and deposited in the chancery clerk's office. On the map of this township, section 22 was subdivided into six lots: Lot 1, containing 88 acres; lot 2, 62 acres; lot 3, 40 acres; lot 4, 80 acres; lot 5, 40 acres; and lot 6, 40 acres. The findings do not show the form of the assessment prior to 1875, but in that year, under a special act of the legislature, it was assessed to the defendant as section 22, containing 350 acres. In 1879 it was assessed

NOTE.—*As to power of states to tax*, see note to Scholey v. Rew, 23:99, and to Dobbins v. Erie County, 10:1022.

As to sale of lands for taxes; strict compliance with statute necessary, see note to Williams v. Peyton, 4:518.

to him as lots 2, 3 and 4, section 22, etc., containing 262 acres. In 1883, in the same way, 547] *except that the number of acres was stated at 260. In 1887, for the first time, the section was assessed as follows: Lot 1, 88 acres, to S. A. Fetters, agent; lots 2, 3 and 4, 182 acres, to D. D. Withers; and lots 5 and 6, 80 acres, to "Unknown." The pencil memorandum of defendant's lands sent by his agent to the assessor as a return of assessment was not in the form required by the assessment laws of Mississippi, but was accepted as sufficient by the assessor. That memorandum describes the land as lots 2, 3 and 4, and as containing, respectively, 62, 80 and 120 acres. Without the knowledge of defendant or his agents, the assessor, in making up the assessment roll, changed the description to conform to that in the new map. On the roll, as finally prepared, lots 2, 3 and 4 appear as valued at $9 per acre, and lots 5 and 6 at $1 per acre.

The minutes of the board show no order changing the assessment of D. D. Withers, or the acreage of lots 2, 3 and 4, and none in regard to the said lands or lots 5 and 6 of said section, other than the general one receiving and approving the assessment roll of 1887, which describes lots 2, 3 and 4 as containing 182 acres, and lots 5 and 6, 80 acres.

The defendant had no notice of the new subdivision of the section into six lots, or of the procuring of new maps by the board of supervisors, or of the change in the form of description from that previously used in all deeds, in assessments, and in the memorandum of return made by his agent.

In reference to the payment of taxes the court found as follows:

"The defendant's agent and attorney went to the county seat of Wilkinson county to pay defendant's taxes, because, upon a statement to defendant by the collector, the amount was much less than in former years and the acreage of his land largely reduced, and for the purpose of clearing up and adjusting the whole matter. He discovered lands of defendant not included in the list furnished to the assessor by Swan, the defendant's agent, and paid on them. He applied to the collector then engaged in attendance on the chancery court, who informed him that he did not think he had paid on all of defendant's lands, and introduced him 548]to a Mr. Miller, his *deputy, there in his office, as one more familiar with the lands in the county than any one else, and requested defendant's agent to make himself at home and use Miller until he got everything straight. In comparing the tax receipts of previous years with the tax receipt then in his possession said agent noticed the discrepancy in the acreage of lots 2, 3 and 4, and called Miller's attention to it. Miller said he would see about it, stepped to the corner of the room and got the township maps, footed up the acreage of lots 2, 3 and 4, and found it 182 acres. Defendant's agent asked him how he accounted for the acreage, and he replied, Withers had been paying for years on land in the Mississippi river, but added, referring to the maps, these are the latest surveys and are, I suppose, correct.

"Defendant's agent then looked at the map and saw lots 5 and 6 thereon and asked, Who do lots 5 and 6 belong to? Miller replied, I don't think they belong to Withers. Said agent replied, They are very close to Withers' land, and Miller answered, He did not think they were ever assessed to Withers, and did not know whether they belonged to him or not. Said agent was doubtful about it, went back; made a thorough examination of Withers' muniments of title to see if lots 5 and 6 belonged to him. It was the first time he had ever heard of said lots 5 and 6, and he had no knowledge of the discrepancy nor of the map beyond the fact that said Miller told him it was the latest survey of the particular tract. When he saw a survey of lots 5 and 6, and could find no such lots in defendant's muniments of title, he concluded the land did not belong to Withers, but that they were water lots that belonged to no one, and that there was no land there. Said agent was then and there ready and willing to pay the taxes on lots 5 and 6, but he did not tender the money for the taxes and demand a tax receipt as prescribed by law, because he did not think the lands belonged to Withers. He first ascertained his mistake when this suit was brought."

In addition it may be noticed that the list of lands furnished by the defendant's agent contained over thirty tracts, aggregating several thousand acres.

Mr. **W. L. Nugent** for plaintiff in error.

Messrs. **Marcellus Green,** *Thomas J. Carson* and *S. S. Calhoon* for defendant in error.

Mr. Justice* **Brewer delivered the [549 opinion of the court:

No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the state for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the state has power to prescribe, and peculiarly and vitally affecting its well being. The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded.

Turning to the decisions of the supreme court of Mississippi, we find in *Richter* v. *Beaumont*, 67 Miss. 285, a case almost precisely like the one at bar. It is true that the question there presented arose upon the admissibility of testimony, but the views expressed by the court in its opinion, if accepted as controlling, as they must be, are decisive of this case. In that case there was an old and a new map; an old and a new description. The owner in possession paid according to the old, and in ignorance of the new, intending to pay on all the land that he owned. But by

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 32: 63.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

the new map and description the number of lots in the section had been increased, and the tract described by the added number was sold for non-payment of taxes. The lot thus numbered and sold was a part of the land belonging to him, and upon which he was intending and attempting to pay all the taxes. The court, by *Mr. Justice* Campbell, thus disposes of the question: "By the ancient division of the town and designation of lots, lot six embraced the parcel of land sued for in this action, 550] which *parcel is, by the modern map, a part of lot seven. The defendant (appellant) was in 1883, and prior and subsequent thereto, in the actual possession of lot six, and he gave the description of his land to the assessor as lot six, and it was so assessed, he intending and understanding that lot six extended eastward according to the ancient order, so as to include that, by the new map, is part of lot seven. He paid the taxes on lot six, and lot seven, not being paid on, was sold for taxes. It does not appear that the appellant had ever done anything in recognition of the new map, or that he knew that the new map was conformed to by the assessor in assessing lots in Woodville. It may be inferred from the fact of his residence in the town, and the recognition by citizens and officials of the new map, that he was aware of it, and that the assessor was governed by it in assessing. If so, he should not be allowed to defeat the assessment and sale by his secret understanding or purpose. A mental reservation of the owner cannot be permitted to defeat assessment. On the other hand, if, until a recent date, lot six was understood to embrace what, by a new map, is part of lot seven, and the owner and occupant was governed by the former description in giving it in to the assessor, and did not know, and should not have known, that the assessor would deal with it as designated by the new map, he should not lose his land."

Little need be added to this extract from the opinion in that case. The suggestion there made a mental reservation is out of this case by the finding of the court. That the owner was not bound, as matter of law, to take notice of the new map is shown by that decision, and if he was not bound to know, and did not in fact know, and paid under a mistake, relying upon the ancient descriptions and the old map, and intended in good faith to pay all his taxes, then clearly within the scope of that decision, the sale was invalid, and the deed fails. Upon the authority of that case the judgment of the court below is affirmed.

551]*EDWARD H. LEWIS, *Plff. in Err.*, *v.* GEORGE C. WILSON ET AL.

(See S. C. Reporter's ed. 551-555.)

Reduction of verdict—evidence thereof.

1. Where a party having a verdict consents to its reduction, he cannot, after the entry of judgment based thereon, the receipt of payment, and an acknowledgment of satisfaction, repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that under the law the court had no power to disturb the verdict.

2. A party may in open court consent to a reduction of the verdict in his favor, and the noting of his consent by the clerk in the journal entry of the judgment is sufficient evidence thereof, and cannot be questioned.

[No. 208.]

Submitted Jan. 17, 1894. Decided Feb. 5, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida, to review a judgment in favor of Edward H. Lewis, plaintiff, against George C. Wilson *et al.*, defendants, for damages for libel. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

The facts in this case are as follows: Plaintiff in error, the plaintiff below, brought suit against the defendants to recover damages for libel. At the December (1887) term and on April 3, 1888, a jury returned a verdict in his favor, assessing the damages at $10,000. On April 16, 1888, the defendants filed a motion for a new trial on the ground that the damages were excessive. After the entry of this motion the following appears of record:

"Edward H. Lewis *v.* Geo. C. Wilson *et al.* } December Term, 1887. Libel.

"After the rendition of the verdict of the jury in this action and a motion by the defendants for a new trial on the ground that the damages assessed by the jury were excessive, the court said from the bench that the defendants' motion would be granted unless the plaintiff consents to reduce the verdict from ten to five thousand dollars, as the verdict is clearly excessive, if we eliminate all damages which arose out of the claim of the plaintiff for special damages to his business in Texas, and to which he could lay no claim under the pleading and evidence in this case, and which the court withdrew from the consideration of the jury.

*"And the court further said if the [552 plaintiff consents to reduce the verdict to five thousand dollars in pursuance of this suggestion, and the defendants decline to pay the judgment for that amount and desire to prosecute a writ of error to the Supreme Court, then, in that event, judgment will be entered up for the sum of ten thousand dollars upon the verdict of the jury.

"And afterwards, to wit, on the 23d day of April, A. D. 1888, comes the plaintiff, by his attorney, and enters his consent to the reduction of the verdict of the jury to the sum of five thousand dollars.

"And then come the defendants, by their

NOTE.—*As to conclusiveness of judgment*, see note to Bank of United States v. Beverly, 11: 75.

As to judgment in admiralty, when conclusive, and when may be re-examined, see note to Williams v. Armroyd, 3: 392.

As to parol evidence to explain judgment by showing issues litigated and decided, and grounds of decision, see note to Miles v. Caldwell, 17: 755.

As to what defects are cured by verdict; what not, see note to Wills v. Claflin, 23: 490.

As to when a verdict may be directed by the court, see note to Grand Chute v. Winegar, 22: 174.

attorney, and submit to pay the said five thousand dollars.

"It is, therefore, considered by the court that the plaintiff, Edward H. Lewis, do have and recover of and from the defendants Geo. C. Wilson, John N. C. Stockton; Mumby, Stockton & Knight, composed of Frank W. Mumby, John N. C. Stockton, and Raymond D. Knight; Wightman and Christopher, composed of William S. Wightman and John G. Christopher; A. W. Owens, Daniel G. Ambler, George F. Drew, J. M. Lee, C. B. Smith, George Hughes, J. M. Barrs, Samuel Barton, F. P. Fleming, J. R. Tysen, C. E. Garner; John N. C. Stockton, trustee: F. W. Hawthorne, C. P. Cooper, J. S. Smith, Jr., James P. Taliaferro, James M. Fairlie, A. W. Cockrell, Charles W. Da Costa, W. B. Young, J. R. Campbell, T. E. Stribling, Roswell H. Mason, B. M. Baer, A. W. Barrs, J. E. T. Bowden, James M. Kreamer, and Telfair Stockton, the sum of five thousand dollars and his costs, taxed at $644.25.

"Comes now the plaintiff, Edward H. Lewis, by H. Bisbee, his attorney, on this 27th day of April, A. D. 1888, and acknowledges the receipt of five thousand six hundred and forty-four and $\frac{25}{100}$ in full satisfaction of this judgment. H. Bisbee, Atty."

Thereafter this motion was filed:

553] *"In the Circuit Court of the United States, Northern District of Florida.

"Edward H. Lewis *v.* Geo. C. Wilson *et al.*	Libel. Damages, $100,000.

"Comes now the plaintiff, by H. Bisbee, his attorney, and moves the court for a judgment on the verdict of the jury in the case, rendered on the 9th day of April, A. D. 1888, *nunc pro tunc* as of the date when it should have been rendered, according to law and the practice of this court, on the following grounds:

"1st. Because said verdict was and is a legal verdict, duly rendered, and has not been set aside or modified by the court, nor in pursuance of any act or order of the court, or any judge thereof acting within its or his jurisdiction.

"2d. That all proceedings in this suit had and entered on the files of the court, its minutes, dockets, and records, of the date of said verdict are null and void for want of jurisdiction of the court.

"3d. Because the defendants could not make the motion for a new trial, which they did make on the 16th day of April, A. D. 1888, on the ground that the laws of the state of Florida prohibited defendants from making a motion for a new trial after the expiration of four days from the date of the verdict rendered on the 9th day of April, A. D. 1888, and any action had on such motion was not within the jurisdiction of the court.

"4th. Because plaintiff cannot apply to the Supreme Court for a writ of mandamus to order the court to enter judgment upon a verdict until a motion for such judgment has been refused, nor can defendant take a writ of error until a judgment on the verdict is entered up.

"If the court enter judgment *nunc pro tunc on the verdict* for $10,000, plaintiff hereby offers and hereby binds himself to credit upon said judgment the sum of $5000, paid by defendants on plaintiff's claim, April 27, A. D. 1888.

"Nov. 29, 1889.

"H. Bisbee, Atty. for Plaintiff.

"To Messrs. A. W. Cockrell & Son, of counsel for defendants."

*This motion was overruled after ar- [554 gument of counsel, and exceptions taken. Thereupon the record was removed into this court by a writ of error, the writ being signed April 23, 1890, just two years after the date of the judgment.

Mr. **H. Bisbee** for plaintiff in error.

Mr. **Wilkinson Call** for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

This is a most extraordinary case. Nearly two years after a judgment has been formally entered, and after the plaintiff has received payment and acknowledged full satisfaction, he comes in and moves the court to enter a new judgment in double the amount, and on the denial of such motion brings the matter here on error. His contention is that, under the practice in Florida, the court had no power to grant a new trial upon a motion made more than four days after a verdict; that the recital of all that the court said from the bench, as to the amount of damages, and its purpose to grant a new trial unless the plaintiff consented to a reduction, must be disregarded as not properly matter for entry on the journal and not brought into the record by any bill of exceptions, and so a mere memorandum made by the clerk, without any significance in the case (*Young* v. *Martin*, 75 U. S. 8 Wall. 354 [19:418]); that no consent to a reduction of the verdict, signed by the plaintiff or his counsel, appears on the record, and that the statement by the clerk is insufficient evidence of the fact. Therefore, the court had no power to enter a judgment for $5000; and the receipt of full satisfaction thereof was only a receipt of half of the amount legally due, and does not prevent the plaintiff from proceeding to recover the other half.

It is unnecessary to express any opinion as to the right of a party to file a motion for a new trial more than four days after the verdict; nor to decide whether the court can or cannot—in the absence of any motion, of its own volition—whenever it sees that a grievous wrong has been done by a *verdict, set it aside. [555 For there is nothing which prevents a party having a verdict from consenting to its reduction; and if he does so, though only for the sake of obtaining immediate satisfaction of his claim and to avoid further delay and further litigation, he may not, after the entry of judgment based thereon, the receipt of payment, and an acknowledgment of satisfaction, repudiate the whole transaction, and obtain a judgment for the full amount of the verdict, on the ground that under the law the court had no power to disturb the verdict. A man may continue litigation and stand on his rights, or he may waive some of his rights for the sake of terminating litigation; and when advised that

a new trial will be granted, unless he consents to a reduction of the verdict, he may, although knowing that the court has no power to grant such new trial, and that if it be done an appellate court will correct the error, consent to a reduction and let judgment be entered for the amount of the verdict thus reduced. And if he does so, he is concluded by his action in that respect. Here not only was there a consent on his part to a reduction, but also what amounted to a waiver of errors by the defendants, and a promise to pay the amount of the judgment. There was full consideration for the agreement, and judgment was entered in accordance therewith. Thereafter he received payment and acknowledged full satisfaction. The litigation is at an end by his consent, and he cannot reopen it. There is no force in the contention of the plaintiff that no written consent to the reduction of the verdict, signed by himself or attorney, was filed in the case. None was necessary. A party may in open court consent to such reduction, and the noting of his consent by the clerk in the journal entry of the judgment is sufficient evidence thereof, and cannot be questioned.

The judgment will be affirmed.

556]*NEW YORK & NEW ENGLAND RAILROAD COMPANY, *Plff. in Err.*, *v.* TOWN OF BRISTOL ET AL.

(See S. C. Reporter's ed. 556 571.)

Motion to dismiss—Connecticut law as to grade crossings—legislative power—amending charter—natural justice—14th Amendment—legislative control of a railroad—unjust discrimination—police power of state.

1. A motion to dismiss a writ of error may be united with a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.
2. The Connecticut act of June 19, 1889, relating to grade crossings, is within the exercise of the police power of the state.
3. The inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals.
4. A power reserved to the legislature to alter, amend or repeal a charter, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.
5. This court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved.
6. The 14th Amendment cannot be availed of, as a means of bringing to this court the abstract opinions of every unsuccessful litigant as to the justice of the state decision against him or of the merits of the legislation on which such a decision may be founded.
7. Railroad corporations are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression, and the state has power to exercise this control through boards of commissioners.
8. There is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest.
9. The adjudication of the highest court of a state that a law enacted in the exercise of the police power of the state, to protect the public from danger, is valid, will not be reversed by this court, on the ground of an infraction of the Constitution of the United States.

[No. 917.]

Submitted Jan. 8, 1894. Decided Feb. 5, 1894.

IN ERROR to the Supreme Court of Errors of the State of Connecticut, to review a judgment of that court, affirming the judgment of the Superior Court of the County of Hartford, in that state, affirming the order of the railroad commissioners of the state of Connecticut, that the grade crossing of the New York & New England Railroad Company's road, and the highway known as Main street, in the town of Bristol, be removed, and directing the alterations, changes and removals to be made and done, and that they be executed by the railroad company at its sole expense. On motion to dismiss or affirm. *Affirmed.*

See same case below, 62 Conn. 527.

Statement by *Mr. Chief Justice* **Fuller:**

By section 1, of an act of the legislature of Connecticut, approved June 19, 1889, entitled "An Act Relating to Grade Crossing" (Conn. Pub. Laws, 1889, chap. 220, p. 134) it was provided:

"The selectmen of any town, the mayor and common council of any city, the warden and burgesses of any borough within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway may bring their petition in writing to the railroad commissioners therein alleging that public safety requires an alteration in such crossing, its ap-

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NOTE.—*As to what is "due process of law,"* see note to Pearson v. Yewdall, 24: 436.

As to constitutionality of ex post facto laws, see note to Calder v. Bull, 1: 648, and to Sturges v. Crowninshield, 4: 529.

As to vested rights defined; how affected by subsequent repeal of statute, see note to Fletcher v. Peck, 3: 162.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

557] proaches, *the method of crossing, the location of the highway or crossing, the closing of a highway crossing and the substitution of another therefor, not at grade, or the removal of obstructions to the sight of such crossing, and praying that the same may be ordered; whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such notice thereof as they judge reasonable to said petitioner, the railroad company, the municipalities in which such crossing is situated, and to the owners of the land adjoining such crossing and adjoining that part of the highway to be changed in grade; and after such notice and hearing, said commissioners shall determine what alterations, changes, or removals, if any, shall be made and by whom done; and if the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they shall order the expense of such alterations or removals, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration, or removal ordered under the authority of this act, to be paid by the railroad company owning or opening the railroad in whose behalf the petition is brought; and in case said petition is brought by the selectmen of any town, the mayor and common council of any city, or the warden and burgesses of any borough, they may, if the highway affected by said determination was in existence when the railroad was constructed over it at grade, or if the layout of the highway was changed for the benefit of the railroad after the layout of the railroad, order an amount not exceeding one quarter of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the petition is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway: if, however, the highway affected by such order last mentioned has been construc ed since the railroad which it crosses at grade, the railroad commissioners may order an amount not exceeding one half of the whole 558] *expense of such alteration, change or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the application is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway. The directors of every railroad company which operates a railroad in this state shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this state, which crossings, so to be removed, shall be those which in the opinion of said directors are among the most dangerous ones upon the lines operated by it, and if the directors of any railroad company fail so to do, the railroad commissioners shall, if in their opinion the financial condition of the company will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

Section 2 related to alterations of highways, one fourth of the expense of which was to be paid by the state. Appeal from any decision of the commissioners under the act was specifically provided for.

On September 2, 1890, the railroad commissioners of the state of Connecticut made an order reciting that whereas the directors of the New York & New England Railroad Company had failed to remove or apply for the removal during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and whereas in their opinion said directors should have applied for the removal of the grade crossing of their road and the highway known as Main street in the town of Bristol; and directing a hearing upon the matter, with notice to the railroad company, the town, and the owners of land adjoining that portion of the highway. The hearing was had on several days, from September 24, 1890, to February 11, 1891, and the commissioners, being of opinion that the financial condition *of the company warranted [559 the order, and that public safety required it, ordered the crossing removed, and determined and directed the alterations, changes, and removals to be made and done, and that they be executed by the railroad company at its sole expense, including damages occasioned thereby. The company appealed from this order to the superior court of the county of Hartford, the petition for appeal setting forth various grounds therefor, which by voluntary amendment and by direction of the court were reduced to these:

"1. On the 2d day of March, 1891, the railroad commissioners of this state made an order to said company, requiring the removal of the grade crossing of its railroad and Main street in the town of Bristol, a full copy of which, marked Exhibit 'A,' is to be annexed hereto and filed herewith.

"1*a*. Said company is not, and at the date of said order was not of sufficient ability to execute the work of making the changes required by said order, and its financial condition does not, and did not then warrant the making of such an order.

"11. Said company cannot meet the expenses of executing the said order of the railroad commissioners, and have enough income left to pay its fixed charges, including interest on its bonds issued as aforesaid and outstanding, and the dividends on its preferred stock issued as aforesaid, and maintain its railroad in good and proper condition.

"12. If the law under which the proceedings were had, as set forth in said order, justifies said order, then it and said law are void as violating both the Constitution of the United States and the constitution of the state of Connecticut, in that said order impairs the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on their bonds and dividends on their preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently, and further in

that it takes the property of said company without just compensation and without due process of law and denies to it the equal protection of the laws.

560] *"16. Said order, herein appealed from, was not an order necessary for the safety of the public.

"17. Said order should have been so made, and proceedings leading up thereto had, if at all, under section 2 of the act of 1889, as that one quarter of the expense of its execution should be paid by the state."

Paragraph 1a was substituted for paragraphs 2 to 10 inclusive, struck out by the court as mere statements of evidence.

The court, upon hearing the parties, the evidence not being preserved in the record, but it appearing that evidence was adduced by the company as to its earnings, expenses, and property, made findings of fact that the railroad company was of sufficient ability to execute, and that the financial condition of the company warranted, the order of the commissioners for the removal of the grade crossing in question; that the crossing was among the most dangerous upon the line of the railroad, and that the safety of the public required its removal; and affirmed the order appealed from. Thereupon the company prosecuted an appeal to the supreme court of errors of Connecticut and assigned various errors to the rulings of the superior court in amendment of the petition on appeal, and in the exclusion and admission of evidence; and afterwards amended its reasons for appeal by adding the following:

"8. Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, instead of holding that it was no law, because contrary to the constitution of this state in that it takes the property of the plaintiff without just compensation and without due process of law.

"9. Because the court erred in holding that the statute under which said proceedings were had, as set forth in said order of the railroad commissioners, justified said order, and in therefore affirming said order, and overruling the plaintiff's claim that said statute was void as violating the Constitution of the United States, in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock, by making 561] it impossible for said company *to pay the interest on its bonds and dividends on its preferred stock, as agreed between them and said company, and yet maintain and operate its railroad efficiently, and further in that it took the property of said company without due process of law, and denied to it the equal protection of the law.

"10. Because the court erred in overruling the claim of the plaintiff in the 12th paragraph of its petition of appeal, that said statute was void, and was no justification of said order, under the Constitution of the United States and the 14th Amendment thereof.

"11. Because the judgment does not meet the issues. There is no general finding of the issues against the plaintiff, and no finding as to issues raised in paragraphs 11 and 17."

The supreme court of errors of Connecticut decided that there was no error in the judgment appealed from (*New York & N. E. R. Co's App.* 62 Conn. 527) and thereupon a writ of error was allowed to this court, and errors assigned as follows:

"1. The said court erred in holding that the statute under which were had the proceedings as set forth in the order of the railroad commissioners exemplified in the record of the case justified said order, and in affirming the judgment of the superior court in and for Hartford county affirming said order, and in overruling plaintiff's claim that said statute was void as violating the Constitution of the United States in that it impaired the obligation of the contracts made by said company with the holders of its bonds and preferred stock by making it impossible for said company to pay the interest on its bonds and dividends on its preferred stock as agreed between them and said company, and yet maintain and operate its railroad efficiently; and further, in that it took the property of the company without due process of law and denied to it the equal protection of the law.

"2. The said court erred in overruling the claim of the plaintiff in error in the 12th paragraph of its petition of appeal from the railroad commissioners to the Supreme Court as set forth in the record, that said statute was void and was no justification of said order under the Constitution of the United States and the 14th Amendment thereof."

Messrs. **Henry C. Robinson** and **John J. Jennings**, for defendant in error, in favor of motion:

The writ of error should be dismissed upon motion.

McNulty v. *California*, 149 U. S. 645 (37: 882); *Walston* v. *Nevin*, 128 U. S. 578 (32: 544); *Clark* v. *Hancock*, 94 U. S. 493 (24: 146); *Mieas* v. *Williams*, 104 U. S. 556 (26: 842); *Swope* v. *Leffingwell*, 105 U. S. 3 (26: 939); *Whitney* v. *Cook*, 99 U. S. 607 (25: 446); *Hinckley* v. *Morton*, 103 U. S. 764 (26: 458); *Roby* v. *Colehour*, 146 U. S. 153 (36: 922).

No contract is impaired by the governmental acts of a legislature in exercising the police powers of the state.

Stone v. *Mississippi*, 101 U. S. 814 (25: 1079); *Boyd* v. *Alabama*, 94 U. S. 645 (24: 302); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989); *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Baker* v. *Boston*, 12 Pick. 184, 22 Am. Dec. 421; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *Barlow* v. *Gregory*, 31 Conn. 261; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *New Orleans Gas Light Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 672 (29: 516, 524).

The statute is not offensive to the 14th Amendment.

Barbier v. *Connolly*, 113 U. S. 27 (28: 923); *Mugler* v. *Kansas*, 123 U. S. 623 (31: 205); *Budd* v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *Woodruff* v. *Catlin*, 54 Conn. 295; *Westbrook's App.* 57 Conn. 104; *New York & N. E. R. Co's App.* 58 Conn. 532; *Doolittle* v. *Branford*, 59 Conn. 402; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 9; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 65.

The plaintiffs in error cannot conplain of inequality of legal protection.

Minneapolis & St. L. R. Co. v. *Emmons*, 149 U. S. 367 (37: 771); *Davidson* v. *New Orleans*, 96 U. S. 104 (24: 619); *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229).

The enactment of the statute under discussion was an exercise of the police powers of the state.

Woodruff v. *Catlin*, 54 Conn. 277; *Middletown* v. *New York, N. H. & H. R. Co.* 62 Conn. 492; *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U. S. 528 (24: 786); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 392 (35: 1054).

The act is clearly within the power of the legislature as amendatory of the charter of the company.

Worcester v. *Norwich & W. R. Co.* 109 Mass. 103; *Union Pac. R. Co.* v. *United States "Sinking Fund Cases,"* 99 U. S. 700 (25: 496); *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347 (28:173).

Messrs. **Charles E. Perkins** and *Edward D. Robbins*, for plaintiff in error, in opposition to motion:

Unless the record shows a color of right to a dismissal, the court will not consider the motion to affirm.

Whitney v. *Cook*, 99 U. S. 607 (25: 446); *Independent School Dist. of Ackley* v. *Hall*, 106 U. S. 428 (27: 237); *Hinckley* v. *Morton*, 103 U. S. 764 (26: 458); *Davies* v. *United States*, 113 U. S. 687 (28: 1149); *New Orleans* v. *Louisiana Const. Co.* 129 U. S. 45 (32: 607); *Amory* v. *Amory*, 91 U. S. 356 (23: 436).

On the merits the following cases are cited: *Santa Clara County* v. *Southern Pac. R. Co.* 118 U. S. 394 (30:118); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (33: 970); 3 Inters. Com. Rep. 209; *Lent* v. *Tillson*, 140 U. S. 316 (35: 419); *Soon Hing* v. *Crowley*, 113 U. S. 703 (28: 1145); *Murdock's Case*, 7 Pick. 328; *Murdock* v. *Phillips Academy Trustees*, 12 Pick. 262.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The reasons of appeal to the Supreme Court were filed October 7, 1892, and assigned errors in the action of the superior court in dealing with various paragraphs of the petition of appeal from the order of the railway commissioners, and in the admission and exclusion of evidence, but contained nothing questioning the constitutionality of the law under which the proceedings were had until they were amended December 17, 1892, by adding the paragraphs raising that question. This tardiness in bringing the contention forward is perhaps not to be wondered at in view of the repeated adjudications of the supreme court of Connecticut sustaining the constitutionality of similar laws, as well as of this particular statute, and of the rulings of this court in reference to like legislation.

A motion to dismiss the writ of error for want of jurisdiction is now made, and with it is united a motion to affirm on the ground, in the language of our rule (Rule 6, ¶ 5) "that, although the record may show that this court has jurisdiction, it is manifest that the writ or appeal was taken *for delay only or that [566 the question on which the jurisdiction depends is so frivolous as not to need further argument."

We agree with counsel that this court has jurisdiction, but are of opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said under the circumstances to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm.

It must be admitted, that the Act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power of the state. And, as before stated, the constitutionality of similar prior statutes as well as of that in question, tested by the provisions of the state and Federal constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff* v. *Catlin*, 54 Conn. 277; *Westbrook's App.* 57 Conn. 95; *New York & N. E. R. Co's App.* 58 Conn. 532; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63; *Doolittle* v. *Branford*, 59 Conn. 402; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 1; *Middletown* v. *New York & N. H. & H. R. Co.* 62 Conn. 492.

In *Woodruff* v. *Catlin*, the court, speaking through Pardee, *J.*, said in reference to a similar statute: "The Act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense *shall be paid by either corporation [567 alone or in part by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

And as to this Act, the court, in 58 Conn. 532, on this company's appeal, held that grade crossings were in the nature of nuisances which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legis-

tive power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 [24:989]; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 [24:1036]; *Barbier* v. *Connolly*, 113 U. S. 27 [28:923]; *New Orleans Gas Light Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 [29:516]; *Mugler* v. *Kansas*, 123 U. S. 623 [31:205]; *Budd* v. *New York*, 143 U. S. 517 [36:247], 4 Inters. Com. Rep. 45. And also that "a power reserved to the legislature to alter, amend or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476 [27:408, 412]; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347 [28:173]; *Pennsylvania College Cases*, 80 U. S. 13 Wall. 190 [20:550]; *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454 [21:204].

568] *The charter of this company was subject to the legislative power over it of amendment, alteration or repeal, specifically and under general law. 5 Conn. Priv. Laws, pp. 543, 547; 7 Conn. Priv. Laws, p. 466; 8 Conn. Priv. Laws, p. 353; Conn. Special Laws, 1881, p. 64; Conn. Stat. 1875, 278; Conn. Gen. Stat. 1888, § 1909; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 1.

The contention seems to be, however, that the legislature, in discharging the duty of the state to protect its citizens, has authorized by the enactment in question that to be done which is, in certain particulars, so unreasonable and so obviously unjustified by the necessity invoked as to bring the act within constitutional prohibitions.

The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the laws.

And further, that the order, and, therefore, the law which was held to authorize it, amounted to a taking of property without due process, in that it required the removal of tracks many feet from their present location, involving the destruction of much private property; the excavation of the principal highway and those communicating; and the building of an expensive iron bridge, all at the sole expense, including damages, of the company, without a hearing as to the extent of the several responsibilities of the company and the town, or as to the expense of the removal of this dangerous crossing as compared with other dangerous crossings, or of the degree of the responsibility of the company for the dangers existing at this particular crossing. The objection is not that hearing was *not required and accorded, **[569]** which it could not well be in view of the protracted proceedings before the commissioners and the superior court and the review in the supreme court, but that the scope of inquiry was not as broad as the statute should have allowed, and that the particular crossing to be removed was authorized to be prejudged.

It is further objected that the supreme court had so construed the statute that upon the issue whether the financial condition of the company warranted the order, no question of law could be raised as to the extent of the burdens, which a certain amount of financial ability would warrant, and thus in that aspect by reason of the large amount of expenditure which might be, and as matter of fact was in this instance required, the obligation of the contracts made by the company with the holders of its securities was impaired. Complaint is made in this connection of the striking out by the superior court of certain paragraphs of the petition on appeal, held by that court and the supreme court to plead mere matters of evidence, and the decision by the supreme court that all the material issues were met by the findings. Those issues were stated by the court to be whether or not the company's directors had removed or applied for the removal of a grade crossing as required by the statute; whether or not the grade crossing ordered to be removed by the commissioners was in fact a dangerous one which the directors ought to have removed, or for the removal of which the directors ought to have applied; and whether or not the company's financial condition was such as to warrant the order.

And upon these premises it is urged in addition that the right to amend the charter of the corporation was not controlling because that did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them, for purposes of management and control, under a corporate organization created by special law, was, nevertheless, private property, not by virtue of the charter, but "by force of the most fundamental and general laws of modern society, which from their nature necessarily protect alike and fully all legitimate acquisitions of the members of the *community, no matter whether held **[570]** by them as individuals, or partnerships, or associations, or corporations."

The supreme court of Connecticut held that the statute operated as an amendment to the charter of the railroad corporations affected by it; that as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional in authorizing the commissioners to determine their own jurisdiction, and that, besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the state to abolish grade crossings as rapidly as could be

reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent.

We are asked upon the grounds above indicated to adjudge that the highest tribunal of the state in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the state of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

As observed by *Mr. Justice* Miller in *Davidson* v. *New Orleans*, 96 U. S. 97, 104 [24: 616, 619], the 14th Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." To use the language of *Mr. Justice* Field in *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512, 520 [29: 463, 465]: "It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures."

571] *The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 [32: 352] *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174 [32: 377]; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 [32: 585]; *Dent* v. *West Virginia*, 129 U. S. 114 [32: 623]; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 [35: 1051]; *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364 [37: 769].

Judgment affirmed.

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*UNITED STATES, *Appt.*, [572
v.
ANNIE M. LA TOURRETTE, Executrix of JAMES A. M. LA TOURRETTE, deceased.

(See S. C. Reporter's ed. 572-576.)

Longevity pay of chaplains in the army.

Under the Act of March 2, 1867, chaplains actually serving as such at military posts of the United States, hold the office and rank of chaplain in the army, and consequently are in the military service, within the meaning of the Longevity Pay Act.

[No. 1087.]

Submitted Jan. 22, 1894. Decided Feb. 5, 1894.

APPEAL from a judgment of the Court of Claims, in favor of Annie M. La Tourrette, Executrix of James A. M. La Tourrette deceased, against the United States, for longevity pay of said deceased, as a chaplain in the army, from February 7, 1885, to April 26, 1887, inclusive. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was a petition filed in the Court of Claims by James A. M. La Tourrette, and prosecuted after his death by his executrix, to recover the sum of $333.75, for longevity pay as a chaplain in the Army from February 7, 1865 to April 26, 1867, inclusive. The facts found by the Court of Claims were in substance as follows:

On February 6, 1865, the claimant was elected and appointed chaplain for the post of Fort Columbus, New York Harbor, by the council of administration at the post, under the provisions of the Act of July 5, 1838, chap. 162, § 18; and of the supplementary acts of July 7, 1838, chap. 194, § 2; March 2, 1849, chap. 83, § 3, and February 21, 1857, chap. 55, § 2. 5 Stat. at L. 259, 308; 9 Stat. at L. 351; 11 Stat. at L. 163.

The action of the post council was approved by the Secretary of War; and the claimant's appointment or employment as post chaplain was subsequently announced in a special order of the War Department of May 19, 1866, as follows: "Fort Colombus, New York Harbor, is announced as a chaplain post, to date from February 6, 1865, in place of Fort Wood, New York Harbor, discontinued as such from that date. The Reverend James A. M. La Tourrette is announced as post chaplain to Fort Columbus, New York Harbor, from February 6, 1865. He will, in connection with his present duties at Fort Columbus, perform also those of Fort Wood, as heretofore."

*Under that appointment he served [573 until April 6, 1867; but received no commission; it did not appear that he was required to take an oath of office; his employment was not for any

NOTE.—*As to extra pay or compensation to officers,* see note to United States v. Macdaniel, 8: 587.

fixed or definite time; and he was paid for services on the certificate of the post commander.

Under the provisions of the Act of March 2, 1867, chap 145, § 7 (14 Stat. at L. 423) he was nominated by the president to the Senate for appointment as post chaplain, March 18; confirmed by the Senate, April 3; commissioned accordingly by the President, April 6, to rank from April 3; and formally accepted the appointment, April 27, 1867. On March 23, 1890, he was retired from active service, as post chaplain, under the Act of June 30, 1882, chap. 254. 22 Stat. at L. 118.

His service as chaplain under the Act of July 5, 1838, together with his service as post chaplain under the Act March 2, 1867, was continuous and uninterrupted from February 6, 1865, to March 23, 1890.

He was not borne on the Army Register before 1867. In the registers from 1867 to 1878, inclusive, his name appears, with the date of "original entry into service," April 3, 1867. The registers from 1879 to 1881, inclusive, refer to that date as "date of commission;" and these registers, as well as those for 1882 and since, record the beginning of his service as chaplain of a post, February 6, 1865, and as post chaplain, April 3, 1867, accepted April 27, 1867.

From April 27, 1867, to March 23, 1890, he was paid his salary, with longevity pay, computed for the most part by crediting him with his service from February 6, 1865; but since February 6, 1885, with his service from April 27, 1867, only. If he is to receive credit for the time from February 6, 1865 to April 26, 1867, the longevity pay due him is the sum of $333.75, more than he has received.

On these facts, the Court of Claims decided as a conclusion of law, "that the decedent, during his services from February 6, 1865, to April 26, 1867, was in the Army of the United States, within the meaning of the law," and therefore entitled to recover the sum claimed, and gave judgment accordingly. The United States appealed to this court.

Messrs. **J. E. Dodge,** *Assistant Atty. Gen.,* and **Charles C. Binney** for appellant.

Mr. **Joseph W. Stryker** for appellee.

574] **Mr. Justice* **Gray** delivered the opinion of the court:

This claim for longevity pay is based on the provision of the Act of July 15, 1870, chap. 294, § 24, reenacted in the Revised Statutes, by which "there shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service." 16 Stat. at L. 320; Rev. Stat. § 1262.

"Service" in this statute evidently, as both parties admit, means military service; and the question is whether the claimant was in that service from February 6, 1865, to April 26, 1867.

This question is best answered by reading the provisions of previous acts of Congress, referred to by counsel, which are as follows, the significant words being printed below in italics.

By the Act of July 5, 1838, chap. 163, § 18, "it shall be lawful for the officers composing the council of administration at any post, from time to time, to *employ* such *person* as they may think proper *to officiate as chaplain,* who shall also perform the duties of schoolmaster at such post; and the *person so employed* shall, on the certificate of the commanding officer of the post, *be paid* such sum *for his services,* not exceeding forty dollars *per month,* as may be determined by the said council of administration, *with the approval of the Secretary of War;* and *in addition to his pay,* the said chaplain shall be allowed four *rations* per diem with *quarters and fuel.*" 5 Stat. at L. 259.

By the supplementary Act of July 7, 1838, chap. 194, "the *posts at which chaplains* shall be allowed shall be limited to the number of twenty, and shall be first *approved by the Secretary of War,* and shall be confined to places most destitute of instruction." 5 Stat. at L. 308.

By the Act of February 11, 1847, chap. 8, § 7, "during the war *with Mexico, it shall [575 be lawful for the officers composing the councils of administration of the several regiments constituting a brigade, either regular or volunteer, in the service of the United States, to employ some proper person to officiate as chaplain to such brigade:" "Provided that the *chaplains now attached to the regular army and stationed at* different *military posts* may, at the discretion of the Secretary of War, be required to repair to the Army in Mexico whenever a majority of the men at the posts where they are respectively stationed shall have left them for service in the field; and should any of *said chaplains refuse* or decline to do this when ordered so to do by the adjutant general, *the office of such chaplain shall be deemed vacant, and the pay and emoluments thereof be stopped.*" 9 Stat. at L. 124.

By § 3 of the Act of March 2, 1849, chap. 83, entitled "An Act to Provide for an Increase of the Medical Staff, and for an Additional Number of *Chaplains of the Army of the United States,*" the provisions of the Act of 1838 "are extended so as to authorize the employment of ten additional *chaplains for military posts of the United States.*" 9 Stat. at L. 351.

By § 1, of the Act of February 21, 1857, chap. 55, entitled "An Act to Increase the Pay of *Officers of the Army,*" the pay of commissioned officers of the Army is increased; and by § 2, it is provided "that the Secretary of War be authorized, on the recommendation of the council of administration, to extend the *additional pay herein provided* to any person serving as *chaplain at any post of the Army.*" 11 Stat. at L. 163.

By the Act of July 17, 1862, chap. 200, § 9, "the compensation of *all chaplains in the regular or volunteer service* or army hospitals shall be one hundred dollars per month and two rations a day when on duty;" "*chaplains employed at the military posts called 'chaplains' posts'* shall be required to reside at the posts; and *all chaplains in the United States service shall be subject to such rules in relation to leave of absence from duty as* are prescribed for *commissioned officers* of the United States Army *stationed at such posts.*" 12 Stat. at L. 595.

By the Act of April 9, 1864, chap. 53, § 1, 576]"the *rank of chaplain* without *command *in the regular and volunteer service of the United States* is hereby recognized;" by § 2, the pension Act of July 14, 1862, chap. 166, is "so amended as to include *chaplains in* the regular and volunteer forces of *the Army;*" and by § 3, "it shall be the duty of *chaplains in the military service of the United States to make* monthly *reports* to the adjutant general of the Army, *through the usual military channels, of the* moral condition and general history of the regiments, hospitals or *posts to which they may be attached.*" 13 Stat. at L. 46.

These acts, all of which were passed before the period in question, unequivocally show that such chaplains as the claimant was during that period—being employed, by the officers composing the council of administration at the post, to officiate as chaplain, and actually serving as such, at a military post of the United States, with the approval of the Secretary of War; receiving monthly for their services a sum approved by him, and allowed, in addition to their pay, rations and quarters; subject to the same rules as to leave of absence from duty as commissioned officers of the Army; required to report monthly to the adjutant general of the Army through the usual military channels; and called indifferently "chaplains attached to the regular army and stationed at military posts," or "chaplains of the Army of the United States"—should be considered, according to the understanding and intention of Congress, as holding the office and rank of chaplain in the Army, and consequently as in the military service, within the meaning of the longevity pay Act.

Moreover, the Act of March 2, 1867, chap. 145, § 7 (under which the claimant was afterwards commissioned) by providing that "the post chaplains now in service," as well as those thereafter to be appointed, should be commissioned by the President, distinctly recognized that the former were already in "service," which, in this Act, as in the longevity pay Act, clearly means the military service of the United States. 14 Stat. at L. 423.

Judgment affirmed.

577]*UNITED STATES, *Plff. in Err.*,
v.
MICHEL THOMAS.

(See S. C. Reporter's ed. 577-586.)

Murder committed on Indian reservation—certificate of division of opinion—irrelevant matter—motion for new trial—school lands—Indian treaty—jurisdiction over Indian reservation.

1. Lands within the limits of an Indian reservation in Wisconsin are within the jurisdiction of the Federal courts, and an indictment for the murder of one Indian by another, committed on such lands, is triable in such courts, although committed on a section granted to the state for school purposes.
2. Although the entire record is sent up on a certificate of division of opinion, this court will only consider such parts as relate to the question certified; the irrelevant matter will be disregarded.
3. Generally there can be no certificate of division in opinion on a motion for a new trial, as that rests in the discretion of the court, but where on such a motion the question of the jurisdiction of the court, or one which goes to the merits, arises, this court will consider it on such certificate.
4. The title of the state to the school lands ceded by Congress is subject to any prior right of occupation of the Indians.
5. By the treaty with the Chippewas of 1842, the right of the Indians to occupy the lands therein reserved still remains, and the title of the state to 16th section of every township for the use of schools is subordinate to the rights of occupancy of the Indians.
6. The United States have full authority to pass laws to punish all offenses committed by or against Indians on an Indian reservation.

[No. 668.]

Argued Oct. 20, 1893. Decided Feb. 5, 1894.

ON A CERTIFICATE of division in opinion between the Judges of the Circuit Court of the United States for the Western District of Wisconsin, on the question of its jurisdiction to try the defendant, Michel Thomas, upon an indictment against him for the murder of David Corbin, within the limits of the Indian reservation in Wisconsin. Said murder having been committed in section 16, of public land ceded to the state for school purposes. *Question answered in the affirmative.*

Statement by *Mr. Justice* **Field:**

This case comes before us on a certificate of division of opinion between the Judges of the Circuit Court for the Western District of Wisconsin, on the question of its jurisdiction to try the defendant upon the indictment against him. The defendant, an Indian of the Chippewa tribe, was indicted in that court for the murder of one David Corbin, a half breed, of the same tribe, within the limits of La Court Oreilles Indian reservation, in Wisconsin, and was convicted. The evidence tended to show that the offense was committed in section sixteen in a township in Sawyer county of that state, embraced within the reservation; and on that ground the counsel for the defendant moved to set aside the verdict, and for a new trial, contending that by the provisions [578 of the Enabling Act by which Wisconsin was admitted into the Union, section 16 in every township in Wisconsin was ceded to the state for school purposes, and could not, therefore,

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* see note to Worcester v. Georgia, 8: 483.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

As to jurisdiction in the United States Supreme Court, where are drawn in question statutes, treaty or Constitution, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679; and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

be subsequently taken by the United States and set off as a part of an Indian reservation.

La Court Oreilles reservation, in the state of Wisconsin, was set apart for the Chippewa tribe of Indians, and embraces three townships in area, but by reason of the extension of several meandered lakes, covers about seven townships. The reservation was approved by the treaty of 1854. The survey of the lands of this portion of the state had not then been made and the townships which compose the reservation were not surveyed until the year 1855, and the lands were not selected until 1859. The state sold, in 1865, section 16 to parties who cut off the timber but otherwise made no use of the land except for the erection of a cabin whilst removing the timber. The land had been used by the Indians continuously, from time immemorial previous to its reservation, and after it was denuded of timber they continued to hunt and travel over it.

Section 9 of the Act of Congress making appropriations for the Indian Department for the fiscal year ending June 30, 1886, provides: "That immediately upon and after the date of the passage of this Act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny *within any territory of the United States, and either within or without any Indian reservation*, shall be subject therefor to the laws of such territory, relating to such crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another In-579] dian or other person *within the *boundaries of any state of the United States, and within the limits of any Indian reservation*, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The motion to set aside the verdict and for a new trial was argued before the circuit judge and the district judge, composing the court, and they differed in opinion. The circuit judge held that the title to the township upon which the offense was committed was in the state of Wisconsin from the time of its admission into the Union, and consequently could not afterwards be used by the United States as a part of an Indian reservation. He was therefore of opinion that the court had no jurisdiction over an offense committed in that township, under the Act of Congress upon which it assumes to take jurisdiction of this case. The district judge, on the contrary, held that the right of occupancy of the Chippewa Indians to the land composing the reservation had never been divested, and that until so divested the title to section sixteen could not vest in the state of Wisconsin under its Enabling Act; and, further, that, independent of any question of title, it was competent for the United States, having set apart certain lands within the state to be used as an Indian reservation, to provide for the protection of the Indians thereon and for the punishment of offenses committed against them, and therefore he was against granting the motion.

The certificate sent to us is as follows: "The motion of the defendant to set aside the verdict and for a new trial, etc., came on to be argued, and was argued by the counsel for the respective parties, and upon the hearing it occurred as a question, 'Whether as the evidence shows that the murder was committed upon section sixteen, in township forty north, of range eight west, in the state of Wisconsin, said section sixteen being within the outside limits of the said Indian reservation, and having been previously, in 1859, settled, platted, and set apart by the United States as a part and parcel of said reservation and ever after occupied by said Indians as such, though claimed *and sold by the state of Wisconsin as [580 and for a part of the school land previously ceded to said state by Act of Congress, such murder was committed within the limits of said reservation within the meaning of section 9 of chapter 341 of the Act of Congress, approved March 3, 1885, so as to give the Federal courts jurisdiction of the offense.' On which question the opinions of the judges were opposed, which said opinions are herewith transmitted." And the court added: "The court considering, as the whole case now turns upon the question of jurisdiction in this court and no proceedings can be had until that question is determined, and that the same question would arise in any subsequent trial, that it is not one addressed to the discretion of the court but is proper to be certified to the Supreme Court for its opinion; whereupon, on motion of the United States, by their attorneys and counsel, it is ordered that the point upon which the disagreement hath happened as herein stated under the direction of the judges, including the entire record of proceedings in court, the evidence on the trial, and statement of facts as stipulated by the attorneys herein, also copy of the said indictment, be, and the same hereby are, made a part of the transcript certified under the seal of this court, according to the request of the United States by their counsel, to the Supreme Court, that the matter may be finally decided."

Mr. **Lawrence Maxwell,** *Jr., Solicitor Gen.*, for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The judges of the circuit court have sent up with the certificate of their division of opinion the entire record of the proceedings in that court, including the evidence on the trial and the agreed statement of facts by counsel. Such matters outside of the certificate, not constituting part of the pleadings in the case or of the public statutes or treaties bearing upon the point certified, cannot be considered by us in disposing *of the question presented. [581 The division of opinion arose on the motion to set aside the verdict and for a new trial, the judges differing as to the jurisdiction of the court under the Act of Congress

upon the facts presented. Until this question is disposed of there can be no further proceedings in the case; and as it arises upon the statute as applied to the facts, this court may very properly consider and answer it, although irrelevant matter, which will not be regarded, is also embraced in the certificate.

It is the general doctrine that there can be no certificate of a division of opinion between the judges of the circuit court on a motion for a new trial, as such motion usually rests in the discretion of the court, and, therefore, properly presents no question for our determination. *United States* v. *Rosenberg*, 74 U. S. 7 Wall. 580 [19:263]. But such is not always the case. Sometimes a motion of the kind or of a similar kind may present for consideration a question going directly to the merits and a decision of which may determine the point in controversy. In such instances the court will consider the question submitted on a certificate of division of opinion between the judges of the court below. Thus in *United States* v. *Wilson*, 32 U. S. 7 Pet. 160 [8:643], the question arose between the judges of the circuit court whether a person convicted of a capital offense, who had received a pardon, could derive any advantage from it without bringing the same judicially before the court by appeal, motion, or otherwise. Upon this question the judges were opposed in opinion, and it was stated under their direction, and certified to this court and here considered and decided. The court regarded the motion as one going to the merits of his case, having a direct bearing upon the punishment to be imposed, and not a question determinable in the discretion of the court, and held that it could properly consider the question upon a certificate of division of opinion of the judges of the circuit court.

Holding, therefore, that we can consider the question certified, disregarding the irrelevant matter accompanying the certificate, we proceed to its examination.

The treaty concluded October 4, 1842, and 582 proclaimed in *March, 1843 (7 Stat. at L. 591) between the United States and the Chippewa Indians, ceded to the United States a large tract of land between Lake Superior and the Mississippi. In article five it recited that the whole country between those points had always been understood as belonging, in common, to the Chippewas. In article two it declared that the Indians stipulated for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States; and that the laws of the United States should be continued in force, in respect to their trade and intercourse with the whites, until ordered by Congress otherwise. And in article seven it declared that the treaty should be obligatory upon the contracting parties when ratified by the President and Senate of the United States.

The Indians have never been removed from the lands thus ceded, and no executive order has ever been made for their removal, and no change has taken place in their occupancy of the lands, except as provided by the treaty of September 30, 1854. 10 Stat. at L. 1109. By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships, and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Oreilles reservation. In the provision for these reservations nothing was said of the 16th section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed the 16th section was already disposed of in the sense of the Enabling Act of 1846. It had been included within the limits of the reservations.

As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the Enabling Act, the Indians stipulated *for the right [583 of occupancy to the lands. That right of occupancy gave them the enjoyment of the land until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the state of Wisconsin acquired by the Enabling Act to the 16th section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different states is that the title to them vests in the several states in which the land is situated, subject to any prior right of occupation by the Indians or others which the government had stipulated to recognize.

Mr. Justice Lamar, while Secretary of the Interior, had frequent occasion to consider the nature and effect of the grant of school lands, where the title was at all encumbered or doubtful; and on this subject he said (6 Land Dec. 418) that the true theory was this: "That where the fee is in the United States at the date of survey and the land is so encumbered that full and complete title and right of possession cannot then vest in the state, the state may, if it so desires, elect to take equivalent lands in fulfilment of the compact, or it may wait until the right and title of possession unite in the government, and then satisfy its grant by taking the lands specifically granted." And this view he considered "as fully sustained by the decision of the courts and the opinions of the Attorneys General," and cited in support of it *Cooper* v. *Roberts*; 59 U. S. 18 How. 173 [15:338]; 3 Ops. Atty. Gen. 56; 8 Ops. Atty. Gen 255; 9 Ops. Atty. Gen. 346; 16 Ops. Atty. Gen. 430; *Ham* v. *Missouri*, 59 U. S. 18 How. 126 [15:334].

In *Beecher* v. *Wetherby*, 95 U. S. 517 [24:440], this court had occasion to consider the nature of the right which Wisconsin took to the 16th section in the townships of that state by virtue of her Enabling Act, which declared that it was an unalterable condition of her admission into the Union that section 16 of every township of the public lands of the state, which had not been sold or otherwise disposed of, should be granted to her for the use of schools. The court said that this compact, whether considered merely as promissory on the *part [584 of the United States, and constituting only a

pledge of a grant in future, or as operating as a transfer of the title to the state, upon her acceptance of the proposition, as soon as the sections could be afterwards identified by the public surveys—in either case the lands which might be embraced within those sections were appropriated to the state, subject to any existing claim or right to them; that for many years before Wisconsin became a state various portions of the territory within her limits were occupied by a tribe of Indians, but the right which they had was only that of occupancy. The court held that the fee was in the United States, subject to that right, and could be transferred whenever they chose, but added "the grantee would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States."

We, therefore, are of opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the state may claim ultimately to the 16th section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The state of Wisconsin, therefore, had no such control over that section or right to it as would prevent it being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested [585] in *the state, except as subordinate to that right of occupation of the Indians.

But independently of any question of title, we think the court below had jurisdiction of the case. The Indians of the country are considered as the wards of the nation, and whenever the United States set apart any land of their own as an Indian reservation, whether within a state or territory, they have full authority to pass such laws and authorize such measures as may be necessary to give to these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations.

This subject was fully considered by this court in *United States* v. *Kagama*, 118 U. S. 375 [30:228]. It was contended that the Act of Congress extending its protection and jurisdiction over the Indians within the limits of the state encroached upon matters within the exclusive jurisdiction of the state. But the court answered this objection, speaking through *Justice* Miller, by observing that the Act "does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

"It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They own no allegiance to the states and receive from them no protection. Because of the local ill-feeling the people of the state where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court wherever the question has arisen. . . .

*"The power of the general govern- [586] ment over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

We, therefore, answer the question certified in the affirmative, that the offense committed was within the limits of the reservation within the meaning of the Act of Congress approved March 3, 1885, so as to give the Federal courts jurisdiction of the same, and our answer to that purport will be returned to the court below; and that the motion to set aside the verdict and for a new trial should be denied.

MAXWELL LAND GRANT COMPANY,
Plff. in Err.,
v.
JOHN B. DAWSON.

(See S. C. Reporter's ed. 586-607.)

Law of New Mexico—deeds, when evidence—declarations of former owners—evidence of adverse possession—burden of proof—exception in

NOTE.—*As to what necessary to constitute adverse possession; requisites of*, see note to Ricard v. Williams, 5: 398.

As to mortgagor's possession not adverse, see note to Higginson v. Mein, 2: 664.

As to occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 9: 624.

As to requisites of deed of land, see note to Agricultural Bank of Mississippi v. Rice, 11: 949.

As to cancellation or surrender of deeds by parties; its effect on title, see note to Parker v. Kane, 16: 286.

As to what is sufficient delivery of a deed to pass the title, see note to Tompkins v. Wheeler, 10: 908.

As to parol evidence to show trusts as to lands, to show mistake or explain, etc., see note to M'Iver v. Walker, 3: 964.

deed—proof in regard to—identity of land—adverse possession in New Mexico.

1. In New Mexico as early as 1868, written instruments were essential to the transfer of land.
2. Deeds to persons under whom the defendant in ejectment claims title, are admissible in evidence to show definitely the land claimed by him.
3. Loose talks which the defendant in an ejectment suit had with former owners of the land, are not admissible either to fix the boundaries of the deed or to throw light upon the character and extent of his alleged adverse possession.
4. Upon the question of adverse possession of land, testimony that the land claimed was generally reputed to belong to claimant, is admissible.
5. In ejectment, the burden of proof is on the plaintiff to show he has the legal title to, and the right of possession of, the lands in controversy.
6. The effect of an exception in a grant, in respect to the thing excepted is as though it had never been included in the deed.
7. Where there is an exception in the general granting clause of a deed the party relying upon such general clause must in pleading state the general clause, together with the exception, and must also show by the testimony that he is not within the exception.
8. To sustain an action of ejectment it is necessary for the plaintiff to show that the land he seeks to recover is without the limits of the tract shown to have been conveyed away by himself.
9. In New Mexico an uninterrupted occupancy of land by a person, who in fact has no title thereto, for a period of ten years adversely to the true owner, operates to extinguish the title of the true owner thereto, and vests the title of the property absolutely in the occupier.

[No. 1065.]

Submitted Jan. 5, 1894. Decided Feb. 5, 1894.

IN ERROR to the Supreme Court of the Territory of New Mexico, to review a judgment of that court, affirming the judgment of the District Court of the Fourth Judicial District of New Mexico, in favor of the defendant, John B. Dawson, in an action of ejectment brought by the Maxwell Land Grant Company, to recover of the defendant, the possession of a large tract of land. *Reversed, with instructions to grant a new trial.*

Statement by *Mr. Justice* **Brown:**

This was an action of ejectment brought by the plaintiff in error in the District Court of the Fourth Judicial District of New Mexico, to recover of the defendant the possession of a large tract of land within what is known as the Beaubien and Miranda, or Maxwell Land Grant.

The declaration was in the ordinary form of a declaration in ejectment, averring the right of the plaintiff to the possession of the entire Maxwell grant, and the unlawful entry of the defendant into that portion thereof situate in the county of Colfax.

Defendant disclaimed as to all the land described in the declaration, except a certain tract described in his first additional plea, as follows: "All the land in the valley or drainage of the Vermejo river, in the county of Colfax, territory of New Mexico, within the following boundaries: Commencing at the dam on said river, at the upper end of John B. Dawson's farm; thence running to a high point of rocks on the north side of the Vermejo Cañon; thence following along the top of the divide west of Rail Cañon to the head of Saltpeter Cañon; thence down along the top of the divide east of Saltpeter Cañon, to a point on a line with John B. Dawson's rock fence; thence following the line of said rock fence across the Vermejo to the top of the divide between the Vermejo and Van Bremmer Cañon; thence following the top of said divide to the head of Coal Cañon, and thence along the top of the divide east of Coal Cañon to a point on said divide nearest the place of beginning; thence to the place of beginning." He further pleaded adverse possession of these lands for more than ten years next before the commencement of the suit, and *that the plaintiff's right to sue for the [588 same accrued more than ten years prior thereto.

Plaintiff deraigned title from the original grantees through Lucien B. Maxwell; but in the deed from Maxwell and wife to the Maxwell Land Grant & Railway Company of April 30, 1870, there was the following exception: "Excepting from the operation of this conveyance such tracts of land, part of the said estate hereby warranted not to exceed in the aggregate fifteen thousand acres, which the parties of the first part have heretofore sold and conveyed by deeds duly recorded on or prior to the 25th day of January, one thousand eight hundred and seventy," and all the subsequent deeds under which the plaintiff claimed, contained the same exception, though not exactly in the same words.

Upon the conclusion of the plaintiff's case, defendant offered evidence tending to show that he occupied under claim of title, and was generally reputed to own a large tract of land, described in his plea, the lower line of which was the projection, for a distance of about six miles, east and west of a stone fence built by him across the valley of the Vermejo river, and including within its east and west limits the entire of what was known as the Coal and Rail cañons and the upper waters of the Lacey, Spring and Saltpeter cañons with the lands and drainage incident thereto. The testimony upon the question of adverse possession of which there was a large amount, showed that defendant made use of the cañons for the purpose of ranging or pasturing cattle, horses, and hogs, and indicated that for the years 1872 to 1883 he had an average of 125 horses, 200 cattle, and some hogs which were turned loose in the cañons within the tract. He looked after them from time to time, and if cattle belonging to other people were there, he turned them out. There was also evidence tending to show that below him the valley of the Vermejo river was pastured by one Lacey, and below *him* by one J. W. Curtis, and also by Miller & Maulding. The testimony of Maulding himself tended to show that he and Dawson and two others went into possession of the land under a contract of purchase from Maxwell, and that they were virtually tenants in common under this contract; that *after Max- [589 well put them into possession they divided up

the entire tract, which he undertook to sell them, each one taking exclusive possession of his particular part. There seems to have been what the witness termed "a kind of a bond for a deed," to which Maxwell and Curtis were parties, but it was not produced, and testimony of its contents was ruled out.

Defendant himself took the stand and testified that in 1867 Curtis, Maulding, and Miller came on to the Vermejo, and told him "they had a contract," and claimed to have possession of the land from the dam which marked the starting point of his (Dawson's) deed, down the river, to a place known as the O'Donnell farm, with all that drainage and lands the water would flow in between these points and the Vermejo river; that it included the land claimed by him, the defendant; that they were residing upon a part of the land themselves, and that Maulding and Curtis told him to take possession of the land he claimed, and on the line fixed by them as his lower boundary he built a stone fence across the valley. He also testified that in June, 1868, he had a conversation with Lucien B. Maxwell in regard to the tract of land which he claimed; that Maxwell knew he was in possession of it; that the boundaries of the tract set forth in his plea were pointed out by Maxwell, and that he paid $3700 for the land, though he afterwards stated that he paid the money to Mr. Curtis, who gave it to Maxwell. On cross-examination, he produced a deed from Maxwell and wife to himself, bearing date January 7, 1869, in which, for a consideration of $3700, Maxwell conveyed to him the property admitted in this suit to belong to him, and described as follows: "All the land or ground now suitable for farming or cultivating purposes in the valley or drainage of the Vermejo river, county of Mora, territory of New Mexico, within the following boundaries, to wit: Beginning at a certain dam at the head of a certain ditch at the right hand point of rocks, from thence running down on the north side of said river to a certain other pile of rocks, on a knoll or elevation, with some bushes near thereto; thence running very near southward across said river 590] to a piñon tree *to the right of a ridge, near a wash, which tree is marked with a letter 'L;' thence running up said river on the south side to the place of beginning; containing about —— acres, more or less." This deed he claimed to have received by mail some time in 1869, and admitted to have shown to one Morley, who, in 1871, came to his house, under orders from the president of the plaintiff company, to survey the land. He appears to have entered upon the land the year before the deed was given, to have made numerous improvements, such as houses, orchards, and fences, and to have put the land under cultivation by means of irrigating ditches. All these improvements, except some cattle fences, were put upon the land described in the deed. Upon redirect examination, he stated that when he first came on the Vermejo, in the early part of 1868 or 1869, passing through, Curtis and Maulding told him that they had a contract with Maxwell for a piece of land there, beginning at the dam, and running down the river to the lower end of what was known as the O'Donnell farm, with all the drainage, with the water that flowed from between this dam and the lower end of the O'Donnell farm; that they asked him, defendant, if he wanted some of it. "I studied a good while and said 'if you will let me have the upper part,' which they agreed to do. . . . The contract which they had was for a block of land. . . . Curtis and Maulding told me that they had this whole drainage belonging to this block of land, and this was my part; and I talked with them often about it, and I talked with others." He further testified that when Maxwell pointed out to him the boundaries of the land they were down at a stage station some four miles away, though they could see the prominent points of the tract from where they were, and that this was six months before he received his deed.

The case was tried by a jury, and a general verdict of not guilty returned, upon which final judgment was entered. The case was then carried to the supreme court of the territory, by which the judgment of the district court was affirmed. Plaintiff thereupon sued out a writ of error from this court.

Messrs. **Frank Springer** and *T. B. Catron* for plaintiff in error.

Mr. **Andrieus A. Jones** for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The controversy in this case relates to a tract of land within what is known as the Maxwell land grant, to a portion of which, about 1000 acres, described in the deed from Maxwell and wife to Dawson, it is admitted the defendant has a good title. Defendant, however, claims title to about 20,000 acres lying outside of the boundaries of the tract admitted to belong to him, which is the property in dispute. The case is before us upon certain errors assigned to the admission of testimony, and to the charge of the court.

(1) The third assignment of error is taken to the admission of the testimony of Dawson as to the parol statements of Maulding and Curtis touching their contract for the purchase of the land, which included that in controversy. The court below held that there was no error in the admission of this testimony, because, under the civil law, land could be conveyed by parol, accompanied by delivery of possession; and that it was immaterial whether the statements of Maulding and Curtis were properly admitted or not, because Dawson had testified that he had conversations with Maxwell, the party from whom they claimed to have purchased, and that Maxwell pointed out the boundaries of the land he would receive under his agreement with Maulding, Miller, and Curtis, who were then in possession, and so recognized by Maxwell under his sale to them.

*We think the court erred in this par- 595
ticular. In the first place we are not prepared to coincide fully in its opinion that, under the civil law as in force in New Mexico in 1868, no written instrument was necessary for the transfer of title to real estate. To justify us in upholding such a radical departure from the existing methods of land transfer in this country from its earliest settlement, we think that it should clearly appear, not only that no

written instrument was required by the usages of the civil law, but that the oral transfer was accompanied by all the customary formalities prescribed by that law for the identification of the land and delivery of possession. The question whether an oral transfer of land was recognized as valid by the law of Mexico was not argued upon the hearing of this case, and may be open to some doubt. There appears to be a diversity of opinion upon the point. Upon the one hand the supreme court of California, which state also inherited the civil law from Mexico, has uniformly held that a conveyance of land resting solely upon parol was void by that law. In *Hoen* v. *Simmons*, 1 Cal. 119, 52 Am. Dec. 291, it is said that by the Recopilacion de las Indias, Law 29, Liber 8, Title 13, a code of the sixteenth century, every sale of real estate was required to be made before the *escribano* (Notary) of the place where the contract was entered into; and if there were no Escribano, before the Judge of First Instance; and these officers were required to furnish a copy and statement of the writings and contracts made before them, with the day, month, and year in which they were made, the names of the seller and purchaser, the property sold or exchanged, and the price. In the opinion of the court in that case it is said: "There has never been a time since the adoption of the *Fuero Juzgo*" (a Visigothic code of the seventh century) "in which lands could be conveyed under Spanish or Mexican law, without an instrument in writing—unless it was, perhaps, in the case of an executed contract, where corporeal possession was delivered at the very time of the sale by actual entry upon the premises, and the doing of certain acts analogous to the *livery of seizin* at common law." The question was again fully considered in the [596] case of *Hayes* v. *Bona*, 7 Cal. 153. *It was contended in that case that the civil law, so far as it required transfers of land to be made in writing, was never extended to California; and even if it were, it never had any force or practical operation there; that the condition of the country, its illiterate population, together with the fact there were no *escribanos*, or Judges of the first instance, residing in San Francisco, warranted the assumption that the law was never regarded as authoritative, and that evidence of a custom of conveyance existing for many years, by which these requisitions of the law seem to have been disregarded, was sufficient to warrant the court in holding that contracts for the sale of land were in no way controlled by it. "It may be admitted," said the court, "that there is some doubt whether this law was in force in California. From what we can learn, it was a fiscal law, and extended over all the states and territories of Mexico. That it fell somewhat into disuse, there is no doubt; but, so far as we are informed, contracts for the sale of land, by the custom of the country, were required to be in writing; and, although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain the names of the parties, the things sold, the date of the transfer, and the price paid. . . . We have always been willing to extend the greatest liberty to contracts executed before the acquisition of California by the United States, and to uphold them, if possible, where there were any equities existing. But to go further, and extend the rule to verbal contracts for the sale of land, or conveyances like the present, would open the door to stupendous frauds and unsettle every title in the state." See also *Stafford* v. *Lick*, 10 Cal. 12; *Merle* v. *Matthews*, 26 Cal. 455.

It will be observed in this connection, however, that the court relies largely upon the extract from the *Recopilacion*, which appears to have embodied a system of laws applicable to all the Spanish possessions in the Indies. The law referred to seems to have been a mere fiscal regulation, designed for the purpose of securing to the government its *alcabalá* or excise tax upon the transfer of land, rather than for the *protection of the parties to such transfer. [597] And as there seems to have been no *escribanos* or judges of the first instance in New Mexico, and no tax upon land transfers, it is very doubtful whether this law was ever enforced there. From Schmidt's Civil Law of Spain and Mexico, published in New Orleans in 1851, three years after the treaty of Guadalupe Hidalgo, under which New Mexico and California were ceded to the United States (book 8, title 3, "Contract of sale") it would appear that no distinction was made between personal and real property, and by article 596, "the sale is perfect from the moment the parties have agreed as to the thing which is to be sold, the price and other particulars," although by article 598 "the sale is not considered complete, when it is stipulated, that the time of making it, that it shall be reduced to writing, until that stipulation is complied with."

It is also said, in the useful and exhaustive work of Mr. Hall upon Mexican Law, page 489, that there was no statute of frauds in Spain or Mexico, and that a verbal sale of real estate was valid. He also speaks of the public writing (*escritura publica*) stated by earlier authors to be essential to the sale of real estate, as being a mere fiscal law, created for the purpose of collecting the *alcabalá*, or tax on sales, and that the law did not declare that sales made otherwise should be null and void. "Sales of real estate or contracts in relation thereto, made in the territory ceded by Mexico to the United States, and subsequent to the concession, could not possibly have been affected by such a fiscal law. There was no law in force in the United States authorizing the collection of an *alcabalá*, and no officer had power to collect such an impost. Such a fiscal law could not have been carried into execution in said territory." See also *Devall* v. *Choppin*, 15 La. 566; *Gonzales* v. *Sanchez*, 4 Mart. N. S. 657. Important changes, were, however, made in the law of Mexico subsequent to the treaty of Guadalupe Hidalgo, and by the Civil Code of 1871 of the Federal District and the territory of Lower California, which also seems to have been adopted by many of the Mexican States it was provided (art. 832) that "the division of immovable property is void, if it is not made by *public writing;" and (art. 3056) that [598] "the contract of purchase and sale (*compraventa*) requires no special formality to give it validity, unless it relates to immovable property." By art. 3057, "the sale of an immovable, whose value does not exceed $500, may be made

by private instrument, which has to be signed by the vendor and the vendee before two known witnesses." By art. 3059 this instrument was to be executed in duplicate, one for the vendor and one for the vendee, and if the value of the immovable exceeds $500, the sale shall be reduced to a public writing.

In a subsequent chapter a system of public registration is provided, somewhat similar to our own. These provisions are also carried into the Civil Code of December 14, 1883.

It is unnecessary, however, for the purpose of this case, to express an opinion whether under the civil law a transfer of land was valid without a written instrument, since we are of the opinion that the civil law in this particular had been supplanted by territorial enactments.

While no statute of frauds appears to have been adopted in New Mexico as early as 1868, the Compiled Laws of 1865 (art. 18, chap. 44) required all conveyances of real estate to be subscribed by the person transferring his title or interest (§ 4) and to be acknowledged and certified by a public officer. § 5. Although there is nothing in this chapter saying in so many words that no transfer can be made without an instrument in writing, the careful provisions made for the execution and acknowledgment of conveyances of real estate indicate very clearly that written instruments were considered essential.

But, however this may be, and giving full force and effect to all that is claimed for the civil law in this particular, it is very clear that there was no such identification of the land, delimitation of the boundaries, and delivery of possession as were necessary, under the most liberal construction of the civil law, to convey a title. The testimony as to any contract which Maulding and Curtis may have had with Maxwell with regard to the large "block of land," of which a portion claimed by the defendant was a part, was not only hearsay, but hear-
599] say *of the loosest description. Taking Dawson's own version of it, all that it amounted to was that Maulding and Curtis told him they had a contract with Maxwell for the purchase of this property, and that he might take a part of it. Neither the property which they purchased nor that which they allowed Dawson to take appears to have been identified in any way beyond the general statement that it included the drainage of the Vermejo river between certain points. If this testimony as to the contract between Miller, Maulding, and Curtis on the one part and Maxwell on the other was entitled to any weight whatever, we think the court should have admitted the deed from Maxwell and wife to Miller and Maulding and to Joel W. Curtis, showing the lands actually conveyed to them, as having a tendency to contradict or at least to qualify their general statements. These deeds appear to have been ruled out upon the ground that defendant could not be bound by recitals in deeds between other parties; but, as both the grantors and grantees in these deeds were the parties from whom Dawson himself claimed title, it was competent to show definitely what land was conveyed by Maxwell to Miller, Maulding and Curtis, from whom Dawson claimed title. Nor was this error cured by the admissions of counsel as to the contents of these deeds, since the deeds themselves were excluded, and the admission was simply for the purpose of enabling the appellate court to pass upon their relevancy in reviewing the action of the trial court in excluding them.

The court below also held that whether the statements of Maulding, Miller, and Curtis, as to their contract with Maxwell, were or were not properly admitted in evidence, was immaterial, from the fact that defendant Dawson further testified that he had conversations with Maxwell, the party from whom they claimed to have purchased, and that Maxwell pointed out the boundaries of the land he would receive *under his agreement with Maulding, [600
Miller, and Curtis, who were then in possession. All this conversation amounted to was that Dawson met Maxwell in June, 1868, at a stage station, some four miles from the land in question; that Maxwell pointed out to him the boundaries of the land he would receive under his agreement with Maulding, Miller, and Curtis; and that some of the permanent objects on the land in question were visible from the spot where they stood. There was no attempt in this conversation to identify the land, to fix the boundaries, or to deliver possession. All he said in this connection was that "the boundaries were what you read in that description there," meaning thereby his plea. There was no bing in the nature of a livery of seizin, which the supreme court of California pronounced to be essential to an oral transfer of lands under the civil law. No weight whatever should be given to testimony of this description in connection with the transfer of lands. It is incredible that any man should have paid $3700 for such an indefinite purchase of real estate. A more probable explanation of the transaction was given by Dawson upon his cross-examination, when he produced a deed from Maxwell and wife, bearing date June 7, 1869, in which, to himself, for the consideration of $3700, Maxwell conveyed to him the property admitted in this suit to belong to him.

As the location of the dam mentioned in this deed as the upper boundary of the tract conveyed, is admitted, and the piñon tree, which marked its lower boundary "to the right of a ridge, near a wash," was admitted by Dawson to have been seen by him when he first went there, and was on the southwest side of the Vermejo river, near the traveled road up and down the river, and only a little over a hundred yards from the bank of the river, at the southwest end of the stone fence built by the defendant to mark his lower boundary line, there was, and could have been, no uncertainty as to the upper and lower boundaries of his tract. The "pile of rocks, on a knoll or elevation, with some bushes near thereto," to which the line ran from the dam, Dawson swears he never found, and it must be admitted that the side lines of the tract are very vague, and, justify the remark made by Morley, the surveyor employed by the plaintiff, when he was shown the deed from Maxwell and wife to Dawson, that there was not a man in the world who could take the deed and survey the land. From the fact, however, that the line was run from a pile of rocks on a knoll or elevation, which could not have been

601]*far from the dam, southward across the river to a piñon tree, and from this tree up the river on the south side to the place of beginning, it is quite evident that it was never intended to include the vast territory claimed by the defendant in his plea, and that the land probably contemplated by the parties was the immediate drainage of the Vermejo river, between the dam and the piñon tree, including all the land between the watersheds on either side of the river, with perhaps grazing privileges over the surrounding territory, which, according to the custom of the country, seems to have been incident to the ownership of the water. If he had purchased all the land he now claims, it is very improbable he would have accepted a deed with this limited and ambiguous description. If he has any title to the territory claimed in his plea, it must be a title by adverse possession. This was evidently the theory upon which he tried his case, though after the deed was introduced, against his objection, he apparently shifted his ground and endeavored to reconcile his claim with the vague description in his deed. It is impossible, however, under any theory of construction, to give it that effect. While possession of the land under the deed would not absolutely conclude him from showing an adverse possession of the much larger tract claimed by him in his plea, the presumption is against him; and, if his testimony as to such possession were reconcilable with his position as grantee under the deed, the theory that he held under the deed, and not by virtue of an adverse possession, should be adopted. This presumption is strengthened by the fact that he appears always to have claimed under his deed up to the time this suit was begun, when, by the filing of his plea, plaintiff was first apprised of the nature and extent of his claim. His disclaimer of holding under the deed is the more apparent from the fact that he made no mention of it in his examination-in-chief; that he exhibited it to his son as the foundation of his title, and produced it to Morley, the plaintiff's agent, as the basis of a survey, when Morley told him it was impossible to locate the land by it. In another part of his testimony he admits that he frequently claimed that, under the deed from Maxwell, he was entitled 602] to the *drainage of the Vermejo river between the dam and the stone fence.

While defendant may have gained a title by adverse possession for ten years, it is difficult to believe that when he went into possession he claimed anything more than the tract covered by the deed from Maxwell, though, having command of the water for a certain distance, he may have treated this as giving him the control of the grazing privileges over a much larger extent of territory.

Under no theory of the case, however, were the loose talks which the defendant had with Miller, Maulding and Curtis or with Maxwell admissible either to fix the boundaries of the deed or to throw light upon the character and extent of his alleged adverse possession. They were calculated to prejudice the plaintiff's case and to leave an impression upon the jury that defendant's claim of adverse possession was justified by a contract with Maulding, Miller and Curtis of which there was no legal evidence. The admission of such testimony would create a most dangerous precedent and open up possibilities of fraud that might operate to the unsettlement of great numbers of titles.

It is insisted, however, that this evidence was admissible to supplement the vague and uncertain language of the deed; that it was essential for defendant to explain why he did claim the Van Bremmer cañon and why he did claim the land in controversy; that he could only do this by relating his conversations with Curtis and Maulding in regard to their contract with Maxwell, and that the question at issue was not the actual contents of this contract, but the good faith of Dawson's claim to the land in controversy. The question, however, was one of actuality and continuity of possession rather than of good faith; and even if the good faith of the defendant had been material to this inquiry, it is difficult to see how loose conversations with parties, who, whatever they claimed, were not shown to have had a contract with Maxwell, tended to throw any light upon this question. The difficulty both with this testimony and with that respecting the conversations with Maxwell is that it was likely to lead the jury to believe that *defendant had a title other than that[603 arising from adverse possession.

(2) There was no error in admitting testimony to the effect that the land claimed by Dawson was generally reputed to belong to him. Claiming as he did by open, notorious and adverse possession of these lands for a period sufficient under the statutes of New Mexico to give him a good title, it was competent to prove that it was generally understood in the neighborhood, not only that he pastured his cattle upon these lands, but that he did so under a claim of ownership, and that his claim and the character of his possession were such that he was generally reputed to be the owner. While this testimony would be irrelevant in support of a paper title, it had an important bearing upon the notoriety of his possession. *Sparrow* v. *Hovey*, 44 Mich. 64. It may be that, as the tract upon which Dawson lived was admitted to be his property, and the question was one of boundaries or extent of ownership, the testimony may not have been of much value, but we cannot say it was inadmissible. It was a question for the jury to say not only whether his adverse possession, but whether this repute of ownership extended beyond the property included in his deed from Maxwell.

(8) Plaintiff has no just reason to complain of the instruction of the court that the documents introduced by it were sufficient to vest in it the title to the land in controversy, unless they found from the evidence that the plaintiff had failed to prove that the land in controversy, or some portion thereof, was not the whole or part of the 15,000 acres of land excepted in the conveyances under which plaintiff claimed title; or in the further instruction that the burden of proof was on the plaintiff to show that it had the legal title to, and the right of possession of, all the lands in controversy; and, unless they found from the evidence that the lands in controversy were included in and not excepted from the deeds of conveyance

under which plaintiff claimed title, plaintiff could not recover.

Under a certain deed from Maxwell and wife to the Maxwell Land Grant & Railway Compa-604] ny, and in all the subsequent *deeds under which plaintiff claims title, there was an exception of such tracts of land "part of the said estate, hereby warranted not to exceed in the aggregate 15,000 acres, which the parties of the first part have heretofore sold and conveyed," etc., and the question was whether the plaintiff was bound to show that the lands claimed by him in this suit had not theretofore been conveyed, or whether the burden was upon the defendant to show that they had been so conveyed. Ordinarily the burden of proof is upon the party claiming the affirmative of the issue. There are, however, certain exceptions to this general rule. Bearing in mind that the burden was upon the plaintiff to show its title to the identical land claimed by the defendant, it is manifest that, as the plaintiff did not take title to 15,000 acres of the Maxwell land grant by reason of the fact that its grantors had already conveyed this amount of land, it was incumbent upon it to show that the land it sued to recover had not been previously conveyed, and, hence, that it had taken title to it under its deeds.

An exception in a grant is said to withdraw from its operation some part or parcel of the thing granted, which, but for the exception, would have passed to the grantee under the general description. The effect in such cases in respect to the thing excepted is as though it had never been included in the deed. If, for example, a person should convey to another a block of land, excepting therefrom a certain lot previously conveyed, to sustain ejectment for any particular lot, it would be necessary for the plaintiff to show that it was not the lot which had been previously conveyed. There is a general rule, applicable both to conveyances and statutes, that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must in pleading state the general clause, together with the exception, and must also show by the testimony that he is not within the exception. Thus in *United States* v. *Cook*, 84 U. S. 17 Wall. 168 [21:538], it was held that if the ingredients of a criminal offense could not be accurately described, if the exception in the statute were omitted, an indictment founded upon the statute must allege enough to show that the accused was not within 605] the exception; but that, if the *language of the statute defining the offense were so entirely separable from the exception that the ingredients constituting the offense might be accurately defined without reference to the exception, the indictment might omit such reference—the matter contained in the exception being matter of defense, and to be shown by the accused. See also *Steel* v. *Smith*, 1 Barn. & Ald. 99; *Varasour* v. *Ormrod*, 6 Barn. & C. 430; *Com.* v. *Hart*, 11 Cush. 130; *Com.* v. *Jennings*, 121 Mass. 57, 23 Am. Rep. 249, *State* v. *Abbey*, 29 Vt. 66, 67 Am. Rep. 754; *Myers* v. *Carr*, 12 Mich. 63; *Lynch* v. *People*, 16 Mich. 472. But, as said by *Chief Justice* Cooley of the supreme court of Michigan in *Osburn* v. *Lovell*, 36 Mich. 246, 250: "This is not always the rule of pleading; it is sometimes a rule of evidence only. It goes no further in any case than to require the party relying upon the exception to present the facts in such form as the case may require, and this may or may not be by special pleadings. . . . Whether special pleadings are necessary must be determined by other considerations and by the general rules of pleading."

But the exact question raised by the exception in this case was considered by this court in *Hawkins* v. *Barney*, 30 U. S. 5 Pet. 457 [8: 190], where a patent was issued for 50,000 acres of land, and by subsequent conveyance the patentee sold small parts of said land, and particularly one parcel of 11,000 acres, within the bounds of the original survey; and it was held, that to sustain an action of ejectment it was necessary for the plaintiff to show that the land he sought to recover was without the limits of the tract shown to have been conveyed away by himself. The court quoted with apparent approval the case of *Taylor* v. *Taylor*, 3 A. K. Marsh. 18, in which the supreme court of Kentucky held that a plaintiff in ejectment, claiming under a deed conveying the balance of a tract of 14,000 acres of land, must show what that balance was, and where situated, and that it included the land in contest. Also the case of *Madison* v. *Owens*, 6 Litt. Sel. Cas. 281, where to recover in ejectment, it was held to be necessary for the patentee to show that the defendant was not within the bounds of certain claims excluded from the language of his patent. See also *Guthrie* v. *Lewis*, 1 T. B. [606 Mon. 143, in which a similar ruling was made.

These cases are precisely in point, and show that the court was guilty of no error prejudicial to the plaintiff.

Defendant, however, claims that, as the plaintiff made no effort to prove himself without the exception, the judgment of the court ought, irrespective of every other consideration, to be affirmed. It is true that the court may have erred in not granting the motion of the defendant made at the close of the plaintiff's case to direct a verdict for him upon that ground, as there does not seem to have been any testimony offered by the plaintiff, in making his original case, to show that the land in controversy was not within the exception; but the defendant is in no condition now to take advantage of it, as the instruction actually given was given upon the request of the defendant himself. While the plaintiff has no right to complain of this instruction, it does not necessarily follow that defendant is entitled to an affirmance of the judgment because the charge of the court was not sufficiently favorable to him in that particular, when such charge was made upon his own request. In putting in its rebutting testimony plaintiff did put in evidence the deeds of Maxwell and wife to Maulding and Curtis, but they were not offered for the purpose of proving itself without the exception, but for the purpose of contradicting the testimony of defendant as to his conversations with Maulding and Curtis, and it is too late for it now to claim that they were offered for the purpose of proving itself without the exception.

(4) Plaintiff also complained of the instruction of the court upon the subject of the stat-

ute of limitation, namely, that if the plaintiff permitted defendant to take possession of the tract, claiming all of it as his own, and to continue such possession adversely under such claim of title for an uninterrupted period of ten years or more, such possession would ripen into a right and title in the defendant, and forever afterwards prevent the plaintiff from taking possession of the property. We think, however, the instruction complained of was justified by the language of the statute, which provides 607] (New *Mex. Comp. Laws, 1884, § 1881) that "no person or persons, nor their children, or heirs, shall have, sue, or maintain any action, or suit, either in law or in equity, for any land . . . but within ten years next after his, her, or their right to commerce . . . such suit shall have . . . accrued, and that all suits . . . shall be had and sued within ten years next after the title or cause of action, or suits, accrued or fallen, and at no time after the ten years shall have passed." Under similar statutes it has been held by this court that the lapse of time not only bars the remedy, but extinguishes the right, and vests a complete title in the adverse holder. See *Leffingwell* v. *Warren*, 57 U. S. 2 Black, 599 [17: 261]; *Den* v. *Sherrerd*, 72 U. S. 5 Wall. 268, 289 [18: 572, 580]; *Probst* v. *Presbyterian Church Board of Domestic Missions*, 129 U. S. 182 [32: 642]. In the last case this court held, construing the statute of New Mexico here in question, that the defendant was entitled to an instruction that an uninterrupted occupancy of land by a person, who in fact has no title thereto, for a period of ten years adversely to the true owner, operates to extinguish the title of the true owner thereto and vest the title of the property absolutely in the occupier.

But for the error of the court specified in the third assignment, in admitting the testimony of the defendant as to the statement of Miller and Curtis, the judgment of the court below must be reversed, and the case remanded with instructions to set aside the verdict and grant a new trial.

GUSTAVE G. SHAUER, *Plff. in Err.*, *v.* R. F. ALTERTON.

(See S. C. Reporter's ed. 607-626.)

Exclusion of evidence—statement to commercial agency—sufficient notice—change of possession—fraudulent transfer.

1. An assignment of error based upon the exclusion by the trial court of an answer given in the deposition of a witness, to a particular question, will be disregarded if the answer, or the substance of it, is not set forth in the record.
2. The confidential business statement made by a person to a commercial agency, which concealed his alleged liability to his brother, then existing, is admissible upon the inquiry whether he was, in fact, indebted to his brother.
3. Under the statute of Dakota, on a sale of property made with the intent of the seller to defraud his creditors, if the purchaser has notice of circumstances sufficient to put him upon inquiry as to whether the seller intended to defraud his creditors, that is sufficient notice to invalidate the sale to him.
4. Whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry may lead.
5. The change of possession, to satisfy the statute of frauds, must be open and visible, and if not, as against creditors without knowledge of the transfer, it will be void.
6. Where the question was whether a transfer of property was fraudulent as to creditors, it was not error for the jury to be instructed that the relations of the parties to the transaction made it necessary to carefully scrutinize the facts, but that their determination must, at last, depend upon the inquiry whether the transaction was honest and bona fide.
7. This court has no authority to set aside the verdict of a jury on the ground that it is not justified by the evidence.

[No. 174.]

Argued and Submitted Dec. 19, 20, 1893. Decided Feb. 5, 1894.

IN ERROR to the Supreme Court of the State of South Dakota, to review a judgment of the Supreme Court of the Territory, affirming the judgment of one of the courts of the Territory of Dakota, in favor of the defendant, R. F. Alterton, in a suit brought by Gustave G. Shauer, to recover damages for the alleged unlawful taking by said defendant of a certain stock of merchandise, in a storehouse that had been occupied by Louis S. Shauer in the city of Mitchell in that territory. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

This action was brought by the plaintiff in error in one of the courts of the territory of Dakota to recover damages for the alleged unlawful taking by the defendant Alterton of a certain stock of merchandise in a storehouse that had been occupied by Louis S. Shauer, in the city of Mitchell, in that territory. The defendant justified the taking under attachments in favor of creditors of Louis S. Shauer, which came to his hands as sheriff of the county. There was a verdict in favor of the defendant and a new trial having been denied, judgment was entered in his favor. That judgment was affirmed by the supreme court of the territory, and the writ of error in this case was directed to the supreme court of the state of South Dakota, as the successor of the supreme court of the territory of Dakota, by virtue of the Act of February 22, 1889, chap. 180, § 22 (25 Stat. at L. 683).

The bill of exceptions shows that there was evidence tending to show the following facts:

NOTE.—*As to what are fraudulent conveyances; when void; when voluntary conveyances are valid; when void*, see note to Gaylord v. Kelshaw, 17: 612.

As to fraud to be inferred from want of change of possession of goods, see note to Brooks v. Marbury, 6: 423.

As to settlements or conveyance for benefit of wife and child; when good, or void, as to creditors, see note to Sexton v. Wheaton, 5: 603.

As to assignments for benefit of creditors, with preferences, when valid, when not, see note to Marbury v. Brooks, 5: 522.

In September, 1885, Louis S. Shauer, owner of [609] the merchandise *attached, was indebted to his brother Gustave G. Shauer, a druggist of Chicago, in the sum of $8000 and more, for moneys loaned and advanced. While Louis was in Chicago, about September 1st, 1885, for the purpose of making fall purchases, Gustave informed him of his intention to buy another drug store, and that he would need the sum Louis owed him. The latter expressed his expectation of being able soon to pay one half of the amount due from him, and after returning to Mitchell remitted a smaller sum than his brother expected. Gustave, having written for more, and receiving only $200, went to Mitchell, arriving there on Sunday, December 13, 1885. From a conversation with Louis during the evening after his arrival at Mitchell, Gustave concluded that Louis was financially embarrassed, and owed more than he could pay. The following morning he urged his brother to secure him by mortgage on his stock. Louis at first consented to do this, but at a later hour of the same day he declined to give a mortgage. Gustave then proposed that Louis sell him goods to the amount of his debt. This Louis refused to do, unless Gustave would take the entire stock, at fair market prices. After consultation, it was agreed that Gustave should take Louis' stock at 85 cents on the dollar, invoiced at wholesale prices, and, after deducting Louis' debt to him of $6788, pay $2100 in cash, and give his notes for the balance. They commenced that afternoon the taking of an inventory, and were so engaged for a day and a half. The inventory was taken publicly, the storeroom being open while the work was progressing. About ten or eleven o'clock in the forenoon of December 16, 1885, Louis made a bill of sale to Gustave embracing the goods here in controversy. After its execution, the parties proceeded to the store in which the goods were contained, when Gustave delivered to Louis his check for $2100, and his two notes of $1247 each, surrendering the note he held against his brother. Louis delivered to Gustave the bill of sale and the keys of the store. The transfer was completed about noon of that day.

Immediately after the transfer Gustave opened an account with the First National Bank of [610] Mitchell, and went with *Louis to an insurance office, where the insurance carried by the latter on the stock was assigned to Gustave. They then went to dinner. That afternoon they caused three other policies of insurance to be changed from Louis to Gustave, after which the latter returned alone to the store and directed Louis's clerk to go to dinner. Having returned to the store, and being informed by Gustave of his purchase of the stock, the clerk entered the service of the latter. By direction of Gustave he changed the "show" in front of the store. During the most of that afternoon Gustave remained in the storeroom and waited personally upon customers. He prepared and left for publication at the office of the Republican and the Mail, newspapers published at Mitchell, notices announcing the transfer from Louis to himself, and asking for the patronage of the public. These notices appeared in the next issue of each of those newspapers. He also ordered letter-heads to be printed and a sign for the store with his name painted on it. He filed the bill of sale for record in the office of the register of deeds. During the afternoon of the day of the transfer Louis, on one occasion, at the request of Gustave, came to the store to assist in making the sale of a trunk, with the price of which Gustave was not familiar.

Louis applied the check of $2100 and the two notes of $1247 each in payment of demands held against him by several of his relatives.

The goods in controversy were seized by the sheriff under the attachments about 10 o'clock in the evening of December 16, 1885. Louis was present in the store at the time.

The bill of exceptions shows that the plaintiff read in evidence the deposition of H. H. Nash, cashier of the Chicago National Bank, relating to three checks of $650, $270.87, and $2100, respectively, which were in evidence in the case as exhibits, and showed upon their faces that they had been drawn by G. G. Shauer upon the Chicago National Bank in favor of Louis S. Shauer. The first two checks named, as alleged by the plaintiff, tended to show the payment of money by the plaintiff to his brother Louis, making a part of the indebtedness in *question, and the third [611] check of $2100 was the check the plaintiff claims to have passed to Louis in part consideration of the alleged transfer. On the objection of defendant the court refused, upon the ground of its being incompetent, to allow the plaintiff to read the answer of the deponent in response to the following question: "You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business." The objection to this question was sustained upon the ground that it appeared in evidence that the check had passed through the other banks than that of which witness was cashier, and it did not appear that the witness was familiar with the course of business of such other banks or their stamp or indorsement thereon, so as to permit him to answer this general question.

To the refusal of the court to allow the answer to be read, the plaintiff duly excepted.

The plaintiff further offered to read in evidence other parts of the deposition of Nash showing what the marks and indorsements on the back of each of the checks indicated, how such marks were made, and by whom. The court refused to allow those parts of the depositions to be read, and to this refusal the plaintiff duly excepted. The objection to this offer was sustained upon the same ground as that last stated.

It appeared that the deposition was taken in Chicago, at the taking of which both parties appeared by counsel, and that Nash was cross-examined at length by counsel for defendants as to his familiarity with the business of the Chicago National Bank, of which he was cashier.

The defendant was allowed under objection by plaintiff, to which ruling the plaintiff duly excepted, to read in evidence a confidential business statement made by Louis, in January 1885, to Bradstreet's Commercial Agency at

Sioux City, Iowa. This statement, the bill of exceptions states, concealed the alleged indebtedness of Louis to his brother, the plaintiff, which existed at that time. It was not shown that this statement was brought to the knowledge of the plaintiff nor to any of the creditors of Louis. All of the indebtedness against Louis [612]*upon which defendant relies, "was created at and subsequent to September, 1885."

Neither party asked a peremptory instruction to find in his behalf. The plaintiff asked ten instructions, of which only three were given, the plaintiff excepting to the refusal of the court to give each of the others. Six instructions were given at the instance of the defendant, to the giving of each of which the plaintiff excepted. In addition, the court charged the jury, the plaintiff excepting to six different parts of the charge.

Messrs. **Henry W. Magee**, *A. E. Hitchcock* and *E. W. Adkinson*, for plaintiff in error:

Plaintiff should have been allowed to read in evidence the deposition of H. H. Nash, Cashier of the Chicago National Bank.

Merchants Nat. Bank of Boston v. *State Nat. Bank*, 77 U. S. 10 Wall. 604 (19: 1008); *Baldwin* v. *Bank of Newbury*, 68 U. S. 1 Wall. 234 (17: 534); *United States* v. *City Bank of Columbus*, 62 U. S. 21 How. 356 (16: 130).

The defendant should not have been allowed to read in evidence a written statement by Louis S. Shauer to Bradstreet's Commercial Agency.

Bump, Fraud. Conv. 583.

A delivery must be a transfer of possession and control made by the seller with the purpose and effect of putting the goods out of his hands.

Stevens v. *Irwin*, 15 Cal. 507, 76 Am. Dec. 500; *Lay* v. *Neville*, 25 Cal. 553; *Godchaux* v. *Mulford*, 26 Cal. 317, 85 Am. Dec. 178; *Wood* v. *Bugbey*, 29 Cal. 466; *Parks* v. *Barney*, 55 Cal. 239.

Both vendor and vendee must be shown to commit the fraud before the deed can be avoided.

Gridley v. *Bingham*, 51 Ill. 153; *Hatch* v. *Jordan*, 74 Ill. 417.

The fraud which will vitiate a sale must be mutual, that is, must be attended by both parties or by one with knowledge of the other's purpose and thus acquiesced in and furthered.

Horbach v. *Hill*, 112 U. S. 144 (28: 670); *Bridge* v. *Eggleston*, 14 Mass. 245, 7 Am. Dec. 209; *Splawn* v. *Martin*, 17 Ark. 146; *Partele* v. *Harris*, 26 Conn. 480; *Fifield* v. *Gaston*, 12 Iowa, 218; *Brown* v. *Smith*, 7 B. Mon. 361; *Byrne* v. *Becker*, 42 Mo. 264; *Weisiger* v. *Chisholm*, 28 Tex. 780; *Leach* v. *Francis*, 41 Vt. 670.

Constructive notice is always insufficient to fix in a party actual knowledge as the ground work of express fraud.

Wade, Notice, 23; *Stearns* v. *Gage*, 79 N. Y. 102; *Parker* v. *Conner*, 93 N. Y. 118, 45 Am. Rep. 178.

When a transfer is accepted by a creditor with the sole purpose of obtaining satisfaction of his own claim, the intent of the vendor, and the purchaser's knowledge of such intent is immaterial.

Coranhoran v. *Hart*, 21 Pa. 495, 60 Am. Dec. 57; *Dudley* v. *Danforth*, 61 N. Y. 626; *Dougherty* v. *Cooper*, 77 Mo. 529; *Frederick* v. *Allgaier*, 88 Mo. 601; *Shelley* v. *Boothe*, 73 Mo. 74, 39 Am. Rep. 881; *Albert* v. *Besel*, 88 Mo. 150.

The test is whether the payment is made to aid the fraudulent debtor, or for the lawful purpose of securing payment of his own debt.

Budlong v. *Kent*, 28 Fed. Rep. 13; *Young* v. *Stallings*, 5 B. Mon. 307; *Ford* v. *Williams*, 8 B. Mon. 550; *Little* v. *Eddy*, 14 Mo. 160; *Bear's Estate*, 60 Pa. 430; *Hobbs* v. *Davis*, 50 Ga. 213; *Troustine* v. *Lusk*, 4 Baxt. 162; *Reehling* v. *Byers*, 94 Pa. 316.

The fact of the parties to a transfer being related, is not a badge of fraud.

Hill v. *Bowman*, 35 Mich. 193; *Reehling* v. *Byers*, 94 Pa. 318; *People* v. *Mitchell*, 55 Cal. 236; *People* v. *Walden*, 51 Cal. 588; *People* v. *Wong Ah Ngow*, 54 Cal. 151.

Messrs. **Morgan H. Beach** and *Dillon & Preston*, for defendant in error:

A party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry suggested by such information, prosecuted with due diligence, would have disclosed to him.

Booth v. *Barnum*, 9 Conn. 286, 23 Am. Dec. 339; *Shaw* v. *Spencer*, 100 Mass. 390, 1 Am. Rep. 115, 97 Am. Dec. 107; *Heaton* v. *Prather*, 84 Ill. 330; *Prewitt* v. *Wilson*, 103 U. S. 24 (26: 363); *Zuver* v. *Lyon*, 40 Iowa, 510; *Jones* v. *Hetherington*, 45 Iowa, 681; *Bradford* v. *Beyer*, 17 Ohio St. 388.

The transaction was all one; it cannot be divided—a part of it good and a part bad.

Russell v. *Winne*, 37 N. Y. 591, 97 Am. Dec. 755; *Goodrich* v. *Downs*, 6 Hill, 438; *Jackson* v. *Packard*, 6 Wend. 415; *Horton* v. *Williams*, 21 Minn. 187.

The debt of a preferred creditor cannot be used as a colorable consideration to screen and protect the debtor's property from creditors' claims or to delay, hinder, and embarrass them in the enforcement of their claims.

Stoddard v. *Butler*, 20 Wend. 507; *Bunn* v. *Ahl*, 29 Pa. 387; *Henderson* v. *Henderson*, 55 Mo. 534; *Smith* v. *Hardy*, 37 Wis. 417; *Kirkland* v. *Snow*, 20 Conn. 23.

Relationship of the parties is calculated to awaken suspicion and the transaction will be closely scrutinized.

Forsyth v. *Matthews*, 14 Pa. 100, 53 Am. Dec. 522; *Harrell* v. *Mitchell*, 61 Ala. 271; *Engraham* v. *Pate*, 51 Ga. 537; *Sherman* v. *Hogland*, 73 Ind. 473; *Fisher* v. *Shelver*, 53 Wis. 501; *Seitz* v. *Mitchell*, 94 U. S. 580 (24: 179).

Mr. Justice **Harlan** delivered the opinion of the court:

*1. The refusal of the court to allow [616 the plaintiff to read the answer of the witness Nash to the question, "You may state whether or not that check has all the appearance of having passed through the bank in the ordinary course of business," cannot be assigned as error. The bill of exceptions does not show what answer was made to that question in the deposition of the witness. It does not even state the facts the answer tended to establish. We cannot, therefore, say that the exclusion of the answer was prejudicial to the plaintiff. For

aught that appears in the record, the witness may have made an answer that was injurious to the plaintiff, or one that was of no value to either party.

In *Northwestern U. Packet Co.* v. *Clough*, 87 U. S. 20 Wall. 528, 542 [22: 406, 409], one of the assignments of error was the rejection of a deposition. In respect to that assignment the court said: "It is sufficient to say that we have not before us either the deposition or any statement of what it tended to prove. We cannot know, therefore, that it was of any importance, or that, if it had been admitted, it could have had any influence upon the verdict. A party who complains of the rejection of evidence must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice in this court, and such is the requirement of our 21st rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict." At the date of the trial of that cause in the court of original jurisdiction it was provided, by Rule 21 of this court, that "when the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. Any alleged error not in accordance with these rules will be disregarded." [617]*11 Wall. ix. Subsequently, the rule was modified so as to substitute for the words above quoted the following: "When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected." 81 U. S. 14 Wall. xii [20: 905]. This change of phraseology did not affect the substance of the rule.

The principle announced in *Northwestern U. Packet Co.* v. *Clough*, was reaffirmed in *Florida R. Co.* v. *Smith*, 88 U. S. 21 Wall. 261 [22: 514], and *Thompson* v. *First Nat. Bank of Toledo*, 111 U. S. 529, 535, 536 [28: 507, 509].

The rule is not the less applicable in the present case, because the trial court excluded the answer to the question upon the particular ground stated in the bill of exceptions. It may, therefore, be regarded as settled, that an assignment of error based upon the exclusion by the trial court of an answer given in the deposition of a witness, to a particular question, will be disregarded by this court if the answer, or the full substance of it, is not set forth in the record in appropriate form for examination.

Nor did the court err in excluding those parts of Nash's deposition showing "what marks and indorsements on the back of each of the checks indicated, how such marks were made, and by whom." The checks themselves were in evidence; and if, as the bill of exceptions states, the witness did not appear to be familiar with the course of business of the banks through which the checks passed, so as to entitle him to speak upon the subject, the exclusion of his answers relating to the subject referred to was not error.

2. The court did not err in allowing the defendant to read, in evidence, the confidential business statement made by Louis S. Shauer to Bradstreet's Commercial Agency, at Sioux City, in January, 1885. That statement, the bill of exception recites, concealed the alleged liability of Louis to his brother, then existing. Why should such concealment have been made? The answer to that question has some, though, perhaps, very slight bearing upon the inquiry whether Louis was, in fact, indebted to his brother to the full extent claimed by the latter.

3. By the statutes of Dakota it is provided that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand, in preference *to another;" also, that "every [618 transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor;" further, that "every transfer of personal property other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property and not accompanied by any immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any person on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrances in good faith subsequent to the transfer." Civ. Code, §§ 2021, 2023, 2024; Dak. Com. Laws, §§ 4654, 4656, 4657.

Other provisions of the statute are to the effect that "actual notice consists in express information of a fact;" that "constructive notice is notice imputed to a person not having actual notice;" and that "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." Civ. Code, §§ 2107, 2108, 2109; Dak. Comp. Laws, §§ 4741, 4742, 4743.

In view of these statutory provisions, and of the facts which the evidence tended to establish, two principal questions were considered by the court in its charge to the jury: first, whether the transfer of the merchandise in question was made with the intent to delay or defraud the creditor of Louis S. Shauer; second, whether the transfer to his brother was accompanied by such immediate delivery of the merchandise and followed *by such [619 actual and continued change of possession as the statute required.

Upon the first of these questions, the court

said, generally, to the jury, that an intent upon the part of the debtor to delay his creditors in the collection of their debts was as much within the statute as if the intent had been to cheat or defraud; that while a debtor, in failing circumstances, was at liberty, acting in good faith and openly, to prefer some creditors over others, he could not, as against those not paid, reserve to himself a secret trust in any transfer; that a creditor thus favored by the debtor, will not be permitted to enjoy the preference given him if he seeks, by the transaction, to cover or protect the remainder of the debtor's property so that it could not be applied to the payment of his honest debts; and that if a creditor seeks to appropriate the debtor's property for a debt, any material part of which was knowingly fictitious, the whole transaction would be held as tainted with fraud and void as to other creditors.

Applying these principles to the facts of this case, the court said: "Therefore, should you find from the evidence that Louis S. Shauer was fairly and honestly indebted to his brother, Gustave Shauer, in the full amount claimed, which I believe is about $6700, you will remember the exact amount, and that with the honest intention of securing such indebtedness he purchased the property in question without notice or knowledge of any fraudulent intent on the part of Louis S. Shauer to delay or defraud his creditors, and without any intent on his own part to secure any interest in said property, present or future, to his brother Louis, and without any intent to delay or defraud the creditors of Louis S. Shauer, then he is entitled to recover whatever, may have been the intent of Louis Shauer himself; for the intent of Louis Shauer can affect the plaintiff only in the case that he knew, had notice, or as a prudent man had knowledge sufficient from the circumstances to put him upon inquiry as to his brother's fraudulent intent. On the other hand, should you find that the alleged indebtedness from Louis to Gustave Shauer, and which forms a part of the consideration of the sale, 620] was knowingly false *and fictitious in whole or in a material part, or should you find that the balance of the consideration money or price was paid by Louis to Gustave Shauer with the intent to place the same out of and beyond the reach of the creditors of Louis Shauer, or should you find that Gustave Shauer in making this purchase had any intent not only to secure his own indebtedness, but also the further intent to hinder and delay the creditors of Louis Shauer, or any intent to so dispose of the remainder of the property after the satisfaction of his own debt either that it would be out of the reach of the other creditors or that it would inure in the future to the use and benefit of Louis Shauer, then and in either event the transaction would be tainted with fraud, and the plaintiff cannot recover."

The jury was further instructed, at the instance of the plaintiff, that if they found that Louis Shauer made a sale of these goods to his brother, it would be presumed, in absence of proof to the contrary, that such sale was made in good faith and with honest intentions; that if the evidence was equally balanced, the defendant must fail in respect to the fraud alleged by him; and that if the plaintiff knew of the insolvency of his brother, and that the payment of his debt would deprive other creditors of their claims, "this mere knowledge on his part would not make the sale in question fraudulent."

The plaintiff contends that the instructions of the court upon the question of intent were based upon an erroneous interpretation of the statute, in that they made knowledge that was sufficient, under all the circumstances, to put him, as a prudent man, upon inquiry as to his brother's fraudulent intent, equivalent to actual notice or knowledge of such an intent. That the court held this view is made clear by one of the instructions given to the jury at the request of the defendant, in which it was said that "actual knowledge by the purchaser of any fraudulent intent on the part of the seller is not essential to render a sale void;" and that "if the facts brought to the attention of Gustave G. Shauer were such as to awaken suspicion and lead a man of ordinary prudence to make inquiry, *and he fails to make [621 such inquiry, then he is chargeable with notice of fraudulent intent and with participation in the fraud, and it will be your duty to find for the defendants."

It is admitted that if at the time of his alleged purchase the plaintiff had actual notice that his brother intended, by the sale, to delay or defraud his creditors, the sale would have been void against creditors. But the plaintiff denies that anything short of actual notice or knowledge of such fraudulent intent will suffice, under the statute, to invalidate his purchase. The statute of Dakota, strictly interpreted, would seem to invalidate any transfer of property made with the intent, upon the part of the owner, to delay or defraud creditors, even when the transferee purchased in good faith. But it was not thus interpreted by the court below. It was liberally construed so as to protect bona fide purchasers for value. Assuming, for the purpose of this case, that this interpretation was correct, we are of opinion that while the plaintiff was not bound to act upon the mere suspicion as to the intent with which his brother made the sale in question, if he had knowledge or actual notice of circumstances sufficient to put him, as a prudent man, upon inquiry as to whether his brother intended to delay or defraud his creditors, and he omitted to make such inquiry with reasonable diligence, he should have been deemed to have notice of such fact, and, therefore, such notice as would invalidate the sale to him, if such sale was in fact made with the intent upon the part of the vendor to delay or defraud other creditors. Referring to the statute of Dakota, declaring a conveyance of real property, other than a lease for a term not exceeding one year, void as against any subsequent purchaser or incumbrancer (including an assignee of a mortgage, lease, or other conditional estate, of the same property or any part thereof) in good faith and for a valuable consideration, whose conveyance is first duly recorded, the supreme court of Dakota, in *Gress* v. *Evans*, 1 Dak. 371, said: "Actual notice of a prior unrecorded conveyance or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the

good faith of the subsequent purchaser. There 622]should be *proof of actual notice of prior title or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court or jury to infer and find actual notice. Or, to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantages of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive."

A less stringent rule cannot be applied to the Dakota statute relating to transfers of property with intent to delay or defraud creditors. The plaintiff had the right, by a purchase of his brother's stock of merchandise, to obtain payment of his claims in preference to the claims of other creditors. But the statute of Dakota, however liberally construed in favor of purchasers from a fraudulent debtor, will not permit him to enjoy, to the exclusion of other creditors, the fruits of his purchase, when the sale was made with the intent to delay or defraud other creditors, if he had, at the time, actual notice of such intent or knowledge of such circumstances or facts as were sufficient to put a prudent person upon an inquiry that would have disclosed the existence of such intent upon the part of the vendor. The plaintiff could not properly have claimed a more favorable interpretation of the Dakota statute than was given to it by the court below. A statute that declares every transfer of property, made with intent to delay or defraud any creditor of his demands, void against all creditors of the debtor, would be wholly defeated in its operation if the rights of the transferee were not subject to the rule that "whatever is notice enough to excite attention and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have lead." *Wood* v. *Carpenter*, 101 U. S. 135, 141 [25: 807, 809]; *Kennedy* v. *Green*, 3 Myl. & K. 722.

4. Having disposed of the question as to the intent with which the sale in question was 623]made, *the court referred to the provision of the statute, declaring the transfer of personal property—the vendor having at the time possession or control thereof—to be conclusively fraudulent and void, as against creditors, unless such transfer is accompanied by an immediate delivery, and followed by an actual and continued change of possession. The court said to the jury that the statute means, as declared by the supreme court of the territory in *Grady* v. *Baker*, 3 Dak. 296, 299, that the sale shall be open and public, that the world may be apprised of the change of ownership; and that the change of possession must be actual and continued, and not subject to some secret trust between the buyer and seller. "Some of the cases," the court below observed, "say that the change must be of that character that customers and those accustomed to frequent the premises may be at once advised of the change of possession by the changed appearance of the property or its change of custody. And this is true, whatever may be the good intention or bona fides of the transaction; even the law will not tolerate such transfers as against creditors. The change of possession must be open and visible, and if not, as against creditors without knowledge of the transfer, it will be void, though made for a valuable consideration in good faith and without any actual intent to defraud. In such case the law conclusively presumes a fraudulent intent, and the party to such sale will not be heard to prove the contrary."

In addition to what appears in the charge, the court, at the instance of the defendant, instructed the jury that a change of the property in controversy in this case must not have been merely nominal and momentary, but real, actual, and open, such as could be publicly known; and that if the property was permitted to remain in the possession of Louis S. Shauer, then the transfer was fraudulent in law as to his creditors, notwithstanding the sale may have been made to his brother in good faith and for a valuable consideration.

The specific objection made by the plaintiff to these instructions is that they stated an arbitrary rule, namely, that the change in possession must be accompanied by such outward, visible signs as would apprise the world of the change, and *made no reference to the [624 time within which such signs should be given, or to the nature of the property transferred or to the circumstances attending the transaction. The court, it is said, should have qualified the rule as indicated in the instructions asked by him. We cannot sustain this position. The instructions asked by the plaintiff, on this point, did not substantially differ from those given by the court, except they were more elaborate and referred more in detail to the facts. The court told the jury that the statute required not only an immediate change of possession, but one so open that the public would be apprised of it. While the court was at liberty to recall to the minds of jurors all the facts and circumstances bearing upon this issue, we cannot say that it erred in not doing so, or that it erred in leaving to the jury to determine whether, under all the evidence, there was such immediate delivery and such actual change of possession of the property in controversy as was necessary, under the statute as explained, to make the transfer valid against creditors.

In this connection, it is appropriate to say that the interpretation placed by the court below on the Dakota statute, relating to change of possession, accords with the decisions of the supreme court of California in respect to a similar statute. In *Stevens* v. *Irwin*, 15 Cal. 507, 76 Am. Dec. 500, it was said: "A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must in

other words, be in the usual relation to the property which owners of goods occupy to their property. This possession—not taken to be surrendered back again—not formal, but substantial." See also *Lay* v. *Neville*, 25 Cal. 545, 553; *Woods* v. *Bugbey*, 29 Cal. 466; *Parks* v. *Barney*, 55 Cal. 239. There are many other cases to the same effect.

5. Exception was taken to what the court said 625[to the jury *touching the relation of the plaintiff and the vendor of the goods. After observing that the law scrutinizes carefully all transfers of the failing debtor and zealously guards the rights of creditors against fraudulent dispositions of the debtor's property, the court said that it was for that reason that transfers to one's wife or to members of his family are carefully scrutinized, experience having taught that such conveyances are more frequently fraudulent than transactions between strangers or those not intimately connected or acquainted. It is said that this language authorized the jury to infer that the mere fact of the parties being related would cause the good faith of the transaction to be suspected. But this criticism of the charge is met by the next succeeding sentence, in these words: "Yet experience also teaches that honest and bona fide sales and transfers of property are made, and that too much stress, or even importance, should not be given to such a fact alone." It is also met by the fact that the court, at the instance of the plaintiff, instructed the jury that if these goods were sold by Louis to Gustave, the law presumed that the sale was made in good faith and with honest intentions; that in absence of proof to the contrary, the validity of the sale could not be questioned; that if the evidence was equally balanced upon that point, the defendant must fail, and that mere knowledge on the part of Gustave that his purchase would deprive other creditors of their debts would not make the sale fraudulent. Again, at the instance of the plaintiff, the court said: "The mere sale by a party of his stock of goods to a relative is not a badge of fraud. If such sales were fraudulent in themselves it would be impossible for family connections to aid each other in case of financial embarrassment without danger of being placed in a false position and losing the entire sum loaned. Under this rule, if Louis S. Shauer owed his brother, Gustave G. Shauer, a just debt, he had the same right to transfer his property to his brother in payment of this debt as he would have had to transfer the same property to any one of these attaching creditors in payment of his claim."

The jury could not have been induced by anything said by the court to give undue weight 626] to the fact that the transaction *in question was between brothers. If that fact induced them, under the instructions—as it might properly have done—to carefully scrutinize the evidence, it must be assumed that they performed their duty without forgetting the injunction that the law presumed the sale, despite the fact of the near relationship of the parties, to have been made in good faith, if accompanied by immediate delivery and followed by actual, continued change of possession.

We are of opinion that it was not error for the jury to be told that the relations of the parties to the transaction made it necessary to carefully scrutinize the facts, but that their determination must, at last, depend upon the inquiry whether the transaction was honest and bona fide.

We perceive no ground to doubt that the case was well tried. The jury were fully and properly instructed in respect to every aspect of the case, and we have no authority to set aside their verdict, even if it does not appear to be justified by the evidence. *New York Cent. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 24, 31 [25: 531, 534]; *Lincoln* v. *Power*, *ante*, p. 224.

Judgment affirmed.

JOHN A. BUCKSTAFF ET AL., *Plffs. in Err.*,
v.
RUSSELL & COMPANY.

(See S. C. Reporter's ed. 626-638.)

Jurisdictional amount—complaint for machinery sold—question to witness—when error to exclude.

1. Where the amount for which plaintiffs sued in their original petition was $4206.07, with interest, and that amount was increased by the supplemental petition to $5882.20, and defendants denied their liability in any sum and by way of counterclaim asked for judgment in the sum of $10,000, and the judgment was in favor of the plaintiff for the sum of $4450, that sum, and the amount sued for in the counterclaim, are in dispute upon the writ of error, and this court, therefore, has jurisdiction.

2. Where plaintiff agreed to build certain machinery for defendant for a certain price to be paid by defendant, and it was further agreed between them that if after fairly testing its efficiency the machinery did not work to defendant's satisfaction, he was to notify plaintiff to comply with the contract in sixty days, and if he did not then defendant might declare the contract paid in full or plaintiff should pay back to defendant all money paid by him and all damages to him and might then remove the machinery, it is not necessary in an action to recover the price to allege in the complaint that the machinery worked to defendant's satisfaction, but this is matter of defense; it is sufficient to allege the delivery of the machinery and that the price to be paid therefor has become due and is unpaid.

3. The rule that an assignment of error, based upon the exclusion of an answer to a particular question in the deposition of a witness, will be disregarded in this court unless the record sets forth the answer or its full substance, does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an

NOTE.—*As to amount necessary to give jurisdiction in circuit court; cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute*, see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to stated sum in contract; whether penalty or liquidated damages, see note to Tayloe v. Sandiford, 5: 384.

As to contracts; their interpretation and validity, see note to Bell v. Bruen, 11: 89.

answer favorable to the claim or defense of the party producing him.

4. If a question to a witness is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it is error to exclude it, although the facts proposed to be proved by the answer, are not stated.

[No. 207.]

Argued and Submitted Jan. 17, 1894. Decided Feb. 5, 1894.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of plaintiff, Russell & Co., a corporation, in a suit brought against John A. Buckstaff *et al.*, to recover the price agreed to be paid for machinery, furnished by plaintiff to defendants. *Reversed, and cause remanded for a new trial.*

The facts are stated in the opinion.

Mr. **John H. Ames** for plaintiffs in error:

Mr. **T. M. Marquett,** for defendants in error:

The question of what damage was sustained was a question for the jury.

Wolf v. *Arthur*, 112 N. C. 691.

The measure of damages is the difference between the value of the property as it actually was, and what would have been its value had it been as represented at the time the representation or warranty was made.

Young v. *Filley*, 19 Neb. 543; *Markel* v. *Moudy*, 13 Neb. 323; *Brown* v. *Rogers*, 20 Neb. 547.

The purchaser cannot retain and use the property and at the same time say he repudiates and rescinds the contract of purchase.

Cookingham v. *Dusa*, 41 Kan. 229; *Aultman* v. *Mickey*, 41 Kan. 348.

The loss of possible profits was not a proper subject for damages.

Wakeman v. *Wheeler & W. Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676.

The general damages in the counterclaim could easily have been prevented by the defendant's quitting the use of the machinery, and hence cannot be recovered.

Wicker v. *Hoppock*, 73 U. S. 6 Wall. 94 (18: 752); *Russell* v. *Butterfield*, 21 Wend. 300.

The verdict being for less than $5000, this court does not have jurisdiction of this case.

New England Mortg. Secur. Co. v. *Gay*, 145 U. S. 123 (36: 646); *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 (35: 659).

Mr. Justice **Harlan** delivered the opinion of the court:

1. It is suggested that the amount in dispute is less than five thousand dollars. This point is not well taken. The amount for which Russell & Co. sued in their original petition was $4206.07, with interest from October 9, 1888. That amount was increased by the supplemental petition to $5882.20. The plaintiffs in error, who were defendants below, denied their liability in any sum, and, by way of counterclaim, in accordance with the practice in Nebraska, 628] asked for judgment *against Russell & Co. in the sum of $10,000. The verdict and judgment were in favor of the plaintiff and for the sum of $4450. That sum, and the amount sued for in the counterclaim, are in dispute upon this writ of error. This court, therefore, has jurisdiction.

2. By an agreement in writing, made June 22, 1888, between Russell & Co., a corporation, and Buckstaff and Utt, the former agreed to furnish and deliver to the latter on cars at Lincoln, Nebraska, three boilers, 60 inches by 14 feet; one automatic cut-off engine, 125 horse power; one automatic cut-off engine, 50 horse power; one Gordon-Maxwell duplex pump; one Garfield injector; one heater, and any necessary fittings of sufficient size and dimension to properly run such plant; also two smokestacks 32 inch diameter, 60 feet long, made of No. 12 iron, with fancy tops, guy rods and stays. For those articles Buckstaff and Utt agreed to pay four thousand nine hundred and fifty dollars, as follows: One third cash when the machinery was "steamed up ready to run, the balance in six and twelve months, with interest at the rate of 7 per cent per annum from time of erection in Lincoln, providing that with proper and careful management, said engines, boilers, and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss non-condensing engine." "It is also understood and agreed," the contract proceeded, "that said Buckstaff and Utt shall use fair and honorable means to satisfy themselves before payments are due, that said engines, boilers, and pumps are working to their entire satisfaction, and should they not be, then, in that event, the said Buckstaff and Utt are to notify said Russell & Co. and said Russell & Co. must at once comply with the terms of this contract within 60 days, and in the event they do not, the said Buckstaff and Utt may declare this contract paid in full, or said Russell & Co. shall pay back to said Buckstaff and Utt all money paid to them, and said Russell & Co. shall pay said Buckstaff & Utt such damage as shall be declared fair by competent judges, and after paying such damages may remove said machinery without cost to *said [629 Buckstaff and Utt. It is hereby agreed that Russell & Co. shall ship said machinery not later than July 15, 1888."

Attached to and made part of the contract are certain proposals from Russell & Co. to Buckstaff and Utt. One of them is a proposal to furnish three eighty horse-power boilers, fully described, and contains this stipulation: "All boilers tested to 150 pounds hydraulic pressure; workmanship and material guaranteed to be first class; plans for setting boilers to be furnished without expense to purchaser." Another is a proposal to furnish one right hand automatic cut-off engine, fully described, and contains this stipulation: "We guarantee the above engine to be well made, of first class material, and in operation to work as economically as any similar engine in the market." A third is a proposal for another right hand automatic cut off engine, accompanied by a similar guaranty.

In the first count of the petition it was alleged that all the machinery covered by the contract was delivered by the plaintiff to the defendants in strict accordance with its terms; that the defendants were to pay for it the sum of four thousand nine hundred and fifty dol-

lars, one third in cash when the machinery was steamed up ready to run, one third in six months, and the remaining one third in twelve months with interest at the rate of 7 per cent per annum from the time of the erection of said machinery; that all of the machinery had been delivered, was set up, put in operation, and commenced running on the 9th day of October, 1888, at which time one third of the four thousand nine hundred and fifty dollars became due; that another one third became due on the 9th day of April, 1889; that neither of those amounts nor any part thereof have been paid by the defendants; and that they have refused and neglected to pay the same or any part thereof, although often requested so to do. The second count was for piping and other machinery of the value of $392.86, and the third for grate bars, of the value of $450, alleged to have been sold and delivered by Russell & Co. to the defendants. By a supplemental petition the plaintiff enlarged its claim so as to embrace the last installment of the $4950 for which the contract stipulated.

630] *At the trial below the defendants objected to the introduction of any evidence in support of the first count of the petition, on the ground that it did not state facts sufficient to constitute a cause of action. This objection was overruled, and to that ruling the defendants excepted.

In support of this exception it is said that if it had been alleged, or indeed proven, that the plaintiff did not "use fair and honorable means to satisfy themselves," before payment was due, that the machinery was "working to their entire satisfaction," or that the refusal to accept was fraudulent, still no action could have been properly maintained for the sale and delivery of the property, because, at all events, there would have been no acceptance, and, in its absence, the contract would have remained executory; consequently, it is argued, the only action maintainable, if any, would have been one to recover damages for fraudulently refusing to accept the machinery and articles furnished. The counsel for the defendants refer to numerous cases which, it is insisted, sustain the construction of the contract upon which this exception is founded. It may be well to refer to some of those cases.

In *Mansfield Mach. Works* v. *Lowell*, 62 Mich. 546, 552, which was a suit upon a contract with a village for the sale of a steam engine and attachments, and which contract provided that a named sum should be paid "when engine and hose are accepted, balance in equal payments—first, on or before six months; second, on or before eighteen months, with interest at six per cent from date of acceptance," it was held that the contract, fairly construed, did not provide for the payment for the engine and machinery until they were tried and accepted; that under its terms the property remained in the vendor until acceptance and after trial of it, the village never becoming the owner of it; and that the remedy of the plaintiff, if any, would be a suit for a breach of the contract and refusal to accept on the part of the defendant.

In *Zaleski* v. *Clark*, 44 Conn. 218, 223, 26 Am. Rep. 446, which was a suit for the price agreed to be paid for a plaster bust of the deceased husband of the defendant—the agreement being *that she was not bound to [631 take it unless she was satisfied with it—the question was as to the liability of the defendant upon proof that the bust was not only a fine piece of work, and a correct copy of a photograph furnished by the defendant, but that it accurately portrayed the features of the deceased. The court said: "In this case, the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she *ought* to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that possibly could be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied is quite another thing. The former can only be determined by experts, or those whose education and habits of life qualify them to judge of such matters. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it, he is bound to it."

In *Brown* v. *Foster*, 113 Mass. 136, 138, 18 Am. Rep. 463, which was an action to recover the price of a suit of clothes which it was agreed should be satisfactory to the purchaser, but with which he was not satisfied and for which he refused to pay, the court said: "If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract *permits [632 the defendant to decide himself whether the articles furnished are to his satisfaction. Although compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

Among many other cases of the same class are *Singerly* v. *Thayer*, 108 Pa. 291; *Goodrich* v. *Van Nortwick*, 43 Ill. 445; *McCarren* v. *McNulty*, 7 Gray, 139; *Cole* v. *Homer*, 53 Mich. 438; *Gibson* v. *Cranage*, 39 Mich. 49, 33 Am. Rep. 351; *Krum* v. *Mersher*, 116 Pa. 17; *Ellis* v. *Mortimer*, 4 Bos. & P. 257.

These authorities do not control the determination of the present case. There is no provision in the contract of June 22, 1888, which either expressly or by necessary implication

justified the defendants in withholding payment for the articles furnished on the ground alone that they were not satisfied with them.

They agreed to pay in cash one third of the stipulated price when the machinery was "steamed up, ready to run," the balance in six and twelve months with interest at 7 per cent "from time of erection in Lincoln." If, after using fair and honorable means, before the payments became due, to test their efficiency, the engines, boilers, and pumps did not work to their entire satisfaction, then Buckstaff and Utt were entitled to notify Russell & Co. to comply with the contract within sixty days, in default of which, but in that event only, they could have declared the contract "paid in full," or Russell & Co. could have been required to pay back all money paid to it, and, in addition, such damage as was declared fair by competent judges—Russell & Co. having the right to remove the machinery after paying such damage. The plaintiff was entitled to recover the price stipulated, unless it appeared that such means had been used, and that the engines, boilers, and pumps were, in that way, ascertained not to work to the entire satisfaction of the defendants; that due notice thereof was given to the plaintiff; and that plaintiff did not comply with the contract within due time after receiving such notice. But **633**] these were matters to be disclosed *in the defense of the action, and need not have been made the subject of specific allegations in the petition. It was not necessary to allege in the petition that the engine, boilers, and pumps were ascertained by the defendants to work to their entire satisfaction. It was sufficient to allege the delivery of the articles, and the expiration of the time limited in the contract for the payments.

In respect to the guaranty of the plaintiff that the engines, boilers, and pumps would work, and that the engines would furnish the stipulated amount of horse power, and be as economical of fuel and as durable as a Corliss non-condensing engine, it need only be said that those were, also, matters to be alleged and proved by defendants in support of their counterclaim.

For these reasons we are of opinion that the court properly overruled the motion of defendants to exclude all evidence in support of the first count of the petition.

3. The defendants in their answer deny the material allegations of the petition; and by way of counterclaim allege that on or about the twenty-second day of June, 1888, the defendants, as the plaintiff then well knew, were the owners of all the capital stock of the Lincoln Paper Manufacturing Company, a corporation duly organized under the laws of Nebraska for the purpose of manufacturing paper in the city of Lincoln in that state; and that on or about that date the plaintiff entered into the contract with the defendants, set forth in the first count of the petition, for the furnishing of boilers, engines, and machinery to generate and apply the power with which to drive the machinery to be used by them in said mill for the manufacture of wrapping and straw building board; that the plaintiff then well knew that if said boilers, engines, and machinery were not of the capacity and efficiency specified in the contract, that then the defects and inefficiency of such machinery would of necessity cause the defendants great injury, cost, and damage in and about their manufacturing business by reducing the quantity and degrading the quality of the paper to be manufactured at their mill and by putting them to great cost and expense for loss of time and for labor, fuel, and material used, lost, and expended above such as *would be required with [**634** the use of boilers, engines, and machinery of the kind, power, effectiveness, and economy specified in the contract; that the defendants entered into the contract in the expressed confidence, assurance, and belief that the plaintiff would furnish for use in their mill, boilers, engines, and machinery of the kind, quality, power, and description in the contract set forth; yet the plaintiff, in pretended compliance with the contract, furnished and erected in said mill three boilers of a capacity not exceeding sixty-five horse power each, and one engine of one hundred and twenty-five, and one of fifty horse power, and that said engines and boilers have at all times and still do consume in the performance of the work of which they are capable not less than fifty per cent more fuel than would be consumed in the performance of the same work by a non-condensing Corliss engine; and that plaintiff furnished with said boilers and engines defective and insufficient grates, fixtures, and appliances therefor, so that the same were for a long time less capable and effective than they would otherwise have been.

The defendants further alleged in their counterclaim that, at the request of plaintiff, they allowed it, after the date of the erection of said machinery, to consume a long time in the attempt or pretended attempt to adjust the boilers, engines, and machinery, and supply them with grates and fittings so that the same would meet the requirements and descriptions of the contract, all of which attempts or pretended attempts have wholly and completely failed; that thereupon, on or about the eleventh day of January, 1889, and the eleventh and twenty-fifth days of February of said year, they duly notified the plaintiff, by letters properly transmitted through the United States mails, that such boilers, engines, and machinery were wholly inadequate, inefficient, and wasteful of fuel as compared with the requirements and descriptions of the contract, and demanded of it to remove the same from said mill and pay defendants the amount of money, to wit, $690.-68, paid by them to and for the use of plaintiff under the contract and the damages suffered by reason of the premises, as by the contract it had undertaken to do, with which request the *plaintiff has at all times neglected, and [**635** still wholly neglects and refuses to comply; and that by reason of the premises, of the wasteful consumption of fuel and lack of power, said boilers, engines, and machinery, and the consequent loss of time and labor and the diminution in quantity and deterioration in quality of the output of said mill resulting from the non-compliance by plaintiff with the contract in the respects and particulars set forth and in the purchase and supplying new grate bars and heater fittings and fixtures for such boilers and engines, the defendants have been damaged in

the sum of ten thousand dollars. An account of the moneys so alleged to have been paid was annexed to the counterclaim.

The plaintiff, in reply, denies that the machinery, etc., furnished by it, under the contract, were defective, and charges that their inefficiency, if they became inefficient, was due entirely to the unskillful and incompetent management of the defendants, their agents, and servants. While it denies that the defendants were the owners of "all" the capital stock of the Lincoln Paper Manufacturing Company, it does not deny that the machinery, etc., was purchased to be used in the mill of that company.

The defendant Utt was sworn as a witness for the defense, and, as we infer, in support of the counterclaim. Having stated that he and Buckstaff, in April, 1888, first commenced negotiations for the purchase of the boilers with Mr. Giddings, representing Russell & Co., the following questions were put, successively, to him: 1. "What conversation did you have with him, if any, about the purpose for which the machine must be used and the necessity for steam capacity in the boilers?" 2. "You may state in what your damages consisted and the amount in consequence of the defective construction and the failure of this machinery to perform its labor and the labor required of it by the terms of the contract from the time of its erection up to the first day of March." 3. "You may state what damage you sustained in consequence of the failure of this machinery to do the work at the paper mill." 4. "You may state what loss you suffered in consequence of the defective construction and [636] failure in the machinery." *5. "In what particular did you and the defendant Buckstaff sustain loss by reason of the defects in the construction and the failure of this machinery?"

Each of these questions were objected to upon the ground that it was incompetent, irrelevant, and immaterial. No one of them was objected to upon the ground that it was a leading question.

In the case of *Shauer* v. *Alterton*, *ante* p. 286, just decided, it was held to be the settled construction of the 21st rule of this court that an assignment of error, based upon the exclusion of an answer to a particular question in the *deposition* of a witness, would be disregarded here, unless the record sets forth the answer or its full substance. *Northwestern U. Packet Co.* v. *Clough*, 87 U. S. 20 Wall. 528, 542, [22: 406, 409]; *Florida R. Co.* v. *Smith*, 88 U. S. 21 Wall. 255, 262 [22: 513, 514]; *Thompson* v. *First Nat. Bank of Toledo*, 111 U. S. 529, 535, 536 [28: 507, 509]. Our rule, thus construed, is one to which parties can easily conform. Having access to the deposition containing the answer of the witness to the interrogatory, parties, as well as the trial court, are informed of the precise nature of the evidence offered. The requirement that an assignment of error, based upon the admission or rejection of evidence, must, in the case of a deposition, excluded in whole or in part, state the full substance of the evidence so admitted or rejected, means that the record must show, in appropriate form, the nature of such evidence, *in order* that this court may determine whether *or not error has been committed* to the prejudice of the party bringing the case here for review.

But this rule does not apply where the witness testifies in person, and where the question propounded to him is not only proper in form, but is so framed as to clearly admit of an answer favorable to the claim or defense of the party producing him. It might be very inconvenient in practice if a party, in order to take advantage of the rulings of the trial court in not allowing questions, proper in form and manifestly relevant to the issues, were required to accompany each question with a statement of the facts expected to be established by the answer to the particular question propounded. Besides, and this is a consideration of some weight, such a statement, in open *court, and in the presence of the wit- [637 ness, would often be the means of leading or instructing him as to the answer desired by the party calling him. If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded.

Tested by these views, the court below erred in not permitting the defendant Utt to answer the above questions. Each one of them was relevant to the counter claim, and each admitted of an answer that tended to support it.

After the court below refused to allow the defendant Utt to answer the above questions, he was asked: "You may state in what manner your industry was affected by the failure of this machinery." The witness answered: "When our mill was erected we made contracts with different parties to put in certain machinery. In cutting straw there is a large amount of steam required. We purchased from Neill patent boilers at an expense of five thousand dollars, to be cooked with steam coming from the boilers. That was the proper way to do it. A lack of steam in the plant that we purchased made it impossible for us to cook this straw in these boilers, so after trying six or eight weeks to do this with this steam and succeeding very poorly we took steam from the escape system that we had made in connection with the big engine, and since that time we have been using that steam, but it does not cook the straw well because the water condenses in these globe bleachers and has to be let out, and with them the liquor passes out that the straw is cooked in, and it makes an uneven cooking of the straw; it is not uniform. The straw is frequently tough, so that we take it over to the grinding machine, where it is ground up. Instead of grinding it up in two hours and a *half to three hours, [638 it takes from four to four and a half to get it in proper shape."

To this question the plaintiff objected, and moved to strike out the answer as incompetent and irrelevant. The objection and motion were sustained by the court, and the defend-

ants excepted. As we are informed by the bill of exceptions what were the facts intended to be elicited by the question and which, after being detailed, were excluded from the jury, it is competent for this court to inquire whether those facts were competent under the issues in the case, and whether the defendants were prejudiced by their exclusion from the jury. But, as the judgment below must be reversed for the errors already stated, we deem it unnecessary at this time to express any opinion as to the competency of this evidence. We adopt this course because it is not entirely clear that the matters referred to by the defendant Utt in his answer to this question had any connection, in fact, with the counterclaim, or that they referred to any defects in the machinery covered by the written guaranty of Russell & Co. This difficulty may be removed at the next trial of the case.

In the brief of counsel for Russell & Co there is some discussion as to the measure of damages, in the event it was found that the defendants were entitled to recover upon their counterclaim. No question of that kind arises upon this writ of error. The only questions now presented for determination are those to which we have referred.

For the error indicated in this opinion, the judgment must be reversed and the cause remanded for a new trial. Judgment reversed.

639] *GEORGE W. BRYAN ET AL.,
Plffs. in Errr.,
v.
THE BOARD OF EDUCATION of the Kentucky Annual Conference of the Methodist Episcopal Church, South, ET AL.

(See S. C. Reporter's ed. 639-658.)

Kentucky Wesleyan College—removal of same to Winchester.

1. There exists no contract, or undertaking, express or implied, that the Institute, commonly known as the Kentucky Wesleyan College, shall remain at Millersburg, Kentucky, permanently, or any longer than its useful and successful operation requires.
2. The decree of the state court dismissing the suit brought to restrain the removal of the Institute, known as the Kentucky Wesleyan College from Millersburg to Winchester, Kentucky, does not give effect to a law of Kentucky which is repugnant to the Constitution of the United States.

[No. 134.]

Argued and Submitted Dec. 6, 1893. Decided Feb. 5, 1894.

IN ERROR to the Court of Appeals of Kentucky, to review a decree of that court, affirming the decree of the Circuit Court of Bourbon County, Kentucky, dismissing a suit in equity, brought by George W. Bryan, *et al.*, on behalf of themselves and other shareholders of the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, and of the Millersburg Male and Female Collegiate Institute against the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, *et al.*, to obtain a decree perpetually restraining the defendants from selling or disposing of certain lands and buildings of said Institute, commonly known as The Kentucky Wesleyan College, located at Millersburg, Kentucky, or from removing that college, its capital or property from that place to Winchester, Kentucky, or from using the capital or fund of the Institute for any purpose, or at any place, except in its conduct and management at Millersburg. *Affirmed.*

The facts are stated in the opinion.

Mr. **Thomas T. Hargis,** for plaintiffs in error:

The defendants in error did not acquire absolute title to the college, grounds and endowment fund, by prescription or adverse possession.

Adverse possession, for the purpose of a hostile claim, is entirely different from exclusive possession amicably obtained by trustees who take a necessary possession in order to discharge their duties.

Sedgwick & W. Trial of Title to Land, §§ 750, 751; *Catlin* v. *Decker*, 38 Conn. 262; 2 Perry, Tr. §§ 745, 863, 864.

The possession of the trustee, although the title is in his individual name, is nevertheless the possession of the beneficiaries or *cestui que trusts*, until unequivocally and openly renounced by the trustee.

Butler v. *Lawson*, 72 Mo. 227; *Norris App.* 71 Pa. 106; *Paschall* v. *Hinderer*, 28 Ohio St. 568.

The court will not countenance the alleged adverse claim of defendants in error under the circumstances of this case (2 Perry, Tr. § 733) but will treat it as a violation of the trust.

There was a contract valid and binding between the donors and founders of the college and the conference and its board of education as trustees of the college to establish and maintain it at Millersburg, Ky.

Hascall v. *Madison University*, 8 Barb. 184; *Chambers* v. *Baptist Education Society*, 1 B. Mon. 221; *Louisville* v. *University of Louisville*, 15 B. Mon. 660; *State* v. *Adams*, 44 Mo. 580; *Allen* v. *McKean*, 1 Sumn. 298.

The persons who make the first gifts and donations to the revenue of a college, to be used to build the college and endow it, are the *foundatio perficiens* or *perficient* founder, or

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NOTE.—*As to contracts; their interpretation and validity*, see note to Bell v. Bruen, 11: 89.

As to stated sum in contract; whether penalty or liquidated damages, see note to Taylor v. Sandiford, 5: 384.

As to contracts; performance; when excused by nonperformance of other party or his prevention of performance, see note to United States v. Peck, 26: 46.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution, to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

original founder of the college; and the private individual who is a party to the contract of donation, or a representative of such party or interested in the same, or in the uses to which the fund was directed to be applied, can prosecute a bill to prevent the perversion of the funds from the object of the founders, or the breach of the contract annexed to and coupled with their donations as a part thereof.

Angell & Ames, Corp. (3d ed.) chap. 19; 2 Kent, Com. 300, 303; *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629); *Allen* v. *McKean*, 1 Sumn. 300; *Phillips* v. *Bury*, 2 T. R. 348; *Murdock's App.* 7 Pick. 322.

Any statute making a substantial change in the charter in the mode of expending the funds, or in the objects of the charity impairs the obligation of the contract, and is forbidden by the Constitution of the United States.

Sage v. *Dillard*, 15 B. Mon. 356, 359, 361, 362, 363; *Hascall* v. *Madison University*, 8 Barb. 184; *Harvard College* v. *Society for Promoting Theological Education*, 3 Gray, 280; Perry, Tr. §§ 733, 735, 742; Ky. Gen. Stat. chap. 13, *Charitable Uses*.

Any stockholder or donor in or to the endowment fund, or for the erection of a college, no matter how small his interest, may appeal to equity to prevent the perversion of the funds from the object of the donors, or the violation of the contract embraced in the charter of the college.

Kean v. *Johnson*, 9 N. J. Eq. 409; High, Inj. §§ 1203, 1204.

The acts of 1860 and 1861 are unconstitutional.

Cooley, Const. Lim. 111.

Whilst privileges and franchises granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

Covington v. *Covington & C. Bridge Co.* 10 Bush, 76.

A legislative power cannot, through amendment, compel the donees of the power under the charter to abandon its contract rights or surrender its property or the enjoyment thereof to others.

Cumberland & O. R. Co. v. *Barren County Ct.* 10 Bush, 609; *Cumberland & O. R. Co.* v. *Washington County Ct.* 10 Bush, 537.

The courts will apply a new statute only to future cases when it can possibly be done.

Cumberland & O. R. Co. v. *Washington County Ct. supra;* Potter's Dwarr. Stat. 162; Cooley, Const. Lim. 370.

The court will not attempt to so apply it to rights and privileges vested prior to its passage.

Com. v. *Frankfort*, 13 Bush, 189.

By the common law a franchise was said to be a branch of the king's prerogative in the hands of a subject.

2 Bl. Com. 37.

In America it is understood to be a particular privilege conferred by grant from government and vested in individuals.

3 Kent, Com. 458; Bouvier, Law Dict. 611; *People* v. *Utica Ins. Co.* 15 Johns. 387, 8 Am. Dec. 243; *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 595 (10: 311); *Sage* v. *Dillard*, 15 B. Mon. 355; *St. Mary's Church Case*, 7 Serg. & R. 562.

The repeal of the Act of 1858 by the Act of 1860, and the substitution of new trustees for those created by the Act of 1858, was unconstitutional, unless the donors assented thereto.

Fry v. *Lexington & B. S. R. Co.* 2 Met. (Ky.) 322; Cooley, Const. Lim. 114, 150.

Messrs. **D. L. Thornton, J. M. Wilson,** and *S. Shellabarger*, for defendants in error.

This court has no jurisdiction to entertain the present writ of error.

San Francisco v. *Itsell*, 133 U. S. 65 (33: 570).

The acts of the legislature involved in this case have no relation to, nor do they, in any way affect any contract rights of the complainants.

New Orleans Water Works Co. v. *Louisana Sugar Ref. Co.* 125 U. S. 18 (31: 607).

Even if the court should reach the conclusion that such acts were unauthorized, still the judgment of the court below must be sustained, because wholly independent of the Federal question here presented, the judgment of the state court is right, and in such case will not be disturbed by this court.

Murdock v. *Memphis*, 87 U. S. 20 Wall. 590, 636 (22: 429. 444); *Hale* v. *Akers*, 132 U. S. 564 (33: 446.)

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiffs in error, suing on behalf of themselves and other shareholders of the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, and of the Millersburg Male and Female Collegiate Institute, brought this suit in equity in the Circuit Court of Bourbon County, Kentucky, against the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, and others, to obtain a decree perpetually restraining the defendants from selling or disposing of certain lands and buildings of the above named institute, commonly known as the Kentucky Wesleyan College, located at Millersburg, Kentucky, or from removing that college, its capital or property, from that place to Winchester in the same *commonwealth, or from using the [640 capital or fund of the institute for any purpose or at any place, except in its conduct and management at Millersburg.

Upon final hearing the bill was dismissed, and that decree was affirmed by the court of appeals of Kentucky, the highest court of the commonwealth. The present writ of error questions the correctness of the decree of affirmance upon the ground, among others, that it gives effect to legislative enactments which, it is alleged, impair the obligation of a contract, in which the plaintiffs and those in whose behalf they sue have an interest, for the permanent location and maintenance of the college at Millersburg.

The facts relating to the alleged contract, and to the Federal question suggested by the legislation referred to, will sufficiently appear in the following statement:

At a meeting of the citizens of Millersburg, held on the 4th day of January, 1858, these resolutions were adopted:

"Whereas it is proposed to purchase ground and erect buildings for an institution of learning and boarding house, the whole to cost about fifteen thousand dollars; and whereas it

is believed to be indispensable to the success of educational enterprises that they may be under the supervision of some denomination: Therefore,

"*Resolved*, That we promise and pledge ourselves for the amount subscribed to secure a male and female collegiate institute in Millersburg or its immediate vicinity, on the following basis, to wit: 1, that it be an Institute for the Covington district, Kentucky Conference, and be under the control of the Methodist Episcopal Church, South; 2, the trustees and building committee be appointed by the Quarterly Conference of the Millersburg station, the former to be subject to the approval of the Kentucky conference; 3, it shall be upon the joint stock plan, the shares to be $25 each, and to be subject to sale or transfer, but not to bear interest; 4, in case the said church fail to sustain the Institute, and it shall from any cause be discontinued, then the property is to revert to the stockholders pro rata; 5, the stock subscribed shall be paid to the building com-[641]mittee on the following terms: one *third when the buildings are put under contract, one third when they are covered in and floors laid, and one third six months thereafter."

For the purpose of accomplishing these objects, the Millersburg Male and Female Collegiate Institute was incorporated by an act of the legislature of Kentucky, approved February 16th, 1858, the preamble of which recited that "divers citizens in and near the town of Millersburg, in the county of Bourbon, have subscribed a considerable sum of money for the purpose of erecting in or near said town a seminary of learning, to be under the control and supervision of the Kentucky Annual Conference of the Methodist Episcopal Church, South, to the extent hereinafter provided." The act made certain trustees and their successors in office capable of purchasing and holding any lands, tenements, goods, chattels, and money, not exceeding $50,000 in value, that should be purchased, granted, or devised to the use of the institution. It was provided that the trustees might receive additional subscriptions and donations in aid of the seminary, and should be selected, from time to time, by the Kentucky Annual Conference of the Methodist Episcopal Church, South, upon the nomination of the Millersburg station of that church. The 4th section of the act is as follows: "All persons who shall subscribe twenty-five dollars or more in aid of said Institute shall be deemed stockholders therein, said sum to constitute a share. And if the said Methodist Church shall ever relinquish or surrender, or cease to exercise a control over said Institute, then, and in that case, its control and management shall revert to and vest in said stockholders, who may, at a meeting for that purpose called, proceed to elect a board of trustees; and if said corporation shall cease to exist, or be dissolved, or its charter surrendered or repealed, all its property of every kind or description shall vest in said stockholders."

This act, it was declared, should take effect from its passage, "but the legislature reserves the right to amend or repeal the same."

At the meeting of the Kentucky Annual Con-[642]ference, held *in Millersburg, in September, 1858, the trustees of the Institute presented a memorial, stating that it had secured a charter for a collegiate institute to be held and controlled, as in its charter provided, by that Conference; had obtained a subscription of $7500; and had purchased a suitable piece of land, and taken steps to have all necessary buildings erected on it. The Conference having been asked to accept the subscription, grounds, etc., upon the terms set forth in the charter of the Institute, the memorial was referred to a committee, which reported as follows: "1, that we accept the Institute upon the terms set forth in the charter; 2, that we request the presiding bishop to appoint the preacher of Millersburg station agent to raise the sum of $10,000 for our educational fund; 3, that the sum of $10,000, when secured, be subscribed as the stock of this Conference in the Institute; 4, that we, the members of this Conference, being deeply impressed with the sense of our educational necessities, do hereby pledge ourselves personally to the support of this institution, and we will afford every facility in our power to the agent in raising the above $10,000."

The Conference approved the report of the committee. But having expressed its belief that harmony of action in that body would be secured if the charter of the Institute were amended so as to make it exclusively a male school, with college privileges, a meeting of the stockholders and friends of the Institute was held, at which it was resolved: "1, that we, as stockholders in the Institute, will unite in application to the legislature to so amend the charter as to make it a first class male college; 2, that we will raise our subscription to $10,000, and that we will use our best efforts to advance and sustain the enterprise, upon the condition that the Kentucky Annual Conference of the Methodist Episcopal Church, South, will appoint a special agent to raise an additional sum of $10,000; and further, that said Conference, in good faith, pledged itself to aid in the erection of suitable buildings, and to take the proper steps to endow the college as soon as practicable." These proceedings were approved by the Conference.

On the 30th day of September, 1858, at a meeting in Lexington, *Kentucky, of the[643] Board of Education, which had been constituted by the Conference at its meeting in Millersburg, but had not then become incorporated, it was resolved: "1, that we believe that $200,000 will be ultimately required to establish and sustain in the best manner a first class college, and that we proceed at once to raise one half of that amount; 2, that no part of the capital raised for the educational fund shall ever be appropiated to the payment of the salaries of the professors and other teachers, or for any contingent expenses whatever, and that only $10,000 of that fund, as already pledged by the Conference, shall be appropriated toward the erection of the college buildings; 3 that no part of the proceeds of the capital shall be used for any purpose whatever until, in the judgment of the Board of Education and the trustees of the college, it is annually sufficient to support three professors; 4, that we issue scholarships of the value of $500 each, to be perpetual and transferable, and to entitle the holder to tuition in either the preparatory department

or the college proper, in any studies necessary to graduation: 5, that we issue scholarships of the value of $100 each, to terminate in fifty years from the time of the opening of the college, not to be transferable, and to entitle the holder to tuition only in the college proper, and in such studies only as may be necessary to graduation—in other respects, they are to be similar to the scholarships of Asbury University, of Greencastle, Indiana; 6, that we issue scholarships to the value of $50 each, entitling the holder to five years' tuition at any time within fifty years from the time of the opening of the college, in any of the classes of the college, in the studies necessary to graduation, but not to be transferable; 7, that if the original stockholders of the Millersburg Male and Female Collegiate Institute will raise in Bourbon county, and in that portion of Nicholas County lying in the vicinity of Millersburg, $10,000 in addition to the $10,000 pledged by them, the entire amount of $20,000 thus raised to be invested in the erection of the buildings, we will issue scholarships for the said $20,000 on the same terms as to others, provided that their amount of stock in that case be surrendered, in lieu of said issue of scholarships, to the [644] *Kentucky Annual Conference of the Methodist Episcopal Church, South, to be held by said conference as part of the educational fund; 8, that the treasurer of the educational fund be instructed to pay over moneys coming into his hands, as they may be needed, as soon as the $10,000, already pledged by the stockholders, shall have been secured, provided that he shall, in so doing, be governed by the action of the Conference and the other part of these proceedings; 9, that any individual who shall endow a professorship shall have the privilege of naming it."

The above proposition was acceded to by stockholders at a meeting held in October, 1858, to consider the subject, and scholarships were issued to those making subscriptions or donations. A certificate of perpetual scholarship recited that the person to whom it was issued had, by payment of the sum therein named "to the treasurer of the Educational Fund of the Kentucky Annual Conference of the Methodist Episcopal Church, South, purchased" the same "in the college or university to be established by said conference at Millersburg, Kentucky," under certain specified limitations. The certificate of a fifty year scholarship contained similar recitals, accompanied by numerous conditions, that need not be here repeated. The notes executed by the scholarships were in the following form: "$500. Bourbon County, Kentucky, ———, 18—. —— year after date I promise to pay to the order of ———, treasurer of the Educational Fund of the Kentucky Annual Conference of the Methodist Episcopal Church, South, five hundred dollars, this being the ——— note in payment for a scholarship in the college or university to be established by said Conference." Some of the notes had in them these words: "In the college or university now established by said conference." Upon delivery by donors or subscribers of their notes, the agent executed a receipt in the following form: "Received of (William M. Miller), five hundred dollars ($500) and his note for five hundred dollars ($500) payable in one year from the —— day of ———, 18—, to ———, treasurer of the Educational Fund of the Kentucky Annual Conference of the Methodist Episcopal Church, South, which, when paid, *will entitle [645] him to two perpetual scholarships in the college or university established by said Conference. ——— County, Kentucky, ———, 18—."

While certificates of scholarships were being issued, the buildings were in process of erection at Millersburg, and by November 23, 1859, nearly $60,000 had been donated in cash and notes, of which about $20,000 had been expended on the buildings, leaving only a small sum to be applied for their completion.

On the 12th of January, 1860, the legislature of Kentucky passed an act entitled "*"An act to incorporate the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South,*" the preamble reciting that "the Kentucky Conference of the Methodist Episcopal Church, South, have resolved to form an Educational Fund and establish a college for the promotion of literature, science, morality, and religion within the limits of said Conference; and having, in fact, secured the sum of fifty-seven thousand dollars in cash and in good and reliable notes, and located an institution at Millersburg, Bourbon county, which is now ready for occupancy; now, in order to give full and complete legal effect thereto, etc. This act authorized the Board to make by-laws and ordinances for the proper conduct and government of the college, to elect its president and faculty, to establish, change, or abolish, professorships as the exigencies of the college might require, and to perform all acts, not inconsistent with the constitution or statutes of the state, that were necessary or expedient in sustaining the Educational Fund of the Conference and for the proper conduct of the college. The board was required to meet at the time of the commencement of the college at Millersburg, and at such other times as it might determine. The money paid into the hands of the treasurer, as the Educational Fund, was directed to be invested in Kentucky state bonds, county bonds, or safe and profitable stocks, as the board might determine, except the amount necessary "to pay for the present college building." By the 11th section, the act incorporating the Millersburg Male and Female Collegiate Institute, approved February *16, 1858, was repealed. And by the [646] 12th section, the right to amend or repeal the act of 1860 was reserved.

By an act of the Kentucky legislature, approved September 17th, 1861, amendatory of the act incorporating the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, it was provided: "§ 1. That it shall and may be lawful for the trustees of Millersburg Male and Female Collegiate Institute, who were in office on the 12th day of January, 1860, when the act incorporating said institute was repealed, or their survivors, to convey, by deed, to the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, South, the property held by said trustees in and near the town of Millersburg, for the purpose of carrying into effect any contract made by said trustees or stockholders of said insti-

tute with said board, and their conveyance, recorded in the proper office, shall be effectual to pass the title of said property to said board and their successors. § 2. Nothing contained in the act of the general assembly incorporating said board, approved January 12th, 1860, shall be construed so as to prevent or hinder said board, or their successors, from removing the seat of the college from Millersburg to any other place in the bounds of the Kentucky annual conference. § 3. This act to be in force from its passage."

This act was accepted by the Annual Conference by formal action taken September 25th, 1861, and on the 4th day of November, 1861, nearly twenty-seven years before this suit was brought, the trustees of the Millersburg Male and Female College conveyed to the Board of Education, and their successors in office, the grounds on which the college buildings were erected, "for the benefit of the Educational Fund of the Kentucky Conference of the Methodist Episcopal Church, South, forever, to be held and used and disposed of in such way as the charter of said Board of Education may direct."

The plaintiffs contend that notwithstanding the act of 1858 reserves the right to amend or repeal the charter of the Millersburg Male and Female Collegiate Institute, the 11th section of the act of 1860 repealing the act of 1858, incorporating the Millersburg Male and Female Collegiate Institute, was repugnant to that provision of the constitution of Kentucky, then in force, declaring that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." Art. 2, § 87. This contention was sustained by the court of appeals of Kentucky, upon the ground that the subject of the repeal of the charter of 1858 was not expressed in the title of the act of 1860. And, in our consideration of the principal question in the case, we will assume, without discussion, that the charter of the Institute was not repealed by the act of 1860.

But the court below further said, in the same connection, that the repeal of the charter of the college "was not actually necessary, because the corporation created by it practically ceased to exist after the contract made between the original stockholders and Board of Education, whereby the latter acquired for use of the Kentucky Wesleyan College possession of and equitable title to all property of the Millersburg Male and Female Collegiate Institute, and the trustees thereof were deprived of their function and divested of every right except the 648]*naked legal title; and as section 1 of the act of September 17th, 1861, merely empowered those trustees to convey that property to the Board of Education, which they might have been coerced to do by a court of equity, no injury resulted from it." But plaintiffs in error insist that the first section of the act of 1861 impaired the obligation of the contract in question.

The view taken by the court below upon this point is, in our judgment, entirely sound. From the inception of the scheme to establish an educational institution at Millersburg, it was intended that it should be under the control of the Methodist Episcopal Church, South, represented by its Kentucky Annual Conference. This purpose was distinctly recognized in the charter of the Institute, which gave authority to that Conference, upon nominations by the Millersburg station of that Church, to select the trustees of the Institute from time to time, and declared that if the Methodist Church should ever relinquish or surrender, or cease to exercise a control over, the Institute, then its control and management should revert to and vest in its stockholders, who were authorized at a meeting called for that purpose, to elect trustees. The trustees of the Institute, therefore, acted within the authority conferred upon them, when, in September, 1858, they asked the Conference to accept the subscription, grounds, etc., that had been obtained for the Institute. The Conference did formally accept the Institute upon the terms set forth in its charter, and by such acceptance acquired full control of the college. The court below correctly held that after the control of the Institute had been thus transferred to the Conference, the trustees had no other functions to perform, in respect to the property of the college, except to hold the naked legal title. Why then was it not competent for the General Assembly to invest the trustees of the Institute—as was done by the first section of the act of 1861—with authority to convey to the Board of Education the property held by them for the purpose of carrying into effect any contract made by them or the stockholders of the Institute with that Board? It must be remembered that the right to amend or repeal was reserved to the General Assembly in the charter of the Institute granted in 1858. The *transfer of the naked legal title from [649 the trustees of the Institute to the Board of Education did not take from the Institute any substantial right, but was in execution of the purpose to put the college and its property wholly under the control and management of the Kentucky Annual Conference of the Methodist Church, South. The deed from the trustees stated that the college buildings had been erected for the benefit of the Educational Fund of the Kentucky Conference of the Methodist Episcopal Church, South, forever, to be held, used, and disposed of in such way as the charter of that Board might direct. That charter, we have seen, was granted to give legal effect to the purpose of the Conference, previously avowed, to form an Educational Fund and establish a college for the promotion of literature, science, morality, and religion within its bounds, to which end a large sum in cash and notes had been secured, and an institution located at Millersburg, then ready for occupancy. If the first section of the act of September 17, 1861, had contemplated any diversion of the property and funds of the Institute from the purposes for which they were acquired, and for which, by its charter, they could be used, a different and more serious question would have arisen.

This brings us to the examination of the second section of the act of 1861, which provided that nothing in the charter of the Board of Education "shall be construed so as to prevent or hinder said Board or their successors from removing the seat of the college from Millersburg to any other place within the

bounds of the Kentucky Annual Conference." The contention of the plaintiffs is that there was and is a contract, the benefits of which they can rightfully claim, that the Institute should remain permanently at Millersburg; and that, if the second section of the act of 1861 contains a grant of power to remove the Institute from that town, it was void as impairing the obligation of the contract.

Literally interpreted, the second section of the act of 1861 would be held to do nothing more than to prescribe a rule for the interpretation of a previous legislative enactment; and, so interpreted, it would be inoperative as an act of legislation under those provisions of the con-[650] stitution of Kentucky, then *in force, confiding the powers of government to three distinct departments, legislative, executive, and judicial, and declaring that no person or collection of persons, being of one of those departments, should exercise any power properly belonging to either of the others, except in the instances expressly directed or permitted. Art. I, §§ 1, 2. But the court of appeals of Kentucky, regarding substance rather than form, held that the intention of the General Assembly, by the second section of the act of 1861, was to confer upon the Board of Education a power not expressly granted by the act of 1860, namely, the power of removing the seat of the college from Millersburg to any other place in the bounds of the Kentucky Annual Conference. We assume that the act means what the court below said it meant, in view of the constitution of the state. It must, therefore, be taken, in our examination of the question as to the repugnancy of the second section of the act of 1861, to the Constitution of the United States, that it was intended by the General Assembly of Kentucky to give the Board of Education authority to remove the college and its capital and funds from Millersburg to some other place within the bounds of the Kentucky Annual Conference. Did the act, thus interpreted, impair the obligation of any contract that the plaintiffs in error had in reference to that college? It certainly did, if the alleged contract forbade the removal of the Institute from Millersburg, except with the assent of the plaintiffs and those in whose behalf they sue. So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment, independently of any adjudication by the state court. *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436, 443 [17: 173, 177]; *Wright* v. *Nagle*, 101 U. S. 791, 794 [25: 921, 922]; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 254, 257 [27: 925, 926]; *Louisville Gas Co.* v. *Citizens Gas Light Co.* 115 U. S. 683, 697 [29: 510, 515]; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 667 [29: 770, 771]. If there was no such contract, as is alleged, then no right, secured by the national Constitution, has been denied by the decree below.

The argument in support of the existence of the alleged contract rests upon the words of va-[651] rious documents, showing *that the original purpose of those who were instrumental in establishing this Institute was to have it located at Millersburg. Undoubtedly, those persons were moved to act, in some degree, by the belief that the seat of the proposed college would be at Millersburg. That belief is disclosed in the resolutions adopted by the citizens of Millersburg at the meeting of January 4, 1858. It is also expressed in the charter of the Institute granted in the same year, reciting that money had been subscribed for the purpose of erecting in or near said town a seminary of learning. It is again expressed in the certificates of perpetual scholarships issued under the authority of the Conference. It is further expressed in the charter of the Board of Education of 1860, referring to the college as having been "located" at Millersburg, with buildings then ready for occupancy. And it is equally manifest that when that charter was granted, the Conference believed that the ends proposed to be accomplished by the establishment of the institution, namely, the promotion, within its bounds, of literature, science, morality, and religion, could be accomplished by an Institute located at Millersburg. It is equally true, upon the record before us, that the Conference was not wanting in earnest, persistent efforts to sustain the Institute at Millersburg. But that body, in its wisdom, determined that the objects in view could be best accomplished by removing the college to some other place. And we are of opinion that its removal to Winchester would not be in excess of its authority.

At the meeting of citizens of Millersburg, held in 1858, it was declared that the Institute should be under the control of the Methodist Episcopal Church, South; and, although the object avowed was to secure a collegiate institute at Millersburg or in its immediate vicinity, the only condition named in the resolution passed at that meeting, upon which the property should revert to the stockholders was the failure of the church to sustain the Institute, or its discontinuance from any cause. And, in the charter of the Institute, it is provided that if "the Methodist Church shall ever relinquish or surrender, or cease to exercise a control over said Institute, then, and in that case, its control and management shall revert to and vest in said *stockholders, who may, at a [652 meeting for that purpose called, proceed to elect a board of trustees; and if said corporation shall cease to exist, or be dissolved, or its charter surrendered or repealed, all its property of every kind or description shall vest in said stockholders." It is a significant fact that the *permanent* location of the Institute at Millersburg was not made in terms by the resolutions of the citizens' meeting or by the charter of the college a condition upon which the control of the Institute and its property should remain with the Conference. The Methodist Episcopal Church, South, as represented by the Kentucky Annual Conference, has not relinquished, surrendered, or ceased to exercise control of the Institute, and, therefore, its control and management has not reverted to stockholders through trustees of their own selection. The Institute has not been discontinued; nor has the corporation ceased, in law, to exist; nor has its charter been surrendered or repealed; and, therefore, its property has not, in any view of the facts, or of the legislation in question, vested in stockholders.

The primary object of those who first moved

in this matter, namely, to secure the establishment of an institution of learning under the control of the Kentucky Conference of the Methodist Episcopal Church, South, has not been overlooked or ignored in anything that has been done or proposed to be done. The belief of those who subscribed to the stock of the Institute, or accepted scholarships after the Institute passed under the control of the Conference, through its Board of Education, that the Institute would remain permanently at Millersburg, cannot be regarded as equivalent to a contract or absolute agreement that prevents the Conference from removing the Institute to another place, if it deems such a course to be best for the cause of education and morality. It is not the province of this court to sit in judgment upon the propriety of the course pursued by that body. We can only deal with the question of contract. And that question cannot depend upon any consideration of what, under all the circumstances, is fair and just as between the Conference and those citizens of Millersburg and vicinity who 653] may have believed, *or expected, when making their subscriptions or giving their support to the institution, that it would always be maintained at that place. This court, in determining the Federal question involved, can only look at the question of the power of the General Assembly of Kentucky to authorize the removal of the Institute to another place within the bounds of the Conference. In the absence of a binding agreement, upon the part of the Conference or those representing it, that the Institute should remain permanently at Millersburg, even if the object of its original establishment could not be accomplished by keeping it there, our duty is to adjudge, without reference to considerations of abstract justice or equity, that the legislation in question is not repugnant to the Constitution of the United States.

In the brief of learned counsel for the plaintiffs are cited numerous authorities which, it is supposed, require a different conclusion from that announced by us.

One of the cases much relied on is *Sage* v. *Dillard*, 15 B. Mon. 340, 361. The question there determined is indicated in the following extract from the opinion of the court of appeals of Kentucky: "In this case it appears that the original founders, or endowers, of the Institute, were willing to entrust their charity to the care and management of the original trustees, and such others, of course, as might be necessary, in their opinion, to effectuate the objects of the charity. To trustees, of their own selection, they confided the bounty which they bestowed for a great, a praiseworthy, and a noble purpose. In the hands of these men, and others of their choice, they entrusted the management and control of an institution which, by their munificence, was brought into being, and into which their beneficence has infused energy and usefulness. This charity has grown into a valuable estate, and sustains an institution which was designed to promote education in the Christian Scriptures, and qualify a Baptist ministry to disseminate religious knowledge in the West. The object is a laudable one; and can it be that the legislature, in retaining the right to 'alter' or 'amend' the charter, retained the right to take the supervision and control of this *opulent chari- [654 ty out of the hands of those to whose care and oversight the founders confided it, and place it in the hands of strangers, who never breathed, perhaps, a single breath of vitality into this institution, either to impart to it life or growth? We think not."

Another case cited by plaintiffs is *Louisville* v. *University of Louisville*, 15 B. Mon. 642, 686. The principal question in that case was as to the validity of an amendment of the charter of the University of Louisville, giving to the city of Louisville, one of the donors of the institution, to the exclusion of other donors, the power of electing trustees of the University. The court, as counsel correctly observe, held that though a part of the funds were granted by the city, the charter constituted a contract, by which all the donors, the trustees, and the state were bound, and the obligation of which could not be impaired by an act passed under a reserved power to alter, amend, or repeal. *Chief Justice* Marshall, speaking for the court of appeals of Kentucky, said, among other things, that "it would at least seem to be just that the donors should have a right to insist that as long as their donation is retained, it shall not, even under the authority of the state, be diverted from the uses stipulated in the charter, and the right should be transmissible as incident to the reversionary interests, and to the contract of donation. . . . We are of opinion, therefore, upon the ground of authority as well as of reason, that the original charter of the University of Louisville creates a private corporation, which is protected by that clause of the Constitution of the United States which prohibits the enactment of laws impairing the obligation of contracts; and that so much of the amended charter of the city of Louisville of 1861, as relates to the existing corporation and charter of the university, and vests, or professes to vest, in a new corporation, or in new trustees, the property and privileges of the original corporation, is in violation of that constitutional prohibition, and consequently void."

Our attention has also been called to the case of *State* v. *Adams*, 44 Mo. 571, 577, relating to the charter of St. *Charles College, a cor- 655 poration of Missouri. That charter, in conformity with the wishes of its founder, declared the college to be an institution purely literary, affording instruction in ancient and modern languages, and in the sciences and the liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology, nor instituting any regulations which should render a place in its classes offensive "to reasonable, liberal minded persons, whatever might be their religious views." By a legislative amendment of the charter, it was provided that the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church, South, should be requisite in filling vacancies on the board of curators, upon the Conference affording satisfactory assurances for the maintenance and endowment of the college. One of the questions in the case was whether this amendment was not void as impairing the obligation of the contract created by the original charter. The supreme

court of Missouri, referring to the provisions of the original charter, said: "It would have been difficult to more emphatically provide for the exclusion of special or denominational religious influences. The declared objects and principles of the foundation are inconsistent with it, and the choice of future curators is to be uncontrolled by any ecclesiastical body or personage. We do not, hence, suppose that the founder intended to exclude all influence from, or instruction in, the great principles of Christian ethics, the basis of all character, the foundation of good citizenship and just government, and which are professedly adopted by men of all creeds; but he did intend to prevent the institution from becoming in any special sense a theological or religious school. The amendment in the charter, by requiring the concurrence in the choice of the curators, of an ecclesiastical body representing one of the religious denominations of the state, endangers, in this regard, the principles of the foundation; and even, if it did not, it changes the character of the administration of the trust, hinders the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impairs the contract under which [656] *he advanced it." For these reasons the amendment was held to be a violation of the contract embraced in the charter.

Reference has been made to *Allen* v. *McKean*, 1 Sumn. 276, 305, which involved the validity of an act of the legislature of Maine relating to Bowdoin College, of which the commonwealth of Massachusetts was the founder. By the Act of Separation of Maine from Massachusetts, the powers and privileges of the president, trustees, and overseers of the college were guaranteed under its charter, so that they could not be altered, limited, annulled, or restrained, except by judicial process, according to the principles of law, unless with the assent of both states. Massachusetts subsequently, by formal Resolve, gave its assent to any alteration or modification of the act relating to the college, not affecting the rights or interests of that commonwealth, which the authorities of the college corporation might make, with the consent of the legislature of Maine. Alluding to the Resolve of Massachusetts, and considering its scope and effect, *Mr. Justice* Story said: "Nothing is clearer in point of law than the right of a founder to have his visatorial power exclusively exercised by the very functionaries in whom he has vested it. It is the very substratum of his dotation. This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the trustees, strictly adhered to, except so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them away from his trustees, and confer the same powers on other persons. My view of the Resolve, therefore, is, that it authorizes no alterations or modifications of the college charter, which shall divert the funds of the founder from their original charter, and, *a fortiori*, that it does not justify the transfer of these powers from the trustees to any other persons not in privity with them. It does not authorize the legislature of Maine to assume to itself the powers of the trustees or overseers, or either of them, or to appoint new trustees or overseers; for that would affect the rights and interests of the founder, who has a right to select his own administrators of his own bounty in perpetuity."

*Neither of those cases has any appli- [657 cation to the one before us. There has been no diversion of the funds raised for this Institute. From the beginning, the purpose was to establish an institution to be under the control and supervision of some religious denomination, and the denomination selected was the Methodist Episcopal Church, South, represented by the Kentucky Annual Conference. Nor has the legislature assumed to make any material change in its control and management. The trustees, as the charter of the Institute required, are selected by that Conference. The question here relates simply to the power of removing the Institute from the place of its origin to another place within the bounds of that Conference. There is no question of diversion of funds, or of change of control and management. It is clear that the above cases are wholly inapplicable to the present controversy.

The case more directly in point than any one to which our attention has been called is the *Pennsylvania College Cases*, 80 U. S. 13 Wall. 190 [20: 550]. It resembles the present one in many important particulars. The principles which, in that case, sustained the validity of the legislation of Pennsylvania relating to the colleges at Canonsburg and Washington leads to an affirmance of the decree below.

We concur with the court of appeals of Kentucky in saying that neither the contract between the original stockholders and Board of Education nor the act of 1860 contains an express condition that the title of the property which became part of the endowment fund was to be held upon condition that the college be forever conducted and maintained at Millersburg, and nowhere else within the territorial limits of the Annual Conference; that such condition exists, if at all, by implication only; that the law does not presume a party entitled to a right or benefit of reservation claimed under contract in the absence of an express stipulation, except such as reason and justice dictates; that not only those residing elsewhere but as well residents of Millersburg and vicinity must be presumed to have regarded the establishment and successful maintenance of a first class college under the patronage and control of the Annual Conference as the first and main *consideration for the outlay of money [658 made, and the particular locality as of secondary importance; and, therefore, all that can be reasonably implied in behalf of the citizens of Millersburg is that they expected and believed that the successful operation of the institution would prove compatible with the continuance of it at that place. To now imply anything else or more, that court well says, would not only involve the absurdity of hazarding or sacrificing an institution of learning, the successful and useful operation of which within the bounds of Conference was clearly the main inducement for the great outlay already made, "but be in disregard of the rights and interests of those residing elsewhere than at Millers-

burg, who have contributed either by purchasing scholarships or donations, very much more than has been raised at that place. There is mention made in the act of 1860 and also in the certificates of scholarships of the college being established at Millersburg, but the language used does not import an agreement that it shall permanently remain there; on the contrary, we think it should, as can fairly be interpreted as merely descriptive of the institution. In our opinion, therefore, there exists no contract or undertaking, express or implied, for the continuance of the institution at Millersburg any longer than its useful and successful operation requires."

It results from these views that the decree below does not give effect to an act of the General Assembly of Kentucky that is repugnant to the Constitution of the United States.

The decree must, therefore, be affirmed. It is so ordered.

JOHN DOWER ET AL., *Plffs. in Err.*,
v.
WILLIAM G. RICHARDS ET AL., *Exrs*

(See S. C. Reporter's ed. 658-673.)

Town site patent—review of question of fact—writ of error and appeal—judgments of circuit court—review of state judgment—jurisdiction of this court—Federal question—independent ground—effect of evidence—action at law—when judgment affirmed.

1. Under the acts of Congress in order to except mines or mineral lands from the operation of a town site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town site patent takes effect; if the lands are not known at that time to be valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town site patent.
2. To review the decision of the state court upon the question of fact is not within the jurisdiction of this court.
3. A writ of error, brings up matter of law only; an appeal, unless expressly restricted, brings up both law and fact.
4. Judgments of the United States circuit court in actions at law are reviewable by writ of error only.
5. Upon a writ of error, this court cannot review a decision of a question of fact, even where, by the local practice of the state, the law and the facts are tried together by the judge without a jury.
6. The only appellate jurisdiction conferred by Congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a state, is by writ of error.
7. A writ of error to review a judgment or decree of a state court can be sustained only when the decision of the state court is against a right claimed under the constitution and laws of the United States.
8. If the decision of the state court rests on an independent ground of law, not involving any Federal question, this court has no jurisdiction.
9. When the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court.
10. This court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided.
11. In an action of ejectment, which was submitted to the supreme court of the state, according to the local practice, upon findings of fact and a statement of evidence by an inferior court of the state, this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town site patent took effect, was known to be valuable for mining purposes; and if the only question of Federal law in the case has been rightly decided by that court, its judgment will be affirmed.

[No. 178.]

Argued and Submitted Dec. 20, 1893. Decided Feb. 5, 1894.

IN ERROR to the Supreme Court of the State of California, to review a judgment of that court, affirming a judgment of the superior court for the county of Nevada, in that state, in favor of the plaintiffs, William G. Richards *et al.*, executors of Philip Richards, against John Dower *et al.*, defendants, for the recovery of the possession of two lots in the city of Nevada, of which said Richards, in his lifetime, was the owner. *Affirmed.*

See same case below, 81 Cal. 44.

The facts are stated in the opinion.

Mr. **H. L. Gear,** for plaintiffs in error:

Grants and reservations by a government are to be construed favorably to the government.

Bartram v. *Central Turnp. Co.* 25 Cal. 283; *Spring Valley Water Works* v. *San Francisco*, 52 Cal. 112; *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.* 36 U. S. 11 Pet. 420 (9: 773); *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 (16: 500).

The reservation of a known mine is not synonymous with and does not require a mining location.

Iron Silver Min. Co. v. *Mike & S. Gold & S. Min. Co.* 143 U. S. 394 (36: 201); *Sullivan* v. *Iron Silver Min. Co.* 143 U. S. 431 (36: 214).

The Act of 1866 expressly authorized and protected "exploration" and "occupation" of mineral land by citizens.

Actual dominion conferred a right of pos-

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12:169.

As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question, see note to Hamblin v. Western Land Co. 37: 267.

session, which would prevail as against one not entering under a better title.

Minturn v. *Burr*, 16 Cal. 109; *Coryell* v. *Cain*, 16 Cal. 573; *Lawrence* v. *Fulton*, 19 Cal. 690; *Shelby* v. *Houston*, 38 Cal. 411; *Gray* v. *Collins*, 42 Cal. 157; *Goodrich* v. *Landignam*, 46 Cal. 601; *Funk* v. *Sterrett*, 59 Cal. 614.

Abandonment is immaterial, there being a known mine not worked out.

Deffeback v. *Hawke*, 115 U. S. 392 (29: 423); *Mullan* v. *United States*, 118 U. S. 271 (30: 170); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Reynolds* v. *Iron Silver Min. Co.* 116 U. S. 687 (29: 774).

Mr. **Preston E. Simonds** for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action of ejectment, brought November 15, 1887, by the executors of Philip Richards against Harriet Dower and others, in the superior court for the county of Nevada in the state of California, to recover possession of two lots in the city of Nevada in that county, which the complaint alleged that Richards in his lifetime was the owner and in possession of.

The defendants, in their answer, alleged that Harriet Dower, of whom the other defendants were servants, was the owner and in possession and entitled to the possession of a quartz ledge and mine, called the Wagner ledge, situated partly upon and crossing the lots demanded; that Richards had no other right of possession than under a town site patent, granted by the United States to the city of Nevada in 1869; that the ledge was known to be a gold bearing ledge, and was held and worked as such long prior and subsequent to that patent, and was by the laws of the United States excepted from that patent; and that Harriet Dower had located the ledge, and was engaged in working it, including three hundred feet on either side thereof, under those laws. The laws relied on by the defendants were the acts of July 26, 1866, chap. 262; March 2, 1867, chap. 177; 14 Stat. at L. 251, 541; June 8, 1868, chap. 53; 15 Stat. at L. 67; May 10, 1872, chap. 152; 17 Stat. at L. 91; Rev. Stat. § 2392.

660] *A jury trial was waived, and the case submitted to the superior court, which made findings of fact, in substance as follows: A town site patent for a tract including the two lots demanded was issued July 1, 1869, by the United States to the city of Nevada, which, before May 1, 1887, conveyed all its title in these lots to Richards, and that title was now vested in the plaintiffs as his executors. Before the issue of that patent, the Wagner ledge was known to exist as a gold bearing quartz lode, but had never been located or marked out; and there was no proof that any local mining rules were in force in that district. For many years before 1869, it had been profitably worked, and many tons of gold bearing rock extracted from it, by persons who were trespassers upon the public domain, and were not shown to have had more than a mere *possessio pedis* of certain shafts, tunnels and dumps. In the winter of 1868-69, work on the ledge was abandoned, and no work was afterwards done by those persons, and the defendants did not claim under them. In 1884, Harriet Dower, being a citizen of the United States and qualified to make a mining location, attempted to make a quartz mining location upon the ledge, within the lots demanded, which in manner and form complied with the laws of the United States in respect to mining locations; and by virtue of her location she claimed the ledge with three hundred feet on each side thereof, and since did annual work thereon as required by those laws, excavated the soil, sunk shafts, erected buildings, and piled earth, sand and debris across the surface of the lots. For more than a year before her attempted location, no annual work had been done by any one upon the ledge. On May 1, 1887, Richards was the owner and in possession and entitled to the possession of the lots, and the defendants wrongfully and unlawfully ejected him from the part claimed by them, and ever since wrongfully and unlawfully withheld the possession thereof from him and his executors.

Upon the facts so found, the court decided, as matter of law, that the plaintiffs were owners and entitled to the possession of the lots; that no part of them was subject to location as a mining claim at the date of Harriet Dower's attempted location; *that the whole of **[661]** these lots passed to Richards by the town site patent and the subsequent conveyance; and that the plaintiffs were entitled to judgment against the defendants for the restitution of the part claimed by the latter, and for costs; and gave judgment for the plaintiffs accordingly. Upon a statement of the evidence, agreed to in writing by counsel, and certified by the judge, a motion for a new trial was made and denied. From the judgment for the plaintiffs, and from the order denying a new trial, the defendants, in accordance with the state practice, appealed to the supreme court of the state.

That court, as stated in its opinion filed in the case, and reported in *Richards* v. *Dower*, 81 Cal. 44, affirmed the judgment upon the following grounds: Upon the facts found and the evidence stated in the record before that court, it decided, as matter of fact, that before 1869 a gold bearing quartz ledge was known to exist and had been profitably worked within the limits of these lots, but had never been located or marked out; that in the winter of 1868-69 all work on the ledge was abandoned, and no work was afterwards done there until one of the defendants in 1884 made the location under which they claimed; that from the time when work was so abandoned until July 1, 1869, when the town site patent was granted, the portion of the ledge included within the boundaries of these lots was regarded as worked out, and as of no further value for mining purposes, and was not known to be valuable for mining purposes at the date of that patent, nor discovered to be so before the plaintiffs and their predecessors occupied and improved the lots for the purpose of residence under the town site patent. Having decided that to be the state of facts at the time when the town site patent took effect—and assuming that the provision of the Act of March 2, 1867, that no title should be acquired by a town site patent "to any mine of gold, silver, cinnabar, or copper," was not repealed by the provision

of the Act of June 8, 1868, chap. 53, that no title should be so acquired to "any valid mining claim or possession held under the existing laws of Congress," but stood with it, as in the re-enactment of both provisions in section 2392 of the Revised Statutes—the court decided, as 662] matter of law, that land not known *at the time to be valuable for minerals was not excepted from the operation of a town site patent, even if afterwards found to contain minerals which might be profitably worked. The defendants thereupon sued out this writ of error.

The only Federal question presented by the writ of error is whether there was error in this decision in matter of law.

The proposition of law on which the plaintiffs in error rely is thus stated in their brief: "When a quartz ledge, known to be gold bearing and to have been profitably worked prior to the acquisition of a town site patent in the year 1869, and not then worked out, is situated within the exterior boundaries of the patent," "the rights of the government and its mining grantees are not limited to such actual mining or tunnel possession as may have existed before the town site patent; or to any continuance of a mining claim or possession by prior locators or their grantees; but the government owns and can grant the right to any quartz mine or gold bearing ledge, which was known to exist and to be valuable for minerals before the town site patent was obtained, and which was not worked out, when the town site patent was obtained; and the rights of a subsequent locator under the government, by virtue of its reservation of the mine, and of the mining acts of 1866 and 1872, include a reasonable quantity of surface for the convenient working of the ledge, not exceeding three hundred feet on each side thereof."

The essential difference between this proposition and that affirmed by the supreme court of the state of California is that the plaintiffs in error insist that if the ledge in question was known to have been gold bearing and to have been profitably worked before the acquisition of the town site patent, and had not in fact been worked out before the acquisition of that patent, the right to that ledge was not included in the patent, but was reserved to the United States, and would pass by a subsequent mining location; whereas the court held that if the ledge was not known, at the time of the acquisition of the town site patent, to contain such an amount of minerals as to be valuable for mining purposes, it was not excepted from the operation of that patent.

663] *There can be no doubt that the decision of the supreme court of the state in this respect was correct. It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town site patent take effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town site patent. *Deffeback* v. *Hawke*, 115 U. S. 392 [29:423]; *Davis* v. *Weibbold*, 139 U. S. 507 [35:238].

The principal ground on which the plaintiffs in error seek to reverse the judgment of the supreme court of California is that its decision in matter of fact was erroneous, and contrary to the weight of the evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court.

In the legislation of Congress, from the foundation of the government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact. *Wiscart* v. *Dauchy*, 8 U. S. 3 Dall. 321 [1:619]; *United States* v. *Goodwin*, 11 U. S. 7 Cranch, 108 [3:284]; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264, 410 [5:257, 292]; *Hemmenway* v. *Fisher*, 61 U. S. 20 How. 255, 258 [15:799]; *Cunningham* v. *Neagle*, 135 U. S. 1, 42 [34:55, 63].

In the first Judiciary Act the whole appellate jurisdiction of this court was limited to matters of law. While an appeal lay from the district court to the circuit court in admiralty cases, neither the judgments or decrees of the circuit court, whether in law, equity or admiralty, nor judgments or decrees of the highest court of a state, could be reviewed by this court, except by a writ of error. Act of September 24, 1789, chap. 20, §§ 19, 22-25; 1 Stat. at L. 83-86.

*Under that Act it was held that a [664 decree in admiralty could not be reviewed by this court in matter of fact; and *Chief Justice* Ellsworth, after laying down the rule that the appellate jurisdiction of this court could only be exercised within the regulations prescribed by Congress, said: "It is to be considered, then, that the judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the Act itself to control, modify or change the technical sense which they have previously borne. An appeal is a process of civil law origin, and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." *Wiscart* v. *Dauchy*, 3 U. S. 3 Dall. 327 [1: 622]; *Jennings* v. *The Perseverance*, 3 U. S. 3 Dall. 336 [1: 625]; *Blaine* v. *The Charles Carter*, 4 U. S. 4 Dall. 22 [1: 724].

In 1803 Congress substituted an appeal from the circuit court to this court instead of a writ of error, in cases in equity and in admiralty; and upon such an appeal the facts as well as the law were open to review in both those classes of cases until 1875, when the appeal in admiralty was restricted to questions of law. Act of March 3, 1803, chap. 40; 2 Stat. at L. 244; *The San Pedro*, 15 U. S. 2 Wheat. 132 [4: 202]; *The Baltimore* v. *Rowland*, 75 U. S. 8 Wall. 377 [19: 463]; Rev. Stat. § 692; Act of February 16, 1875, chap.

77, § 1; 18 Stat. at L. 315; *Duncan* v. *The Francis Wright*, 105 U. S. 381 [26:1100].

Judgments of the circuit court in actions at law have remained reviewable by writ of error only. *Jones* v. *La Vallette*, 72 U. S. 5 Wall. 579 [18: 550]; Act of July 4, 1840, chap. 43, § 3; 5 Stat. at L. 393; Rev. Stat. § 691. Upon such a writ of error, this court, as is well settled, cannot review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury.

In such a case *Mr. Justice* Story said: "We have no authority, as an appellate court, upon a writ of error to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper **665**] province of the jury; or of *the judge himself, if the trial by jury is waived, and it is submitted to his personal decision." *Hyde* v. *Boorman*, 41 U. S. 16 Pet. 169, 176 [10: 925, 927].

In a petitory action in the nature of ejectment, to recover land in Louisiana, the subject was fully explained by *Chief Justice* Taney, who (according to the original opinion on file, misprinted in some particulars in the official report) said: "According to the laws of that state, unless one of the parties demands a trial by jury, the court decides the fact as well as the law: and if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the appellate court. The record transmitted to the superior court, therefore, in the state practice necessarily contains all the evidence offered in the inferior court. And as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding. In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other states. And the removal of the case from the circuit court to this court is regulated by Act of Congress, and not by the practice of Louisiana; and the writ of error, by which alone a case can be removed from a circuit court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the circuit court upon questions of fact are as conclusive as if they had been found by the jury." The *Chief Justice* stated that, upon the first argument of the case at a former term, the court, its attention "not having been drawn to the difference between an appeal in the state practice, and the writ of error from this court," and being of opinion that the weight of evidence was against the authenticity of an instrument under which one of the parties claimed title, and which the circuit court had held to be authentic, therefore reversed the judgment of that court; but that this court, upon reconsideration, was "unanimously of opinion that the decision of the circuit court **666**]upon this question of fact *must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but *questions* of law; and that, in deciding the question of title in this court, the paper referred to must be treated and considered as authentic and sufficiently proved;" and had therefore ordered the case to be reargued. *United States* v. *King*, 48 U. S. 7 How. 833, 844, 845 [12: 934, 939]. Upon the final argument, while four of the justices dissented from the opinion of the court upon the question of law presented by the record, none of them differed from the Chief Justice on the question of practice; and *Mr. Justice* Wayne, who delivered the principal dissenting opinion, said: "No point has been more repeatedly and more authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record." 48 U. S. 7 How. 865 [12: 948]. See also *Parks* v. *Turner*, 53 U. S. 12 How. 39, 43 [13:883, 885]; *Arthurs* v. *Hart*, 58 U. S. 17 How. 6, 12 [15: 30, 32]; *Lanfear* v. *Hunley*, 71 U. S. 4 Wall. 204, 209 [18: 325, 326]; *Generes* v. *Campbell*, 78 U. S. 11 Wall. 193 [20: 110]; *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 305, 309 [28: 156, 157].

The only appellate jurisdiction which has ever been conferred by Congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a state, has been by writ of error. *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264, 410 [5: 257, 292]; *Verden* v. *Coleman*, 63 U. S. 22 How. 192 [16: 336]; Act of September 24, 1789, chap. 20, § 25; 1 Stat. at L. 85; Act of February 5, 1867, chap. 28, § 2; 14 Stat. at L. 386; Rev. Stat. § 709; Act of March 3, 1891, chap. 517, § 5; 26 Stat. at L. 827.

Such a writ of error can be sustained only when the decision of the state court is against a right claimed under the Constitution and laws of the United States. *Montgomery* v. *Hernandez*, 25 U. S. 12 Wheat. 129 [6: 575]; *Missouri* v. *Andriano*, 138 U. S. 496 [34:1012]. And if the decision of the state court rests on an independent ground of law, not involving any Federal question, this court has no jurisdiction. *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31: 607]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *California Powder Works* v. *Davis*, *ante*, p. 206. The reasons against its jurisdiction are as strong, if not stronger, when the decision of the state court proceeds upon matter of fact only.

*When, indeed, the question decided [**667** by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by *Mr. Justice* Catron: "The powers of the supreme court are limited in cases coming up from the state courts, under the 25th section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an Act of Con-

gress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction." *Mackay* v. *Dillon*, 45 U. S. 4 How. 421, 447 [11: 1038, 1050]. The only questions of evidence considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an Act of Congress.

Again, in *Almonester* v. *Kenton*, *Mr. Justice* Catron said: "Now that this court has no jurisdiction, under the 25th section of the Judiciary Act of 1789, to re-examine the decision of a state court, which drew in question the mere fact of where a dividing line between two tracts of land was, is too plain for discussion. Had the decision of the supreme court of Louisiana stopped here, then certainly jurisdiction would be wanting." 50 U. S. 9 How. 1, 7 [13: 21, 23]. And this court assumed jurisdiction of that case solely because the state [668] court had *gone further, and had given a construction to an Act of Congress.

So in *Moreland* v. *Page*, this court dismissed a writ of error to review the judgment of a state court upon a question of the proper boundary between two tracts of land, although the owner of each claimed under a grant from the United States; and *Mr. Justice* Grier in delivering judgment said: "It is a question of fact, depending on monuments to be found on the ground, documents in the land office, or the opinion of experts or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise or sale of it, may, with equal propriety, be subject to the examination of this court in all time to come." 61 U. S. 20 How. 522, 523 [15: 1009, 1010].

In *Lytle* v. *Arkansas*, in which the supreme court of Arkansas had decided against a pre-emptive right claimed under the laws of the United States, *Mr. Justice* Catron said: "It is not material whether the invalidity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree." 63 U. S. 22 How. 193, 208 [16: 306, 309]. Those observations must be taken as applied to the case before the court, in which the decision of the question of fact depended on the legal effect of acts of officers of the United States regarding that title; and that it was not intended to enlarge the scope of the appellate jurisdiction of this court is evident from the cases there cited. See also *Maguire* v. *Tyler*, 66 U. S. 1 Black, 195, 203 [17: 137, 141].

That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of later decisions, some of them in cases very like the one now before us.

*In *Campau* v. *Lewis* (1865) 70 U. S. 3 [669] Wall. 106 [18:211], a decision of the state court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although, if the value of the land had been admitted, a Federal question would have been presented. *Hall* v. *Jordan*, 82 U. S. 15 Wall. 393 [21: 72].

In *Merced Min. Co.* v. *Boggs* (1865) a right of possession for the purpose of extracting gold from quartz rock was claimed "by a license inferred from the general policy of the state or of the United States, in relation to mines of gold and silver and the lands containing them;" and a writ of error to review a decision of the supreme court of California against the claim was dismissed by this court, speaking by *Chief Justice* Chase, for the following reasons: "We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court. However that may be, there was no decision of the court against the validity of such a license. The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law. It is the same case, in principle, as would be made by an allegation, in defense to an action of ejectment, of a patent from the United States, with an averment of its loss or destruction, and a finding by the jury that no such patent existed, and a consequent judgment for the defendant. Such a judgment would deny, not the validity, but the existence of the patent. And this court would have no jurisdiction to review it." 70 U. S. 3 Wall. 304, 310 [18: 245, 247].

In *Carpenter* v. *Williams* (1869) it was held that this court had no jurisdiction where the decision of the state court turned upon the identity of the person to whom a recorder of land titles confirmed, or intended to confirm, a lot of ground; and *Mr. Justice* Miller in delivering judgment said: "It is a mistake to suppose that every suit for real estate, in which the parties claiming under the Federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of Federal cognizance. If this were so, the title to all the vast domain, once vested in the United *States, could be [670] brought from the state courts to this tribunal." 76 U. S. 9 Wall. 785, 786 [19: 827, 828].

In *Crary* v. *Devlin* (decided February 21, 1876) in an action to recover the price of alcohol sold, the defendants contended that the sale was unlawful because of a violation of the internal revenue laws of the United States. The court of appeals of New York gave judgment for the plaintiff, because no such violation was proved; and this court dismissed the writ of error, upon the authority of *Merced*

Min. Co. v. *Boggs*, above cited; *Chief Justice* Waite saying: "There could have been no decision of the court of appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation." Reported only in U. S. Sup. Ct. Rep. Bk. 23 L. ed. 510, 511.

In *Republican River Bridge Co.* v. *Kansas Pac. R. Co.* (decided a week later) in an action at law concerning the title to real estate, in which each party claimed under a grant from Congress, a district court of the state of Kansas, to which the case had been submitted without the intervention of a jury, made findings of fact, upon which it declared the law to be for the defendant; its judgment was affirmed by the supreme court of the state, and the plaintiff sued out a writ of error from this court, *Mr. Justice* Miller, in delivering the opinion, said: "The finding by the district court was received by the supreme court of the state as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an Act of Congress in a state court, any matter of law found in the record, decided by the highest court of the state, bearing on the right so set up under the Act of Congress, can be re-examined here. In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right set up under **671**]*the Act of Congress. But in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common law action, this court has the same inability to review those facts in a case coming from a state court, that it has in a case coming from a circuit court of the United States. This conclusiveness of the facts found extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by state laws, as well as to the verdict of a jury." And *Merced Min. Co.* v. *Boggs* and *Crary* v. *Devlin*, above cited, were referred to as supporting this conclusion. 92 U. S. 315-317 [23: 515, 516].

Whether the suggestion in that opinion, as to the power of this court in chancery cases to review the decision of a state court on both the law and the fact, is to be limited to cases in which the decree of that court is general upon the whole record, without specifically passing upon any question of fact; and whether the suggestion, especially if more broadly construed, can be reconciled with the earlier opinions of this court, already cited, upon writs of error to the circuit court of the United States in admiralty cases, or in cases tried according to the law of Louisiana, need not now be considered.

In *Martin* v. *Marks* (1877) upon a writ of error to the supreme court of Louisiana in an action in the nature of ejectment, *Mr. Justice* Miller, speaking for this court, said that the question whether a selection of swamp lands had in fact been filed by the surveyor general of Louisiana in the General Land Office was "not of that Federal character which authorizes us to review the decision of the supreme court of Louisiana upon it." 97 U. S. 345, 348 [24: 940, 941].

In *Kenney* v. *Effinger* (1885) this court dismissed a writ of error to the supreme court of appeals of the state of Virginia, for reasons stated in the opinion delivered by *Mr. Justice* Field as follows: "The writ of error brought by the trustee raises no Federal question which we can consider. Whether the bond of Effinger was or was not executed with reference to Confederate notes is a question of fact for the state court, and not one of law for this court." 115 U. S. 577 [29: 498].

*In *Quimby* v. *Boyd* (1888) in which va-[**672** rious errors were assigned in a judgment of the supreme court of the state of Colorado between two adverse claimants of a lode, this court, speaking by the present *Chief Justice*, dismissed the writ of error for want of jurisdiction, because some of the objections made in this court had not been taken below, and "the other alleged errors involved questions either of fact, or of state and not of Federal law." 128 U. S. 488, 489 [32: 502, 503].

In *California Powder Works* v. *Davis*, *ante*, p. 206, in which each party to a suit to quiet title claimed title claimed under a patent from the United States confirming a Mexican grant, and the judgment of the supreme court of California rested on the proposition of fact that the grant under which the plaintiff in error deraigned title was simulated and fraudulent, this court dismissed the writ of error for want of jurisdiction.

The case now before us is an action of ejectment, which was submitted to the supreme court of the same state, according to the local practice upon findings of fact and a statement of evidence by an inferior court of the state. From the foregoing reasons and authorities, it follows that this court cannot review the decision of the state court upon the question of fact whether the ledge, at the time when the town site patent took effect, was known to be valuable for mining purpose; and the only question of Federal law in the case having been rightly decided by that court, its judgment is affirmed.

Mr. Justice **Harlan** concurred in the judgment of affirmance, but not in all the reasoning of the opinion.

673] *L. C. GERLING, Administrator of JOHN W. MARTIN, *Plff. in Err.*,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY.

(See "*Martin's Admr.* v. *Baltimore & O. R. Co.*" S. C. Reporter's ed. 673-710.)

Non-resident, who is—removal of suit from state to Federal court—when petition for removal must be filed—filing too late—objection may be waived—amendment—personal representative of deceased party—cannot maintain action for personal injury—dismissal of suit.

1. Defendant, in order to be a nonresident of a state within the meaning of the Act of March 3, 1887, chap. 373, must be either a citizen of another state, or a corporation created by the laws of another state.
2. A railroad corporation of one state, which is also created a corporation of another state, cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state.
3. A railroad corporation of one state, which carries on business in another state by the license of the latter state, can remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state.
4. The petition for removal must be filed in the state court as soon as the defendant is required to make any defense whatever in that court.
5. Where a suit is not removed from a state court to a Federal court within the time prescribed in the Act of Congress, and a motion to remand upon that ground is promptly made and denied, the judgment of the Federal court will be reversed with directions to remand the case to the state court.
6. The objection that the petition of removal was filed too late, is waived, if such objection is not taken until after the case has been tried in the Federal court.
7. Amendments to a petition for removal can only be allowed when the petition as presented to the state court shows upon its face sufficient grounds for removal.
8. The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law.
9. In West Virginia, no action for personal injury can be maintained by the executor or administrator of the person to whom the wrong was done, except for a wrongful act, neglect or default causing death.
10. Where in an action for personal injuries the judgment was against the plaintiff, and he has died since the action was brought to this court by writ of error, the writ of error will be dismissed.

[No. 67.]

Argued Nov. 6, 1893. Decided Feb. 5, 1894.

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyance to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to removal of causes, under Act of 1875; citizenship, see note to Meyer v. Delaware R. Const. Co. 25: 593.

IN ERROR to the Circuit Court of the United States for the District of West Virginia, to review a judgment in favor of defendant, The Baltimore & Ohio Railroad Company, in a suit brought by John W. Martin, plaintiff, against said company, to recover damages for personal injuries caused to plaintiff by defendant's negligence. At the present term of this court, the plaintiff's death was suggested, and Gerling, his administrator, appointed by the county court of Berkeley county, in West Virginia, came in to prosecute in his stead, and defendant moved to dismiss the writ of error. *Dismissed.*

The facts are stated in the opinion.

Mr. **Daniel B. Lucas,** for plaintiff in error:

The application for removal was not made in time.

Ex parte Pennsylvania Co. 137 U. S. 451 (34: 738); *Fisk* v. *Henarie*, 142 U. S. 459 (35: 1080); *Wyche* v. *Macklin*, 2 Rand. (Va.) 426; *Hinton* v. *Ballard*, 3 W. Va. 582; *Delaplain* v. *Armstrong*, 21 W. Va. 211, 219.

The Baltimore & Ohio Railroad Company, as to its franchises and operations in West Virginia, was a "citizen" of that state, and as such incapacitated to remove a case instituted in her courts by another citizen thereof.

Ohio & M. R. Co. v. *Wheeler*, 66 U. S. 1 Black, 286 (17: 130); *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270 (20: 571); *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581 (27: 518); *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 82 (20: 358); *Baltimore & O. R. Co.* v. *Gallahue*, 12 Gratt. 658, 65 Am. Dec. 254; *Goshorn* v. *Ohio County Supra.* 1 W. Va. 308; *Baltimore & O. R. Co.* v. *Marshall County Supra.* 3 W. Va. 319; *Clark* v. *Barnard*, 108 U. S. 436 (27: 780); *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 295 (30: 87); *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Henen* v. *Baltimore & O. R. Co.* 17 W. Va. 881; *Quarrier* v. *Baltimore & O. R. Co.* 20 W. Va. 424.

Mr. **John K. Cowen,** for defendant in error:

The very broad distinction should be observed and maintained between corporations which are chartered by one state and afterward permitted by license to come into other states and exercise corporate franchises, and corporations which are chartered by two or more states.

In the first class, although the condition upon which the corporation is allowed to exercise its franchise in the foreign state may be that it shall be amenable to all the laws of the state and be liable to suit therein, yet it is still held to be a citizen of the state creating it, and may, if sued in the foreign state, by a resident of that state, remove the suit to the Federal court.

Baltimore & O. R. Co. v. *Harris*, 79 U. S. 12 Wall. 65 (20: 354); *Callahan* v. *Louisville & N. R. Co.* 11 Fed. Rep. 537; *Williams* v. *Missouri, K. & T. R. Co.* 3 Dill. 267; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 295 (30: 87); *Goodlett* v. *Louisville & N. R. Co.* 122 U. S. 391 (30: 1230).

In the second class, as the corporation is chartered by both states, it cannot, when sued

by a citizen of one of the chartering states, remove the case to the Federal court, on the ground that it is chartered by another state. It is held to be a domestic corporation of either state, in cases of suit by citizens of the same state.

Ohio & M. R. Co. v. *Wheeler*, 66 U. S. 1 Black, 286 (17: 130); *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581 (27: 518); *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 5 (26: 643); *Home Ins. Co.* v. *Morse*. 87 U. S. 20 Wall. 445 (22: 365); *Leland* v. *Wilkinson*, 31 U. S. 6 Pet. 317 (8: 412).

Objection cannot be taken at this time of filing the petition for removal.

Ayers v. *Watson*, 113 U. S. 594 (28: 1093).

The time of filing the petition for removal is not a jurisdictional matter, and may be waived by the parties.

French v. *Stewart*, 89 U. S. 22 Wall. 288 (22: 854); *Edrington* v. *Jefferson*, 111 U. S. 770 (28: 594).

This action has abated by the death of the plaintiff in error.

Cunningham v. *Sayre*, 21 W.Va. 440; *Curry* v. *Mannington*, 23 W. Va. 14.

Suits for injuries to the person or character die with the person, and cannot be maintained by the representatives of the deceased party.

Flynn v. *Perkins*, 8 Jur. N. S. 1177.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action of trespass on the case, brought March 1, 1888, in the circuit court of Berkeley county in the state of West Virginia, by John W. Martin against the Baltimore & Ohio Railroad Company to recover damages in the sum of $10,000 for personal injuries caused to the plaintiff by the defendant's negligence at Bayview in the state of Maryland on May 22, 1887.

On April 12, 1888, the defendant filed in that court a petition, with proper affidavit and bond, for the removal of the case into the Circuit Court of the United States for the District of West Virginia, on the ground that at the commencement of the suit and ever since the plaintiff was a citizen of West Virginia and the defendant a corporation and citizen of Maryland. On April 24, 1888, the plaintiff was permitted by the state court, against the defendant's objection, to file an answer to the petition for removal, denying that the defendant was a nonresident corporation, and alleging that it was for all the purposes of the suit a resident of West Virginia, and therefore not entitled to remove the case; and the court, upon a hearing on that petition and answer, "taking judicial [675] notice *of the statutes incorporating the defendant in Virginia and in this state, and being of opinion that said Baltimore & Ohio Railroad Company is not a nonresident corporation," refused to allow the removal.

But the circuit court of the United States, on June 11, 1888, upon the production by the defendant of a duly certified copy of the record of the above proceedings, ordered the case to be docketed in that court; and on July 23, 1888, ordered it to be removed into that court.

On December 13, 1888, the plaintiff filed in that court a plea (called in the record a plea in abatement) that it ought not to take further cognizance of the action, because before and at the time of the removal the defendant "was and is now a resident of the district of West Virginia, and is therefore not entitled to remove said action" to that court. A demurrer to that plea was filed by the defendant, and sustained by the court. "And thereupon," as the record stated, "the plaintiff moved to remand this action to the circuit court of Berkley county, which motion the court overruled."

The defendant then pleaded not guilty. Upon the issue joined on this plea, the case was tried by a jury, the plaintiff and other witnesses testified in his favor, a verdict was rendered for the defendant under instructions of the court, and judgment was rendered upon the verdict.

The plaintiff duly excepted to those instructions, and sued out this writ of error, which was entered in this court on January 13, 1890, together with an assignment of errors, in which the only error assigned to the sustaining of the demurrer to the plaintiff's plea, or to the denial of his motion to remand, was as follows: "The circuit court erred in sustaining the demurrer of the said defendant in error to the plaintiff's plea in abatement, and in overruling the motion of the plaintiff in error to remand the said cause to the state court whence it had been removed to said circuit court of the United States, thus deciding, both in sustaining said demurrer and in overruling said motion, that the Baltimore & Ohio Railroad Company was a nonresident of West Virginia and entitled to remove."

*The other errors assigned were in [676] rulings and instructions at later stages of the case, which it will not be necessary to consider.

At the present term of this court the plaintiff's death was suggested, and Gerling, his administrator, appointed by the county court of Berkeley county in West Virginia, came in to prosecute in his stead; and the defendant moved to dismiss the writ of error, because an action for personal injuries abated by the death of the plaintiff.

It was argued, in behalf of the administrator, that the removal from the state court gave the circuit court of the United States no jurisdiction of this case, for two reasons: 1st. That the Baltimore & Ohio Railroad Company was a resident corporation of the state of West Virginia; 2d. That the application to the state court for removal was not made in time.

The consideration of this argument naturally takes precedence; because, if the courts of the United States never lawfully acquired jurisdiction of the case, they have no rightful power to determine any question of the liability of the defendant, or of the right of the original plaintiff in his lifetime, or of his administrator since his death, to maintain this action, but all such questions can only be determined in the courts of the state in which the action was brought; and, therefore, if the circuit court of the United States had no jurisdiction of the case, its judgment should be reversed for want of jurisdiction, with directions to remand the case to the state court, without passing upon the right to maintain the action in a competent tribunal.

1. The Act of March 3, 1887, chap. 373, which was in force at the time of the removal of this case, authorized any civil action brought in a court of a state between citizens of different states, and in which the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $2000, to be removed into the circuit court of the United States "by the defendant or defendants therein, being non-residents of that state." 24 Stat. at L. 552. In order to be a "nonresident of that state," within the meaning of this stat-
677] ute, the defendant must be a *citizen of another state, or a corporation created by the laws of another state. *McCormick Harvesting Mach. Co.* v. *Walthers*, 134 U. S. 41 [33: 833]; *Ex parte Shaw*, ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444 [36: 768]; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202 [36: 942]; *Martin* v. *Snyder*, 148 U. S. 663 [37: 602].

A railroad corporation, created by the laws of one state, may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in *Indianapolis & St. L. R. Co.* v. *Vance*, 96 U. S. 450 [24: 752]; *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581 [27: 518]; *Clark* v. *Barnard*, 108 U. S. 436 [27: 780]; *Stone* v. *Farmers Loan & T. Co.*, 116 U. S. 307 [29: 636]; and *Graham* v. *Boston, H. & E. R. Co.*, 118 U. S. 161 [30:196]; or by virtue of a license, permission or authority, granted by the laws of the latter state, to act in that state under its charter from the former state. *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65 [20: 354]; *Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 5 [26: 643]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, 118 U. S. 290 [30: 83]; *Goodlett* v. *Louisville & N. R. Co.*, 122 U. S. 391 [30: 1230]; *Marye* v. *Baltimore & O. R. Co.*, 127 U. S. 117 [32: 94]. In the first alternative, it cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state, because it is a citizen of the same state with him. *Memphis & C. R. Co.* v. *Alabama*, above cited. In the second alternative, it can remove such a suit, because it is a citizen of a different state from the plaintiff. *Baltimore & O. R. Co.* v. *Koontz*, above cited.

Whether the Baltimore & Ohio Railroad Company had the right to remove into the circuit court of the United States this action, brought against it by a citizen of West Virginia in a court of that state, therefore depends upon the question whether this company was a corporation created by the laws of Maryland only, or by the laws of West Virginia also.

This company, as is admitted, was originally incorporated by the statute of Maryland of February 28, 1827 (1826, chap. 123) entitled "An act to incorporate the Baltimore & Ohio Railroad Company," by which subscriptions to its capital stock were to be received by commis-
678]sioners therein appointed, *rights to subscribe for certain amounts of stock were reserved to the state of Maryland and to the city of Baltimore, and, as soon as a certain amount had been subscribed for, it was to become a corporation by the name of the Baltimore & Ohio Railroad Company, capable of purchasing, holding and selling real and personal property, and of suing and being sued by that name, and to enjoy all the powers, rights and privileges of a corporation; its general meetings were to be held and directors chosen annually in Baltimore, and the president chosen by the directors; and the president and directors were authorized to increase the capital stock, to declare dividends, and to construct and maintain a railroad from the city of Baltimore to the Ohio river, and to purchase or take property for this purpose, making compensation to the owners.

In support of the proposition that this company had no right to remove the case into the circuit court of the United States, several legislative acts and judicial decisions of Virginia and West Virginia were relied on, which require examination.

In West Virginia, statutes of that state, or of the parent state of Virginia, creating railroad corporations, or licensing and authorizing them to exercise their franchises within the state, are deemed public acts of which the courts of the state take judicial notice, without proof. *Hart* v. *Baltimore & O. R. Co.* 6 W. Va. 336, 349-358; *Mahaney* v. *Kephart*, 15 W. Va. 609, 621; *Henen* v. *Baltimore & O. Co.* 17 W. Va. 881, 899; *Northwestern Bank of Virginia* v. *Machir*, 18 W. Va. 271. Doubtless, therefore, such statutes must be judicially noticed by the circuit court of the United States, sitting within the state of West Virginia and administering its laws, and by this court on writ of error to that court. *Covington Drawbridge Co.* v. *Shepherd*, 61 U. S. 20 How. 227, 232 [15: 896, 898].

By the statute of Virginia of March 8, 1827, chap. 74, entitled "An Act to Confirm a Law, Passed at the Present Session of the General Assembly of Maryland, entitled 'An Act to Incorporate the Baltimore & Ohio Railroad Company,'" and reciting that act in full, it was enacted that "the same rights and privileges shall be and are hereby granted to the aforesaid company *within the territory of Virginia, [679
as are granted to them within the territory of Maryland; the said company shall be subject to the same pains, penalties and obligations, as are imposed by said act; and the same rights, privileges and immunities which are reserved to the state of Maryland, or to the citizens thereof, are hereby reserved to the state of Virginia and her citizens;" excepting as to the location of the railroad in Virginia, and the property to be taken for its construction; and excepting also that any injury at any time done to the road within the limits of Virginia should be punished according to its laws in force for the protection of its public works.

By the statute of Virginia of March 6, 1847, chap. 99, it was enacted that "the Baltimore & Ohio Railroad Company be and they are hereby authorized to complete their road through the territory of this commonwealth" to Wheeling in Virginia, upon certain conditions, including the following:

By section 6, "said company shall be subject to the provisions of" the statute of Virginia of March 11, 1837, chap. 118, "with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable."

By section 7, "the stock, property and profits of said company, so far as the same may be or accrue within this commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this state: Provided, however, that said taxing power shall not be exercised until and unless the net income of the said Baltimore & Ohio Railroad shall exceed six per centum per annum upon their capital invested."

By section 8, "the general assembly hereby reserves to itself the power of hereafter altering, amending or modifying any or any part of the provisions of this act: Provided, that the rights of property and franchises acquired under this act, and the free use and enjoyment of their rights and privileges, as granted by this or any other former act now in force, shall not be taken away or impaired by any such further act of legislation."

680] "The statute of Virginia of March 11, 1837, chap. 118 (referred to in section 6 of the statute of 1847, above cited) was entitled "An act prescribing certain regulations for the incorporation of railroad companies;" and began by enacting that "whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide." Those general provisions related to the exercise of the right of eminent domain, and the payment of compensation for property taken or injured; the time of completing the works of a company so incorporated; the annulling of its charter by the state of Virginia in case it should afterwards fail to keep its road in repair, and to afford the intended accommodation to the public, for three successive years; the right and duty of transporting persons and property; and other matters not neccessary to be specified.

Upon the division of the state of Virginia, and the admission of West Virginia into the Union as a state, that part of the Baltimore & Ohio Railroad, which had been within the state of Virginia, came within the state of West Virginia. See Act of Congress of December 31, 1862, chap 6; 12 Stat. at L. 633; *Virginia* v. *West Virginia*, 78 U. S. 11 Wall. 39 [20:67]. But the general statutes of West Virginia, cited for the plaintiff, do not appear to have any important bearing upon this part of the case.

The statutes of West Virginia of 1872, chap. 227, § 16, and 1882, chap. 97, § 30, by which all railroad corporations, "doing business in this state under charters granted and laws passed by the state of Virginia or this state," are declared to be domestic corporations, were evidently aimed at those companies which had been made corporations by either state, whether under special charters or general laws; and were probably intended to make sure that corporations, created by Virginia before the separation of West Virginia, and doing business within the territory of the latter, should be consider-
681] ed *corporations of this state; and cannot reasonably be construed as including corporations created by some other state only.

Section 30 of chapter 54 of the code of West Virginia authorizes any corporation, duly incorporated by the laws of any other state, to hold property and transact business in West Virginia, "upon complying with the requirements of this section, and not otherwise." These requirements are that every such corporation shall file with the secretary of state a copy of its charter, or of its articles of association and of the law under which it is incorporated, and shall receive from him a certificate of the fact, and file this certificate with the clerk of a county in which its business is conducted. By a further provision of this section, "every railroad corporation, doing business in this state under the provisions of this section, or under charters granted or laws passed by the state of Virginia, or this state, is hereby declared to be, as to its works, property, operations, transactions and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation." It then prohibits, under penalties, any "railroad corporation, which has a charter or any corporate authority from any other state," to do business or to bring any action in the state, until it has filed with the secretary of state a writing under its corporate seal accepting the provisions of this section. This section does not make any corporation of another state, which has neither complied with its requirements, nor been previously made a corporation by special charter or general law of Virginia or of West Virginia, a domestic corporation of West Virginia. It has not been proved or suggested that the Baltimore & Ohio Railroad Company ever complied with the requirements of this section. Nor, as has been seen, had it been previously made a corporation by any statute of West Virginia.

The question under consideration, therefore, turns upon the construction and effect of the statutes of Virginia, above referred to.

*The position that, by force of those **[682** statutes of Virginia, the Baltimore & Ohio Railroad Company became a corporation of Virginia, and consequently of West Virginia, is sought to be maintained by expressions of opinion to that effect by the court of appeals of Virginia in *Baltimore & O. R. Co.* v. *Gallahue* (1855) 12 Gratt. 655, 65 Am. Dec. 254, and by the supreme court of appeals of West Virginia in *Goshorn* v. *Ohio County Supvrs.* (1865) 1 W. Va. 308, and in *Baltimore & O. R. Co.* v. *Marshall County Supvrs.* (1869) 3 W. Va. 319. But in the first case the point decided was that the Baltimore & Ohio Railroad Company was liable to be sued in Virginia; the second case concerned the validity of a county subscription to stock of a railroad company incorporated in Pennsylvania, and authorized by a statute of Virginia to construct a railroad therein; and the third case involved only the right of the state of West Virginia to tax the Baltimore & Ohio Railroad Company.

On the other hand, this court, in *Baltimore & O. R. Co.* v. *Harris* (1870) 79 U. S. 12 Wall. 65 [20: 354], upon great consideration, and with

those cases before it, was clearly of opinion that neither the statutes of Virginia, nor a similar Act of Congress as to the District of Columbia, made the Baltimore & Ohio Railroad Company a new corporation; and this for cogent and satisfactory reasons, which were stated by *Mr. Justice* Swayne in delivering judgment as follows: "In both the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia, as well as in Maryland. The latter [a mistake for "former," as it evidently means in Virginia] could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions, and liabilities as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and [683] in its identity *afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged." 79 U. S. 12 Wall. 81 [20: 358]. This court then expressed its concurrence in the view taken in *Baltimore & O. R. Co.* v. *Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254, that the company was suable in Virginia, and decided that it was likewise suable in the District of Columbia, concluding its discussion of the subject by saying, "Looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought, in all respects as if it had been an independent corporation of the same locality." 79 U. S. 12 Wall. 83, 84 [20: 358, 359].

In *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.* (1881) 17 W. Va. 812, a petition of the Baltimore & Ohio Railroad Company, for the removal into the circuit court of the United States of a proceeding for the taking of some of its land for the railroad of a West Virginia corporation, was denied by the courts of West Virginia, upon the ground that the Federal courts could under no circumstances have jurisdiction of such cases. 17 W. Va. 866, 867. That decision is inconsistent with the decisions of this court. *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 403, 407 [25: 206, 208]; *Union Pac. R. Co.* v. *Myers*, 115 U. S. 1, 19 [29: 319, 325]; *Searl* v. *School Dist. No. 2*, 124 U. S. 197 [31: 415]. But (which directly bears upon the question now before us) the highest court of West Virginia, in that case, after referring to the cases in 12 Gratt. and in 1 and 3 W. Va. and quoting at length from the opinion of this court in *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65 [20: 354], including the passages above cited, said: "If this be true, we need not differ as to whether the act of Virginia was a charter to the Baltimore & Ohio Railroad Company, or a license of the character described; the result would be the same in either case; the effect would be to make it, *quoad* all its bearings [business?] contracts, etc., in West Virginia, liable to suit here, the same as if were a corporation of West Virginia." 17 W. Va. 875. The decisions in *Henen* v. *Baltimore & O. R. Co.* 17 W. Va. 881, and *Quarrier* v. *Baltimore & O. R. Co.* 20 W. Va. 424, *simply follow that case; and [684] we have been referred to no later decision of that court upon the subject.

There does not appear, therefore, to be such a settled course of adjudication in the courts of West Virginia that the Baltimore & Ohio Railroad Company has been made by the statutes of Virginia a corporation of that state and of the state of West Virginia, as should induce this court, when the question arises under an Act of Congress defining the jurisdiction of the courts of the United States, to surrender its own opinion, and to reverse the conclusion at which it deliberately arrived in *Baltimore & O. R. Co.* v. *Harris*, and which it has since repeatedly approved. *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 285 [20: 571, 576]; *Ex parte Schollenberger*, 96 U. S. 369, 376 [24: 853, 854]; *Indianapolis & St. L. R. Co.* v. *Vance*, 96 U. S. 450, 458 [24: 752, 756]; *Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 5, 9, 13 [26: 643-645]; *Goodlett* v. *Louisville & N. R. Co.* 122 U. S. 391, 402, 403 [30: 1230, 1231].

The Baltimore & Ohio Railroad Company not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right under the Constitution and laws of the United States, when so sued by a citizen of this state, to remove the suit into the circuit court of the United States; and could not have been deprived of that right by any provision in the statutes of the state. *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 445 [22: 365]; *Barron* v. *Burnside*, 121 U. S. 186 [30: 915]; *Southern Pac. Co.* v. *Denton*, 146 U. S. 202, 207 [36: 942, 945].

2. The other objection taken in argument to the validity of the removal of the case into the circuit court of the United States is, that the petition for removal was not seasonably filed in the state court under the provision of the Act of Congress of 1887, by which any party, entitled to remove such a suit from a state court into the circuit court of the United States, "may make and file a petition in such suit in such state court at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. at L. 554.

*The original summons in this case [685] was issued by the state court on March 3, 1888, returnable at the rules to be held on the first Monday of March, 1888, which was March 5, and was served, as appeared by the officer's return, at 11 A. M. of March 5, the statutes of the state providing that "any process may be executed on or before the return day thereof." W. Va. Code of 1884, chap. 124, § 2.

On the record of that court were the following minutes: "March rules, 1888: Declaration filed and common order. April rules, 1888: Common order confirmed and W. E."

The meaning of these minutes is that the plaintiff, having filed his declaration at the rule

day on which the summons was returnable, and the defendant having failed to appear on that day, there was thereupon entered in the clerk's office, as authorized by the statutes of the state, a conditional judgment, or judgment *nisi*, known as the "common order," that judgment be entered for the plaintiff unless the defendant should appear and plead at the next rules; and at April rules, the defendant continuing in default, the clerk entered, pursuant to those statutes, an office judgment, confirming the former one, with an order or writ of inquiry of damages. W. Va. Code, chap. 125, §§ 1, 6; 4 Minor. Inst. 599, 601.

By the statutes and practice of the state, this office judgment would, if not set aside, become a final judgment on, and not before, the last day of the next succeeding term. But the defendant might, at any time before the end of that term, "appear and plead to issue," that is to say, answer to the merits of the action, either by plea in bar, or by demurrer; and, if he did so appear and plead within that time, the office judgment, not having been entered up in court, nor the writ or order of inquiry executed, would be set aside as of course, and the case stand for trial upon the merits. In short, either judgment in the clerk's office was merely a formal judgment of default, not affecting the defendant's absolute right to interpose any defense upon the merits. But at a subsequent term, or if the office judgment had been confirmed by the court, or the writ of inquiry executed, he could not, without leave of court, file any plea whatever. A plea [686] to the *jurisdiction, or in abatement, if it could have have been filed after the common order or conditional judgment in the clerk's office, certainly could not be filed, without special leave of the court, after the office judgment confirming that order; and therefore, in this case, upon the most liberal construction possible, not after the April rules. W. Va. Code, chap. 125, §§ 16, 46, 47; 4 Minor, Inst. 601, 605; *Rester* v. *Shelice*, 5 U. S. 1 Cranch, 110 [2: 51]; *Furniss* v. *Ellis*, 2 Brock. 14; *Hinton* v. *Ballard*, 3 W. Va. 582; *Delaplain* v. *Armstrong*, 21 W. Va. 211.

The defendant's petition for the removal of the case into the circuit court of the United States was not filed at the rules, either in March or in April. But it was afterwards filed in and heard by the state court before the end of the April term. It was therefore filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ.

Was this a compliance with the provision of the Act of Congress of 1887, which defines the time of filing a petition for removal in the state court? We are of opinion that it was not, for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint." These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory pleas to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to "oppose or answer" the declaration or complaint which the defendant is summoned to meet. Stephen, Pl. (1st Am. ed.) 60, 62, 68, 70, 71, 239; Lawes, Pl. 36. The Judiciary Act of September 24, 1789, chap. 20, § 12, required a petition for removal of a case from a state court into the circuit court of the United States to be filed by the defendant "at the time of entering his appearance *in [687] such state court." 1 Stat. at L. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest statute. *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 84 [28: 925]; *Smith* v. *Lyon*, 133 U. S. 315, 320 [33: 635, 637]; *Ex parte Pennsylvania Co.* 137 U. S. 451, 454 [34: 738, 740]; *Fisk* v. *Henarie*, 142 U. S. 459, 467 [35: 1080, 1082]; *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444, 449 [36: 768, 771].

Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States.

As the petition for the removal of this case into the circuit court of the United States was not filed in the state court within the time mentioned in the Act of Congress, it would follow that, if a motion to remand upon that ground had been made promptly and denied, the judgment of the circuit court of the United States must have been reversed, with directions to remand the case to the state court. *Edrington* v. *Jefferson*, 111 U. S. 770 [28: 594]; *Baltimore & O. R. Co.* v. *Burns*, 124 U. S. 165 [31: 333].

3. But the record, as appears by the statement of the material parts thereof at the beginning of this opinion, not only does not show that any such objection to the removal was made, either in the state court or in the circuit court of the United States, but clearly implies that it was not, and that the only objection made in either court to the jurisdiction of the circuit court of the United States was that the defendant, as well as the plaintiff, was a citizen of West Virginia; and the assignment of error in this respect is expressly so limited.

The question therefore arises whether the objection to the time of filing the petition for removal can be raised for the *first time [688] in this court, or must be held to have been waived by not taking it below.

The time of filing a petition for the removal of a case from a state court into the circuit court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of dif-

ferent states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the circuit court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district. *Gracie* v. *Palmer*, 21 U. S. 8 Wheat. 699 [5: 719]; *Taylor* v. *Longworth*, 39 U. S. 14 Pet. 172, 174 [10: 405, 406]; *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127 [35: 659]; *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 [36: 829]; *Central Trust Co.* v. *McGeorge*, *ante*, p. 98.

That the jurisdiction of the circuit court of the United States over a case removed into it from a state court cannot be defeated upon the ground that the petition for removal was filed too late, if the objection is not taken until after the case has proceeded to trial in the circuit court of the United States, has been distinctly decided by this court.

In *French* v. *Stewart*, 89 U. S. 22 Wall. 238 [22: 854], the case had been removed under the Act of March 2, 1867, chap. 196 (14 Stat. at L. 558) re-enacted in Rev. Stat. § 639, cl. 3, which required the petition to be filed "before the final hearing or trial" in the state court; the circuit court of the United States denied a motion to remand, made, as the report states, because the Act "had not been complied with in respect to time and several other important particulars;" and this court, on appeal, approved its action, and, speaking by *Mr. Justice* Swayne, said: "The objection made in the court below touching the removal of the case from the state court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the transfer was made. The objection came too late. Under the circumstances it must be held to have been 689] *conclusively waived." And *Taylor* v. *Longworth*, above cited, was referred to as in point. 89 U. S. 22 Wall. 244, 245 [22: 856].

The reasons in support of this conclusion were stated at length in *Ayers* v. *Watson*, 113 U. S. 594 [28: 1093], which was brought up by writ of error from the circuit court of the United States, into which the case had been removed under the Act of March 3, 1875, chap. 137, since amended by the Act of 1887 in no material respect bearing upon the present inquiry, except in fixing an earlier time for filing the petition for removal in the state court, by requiring it to be filed at or before the time when the defendant is required to answer or plead, instead of (as it was in the Act of 1875) "before or at the term at which such cause could be first tried and before the trial thereof." The two acts are printed side by side in 120 U. S. app. 786-794 [30: app. I-III.].

In *Ayers* v. *Watson*, *Mr. Justice* Bradley, speaking for the whole court, after observing that "the application for removal was beyond question too late, according to the Act of 1875," which governed the case, and that the court was therefore compelled to examine the effect of the Act of 1875 when the application was made at a later period of time than was allowed by that Act, and stating the substance of section 2 of that Act, defining the classes of cases which might be removed into the circuit court of the United States, said: "This is the fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal." "The second section defines the cases in which a removal may be made; the third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record; the directions of the third, though obligatory, may to a certain extent be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Mansfield, C. & L. [690 *M. R. Co.* v. *Swan*, 111 U. S. 379 [28: 462]. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word 'jurisdiction' is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it. And since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped." 113 U. S. 597-599 [28: 1094, 1095].

In that case, it is true, it was the party who had removed the case into the circuit court of the United States, who afterwards objected to the jurisdiction of that court because the removal was not in time, and was held to be estopped to do so. But if due time of removal had been made by the Act of Congress a jurisdictional fact, neither party could waive, or be estopped to set up, the want of it; but, as observed by *Mr. Justice* Bradley in the passage above quoted, and directly adjudged in *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 [28: 462] cited by him, the fact would be absolutely essential, and the want of it would be error at any stage of the cause, even though assigned by the party at whose instance it was committed. His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and of estoppel alike.

The incidental suggestion, in that opinion,

that the petition for removal might be amended 691] in the circuit court as to the *form of stating the jurisdictional facts, assumes that those facts are already substantially stated therein, and accords with later decisions, by which such amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal. *Carson* v. *Dunham*, 121 U. S. 421, 427 [30: 992, 994]; *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 [33: 144]; *Jackson* v. *Allen*, 132 U. S. 27 [33: 249].

The decision in *Ayers* v. *Watson*, 113 U. S. 594 [28: 1093] as to the waiver in the circuit court of the United States of the objection that the petition for removal had not been seasonably filed in the state court, has never been doubted or qualified. In *Kansas City, Ft. S. & M. R. Co.* v. *Daughtry*, 138 U. S. 298 [34: 963] cited by the plaintiff in the present case, the writ of error was not to the circuit court of the United States, after the case had been removed into that court and tried and determined there; but it was to the state court, which had refused to allow the removal, and the decision of this court was that there was no error in that refusal if the petition for removal had not been filed in time to make it the duty of that court to surrender its jurisdiction.

The result is, that an objection to the exercise by the circuit court of the United States of jurisdiction over a case, otherwise removable upon the ground that the petition for removal was filed too late, is an objection which may be waived, and that it has been waived in the case at bar.

4. There being no error, of which advantage can be taken at this stage of the case, affecting the jurisdiction of the circuit court of the United States, the next matter to be considered is the defendant's motion to dismiss the writ of error, as having abated by the death of the original plaintiff, because it was an action to recover damages for a personal injury.

By the Judiciary Act of September 24, 1789, chap. 20, § 31 (1 Stat. at L. 90) following the statute of 8 & 9 Wm. III. c. 11, §§ 6, 7, and since embodied as follows in the Revised Statutes, "when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause 692] of action survives by *law, prosecute or defend any such suit to final judgment," and upon *scire facias* judgment may be rendered for or against him; and "if there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff, or against the surviving defendant, and one or more of them dies, the writ of action shall not be thereby abated, but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." Rev. Stat. §§ 955, 956.

These statutes authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives by law, and do not undertake to define what those cases are.

The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question not of procedure, but of right. As was said by *Chief Justice* Waite, speaking for this court: "The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. Stat. § 955." "The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. Stat. § 914. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of the action, not on the forms of proceeding to enforce it." *Re Schreiber*, 110 U. S. 76, 80 [28: 65, 66]. In that case, the right in question being of an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. But in the case at bar, the question whether the administrator has a right of action depends upon the law of West Virginia, where the *action was 693] brought and the administrator appointed. Rev. Stat. § 721; *Henshaw* v. *Miller*, 58 U. S. 17 How. 212 [15: 222]. The mode of bringing in the representative, if the cause of action survived, would also be governed by the law of the state, except so far as Congress has regulated the subject.

The provisions of the code of West Virginia, which have been supposed in argument to have any bearing upon this subject, are copied in the margin.*

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*CHAPTER LXXXV.

OF PERSONAL REPRESENTATIVES; THEIR POWERS AND DUTIES AS TO PERSONAL ASSETS.

SEC. 19. A personal representative may sue or be sued upon any judgment for or against, or any contract of or with his decedent.

SEC. 20. An action of trespass, or trespass on the case, may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent.

CHAPTER CIII.

OF ACTIONS FOR INJURIES.

SEC. 5. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as to amount in law to murder in the first or second degree, or manslaughter.

SEC. 6. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate. In every such action,

[694] *Chapter 85, entitled "Of personal representatives; their powers and duties as to person-
[695] al assets," authorizes actions, *which might have been brought by or against a person in his lifetime, to be brought after his death by or against his personal representative, in no other cases but those of judgments or contracts, or of taking or injuring personal property.

These provisions are copied from the code of Virginia of 1849, chap. 130, §§ 19, 20, and approximately, though not exactly, adopt the rule of the common law that a personal action dies with the person, as modified by the English statutes of 4 Edw. III. chap. 7, and 3 & 4 Wm. IV. chap. 42, § 2; 3 Williams, Exrs. pt. chap. 1, § 1. In Virginia and West Virginia, except as specified in their own statutes, no action or tort can be maintained by or against the executor or administrator of the person to or by whom the wrong was done. *Henshaw* v. *Miller*, 17 How. 212 [15: 222]; *Harris* v. *Crenshaw*, 3 Rand. (Va.) 14; *Curry* v. *Mannington*, 23 W. Va. 14, 18.

The only case of a personal injury, for which an action might have been brought by a person in his lifetime, in which the Code of West Virginia authorizes an action to be brought by his personal representative, is that of a wrongful act, neglect or default causing death, in which case chapter 103, entitled "Of actions for injuries," provides in sections 5 and 6, following the English statute of 9 & 10 Vict. chap. 93, §§ 1, 2 (commonly known as Lord Campbell's Act) that the person or corporation, who would have been liable if death had not ensued, shall be liable to an action by the personal representatives *of the de- [696
ceased person. The right of action thus given, although for the same act or neglect for which the person injured would have had a right of of action in his lifetime, differs from an action brought by him, both in the ground on which it proceeds and in the award of damages. It is not a common law action to recover damages for the injuries suffered by him while he lived, but it is an action given by statute for causing his death. The damages recovered cannot exceed $10,000, and are no part of the estate of the deceased, and cannot pass by his will, or be reached by his creditors; but, by the express terms of the statute, are to be distributed to his next of kin as if he died intestate, and are not subject to his debts. Those sections, therefore, authorizing the personal representative to bring such an action after the death of the person injured, have no tendency to show an intention of the legislature that the representative may prosecute a common law action brought by that person in his lifetime.

The statute action must be brought within two years after the death. All other actions for personal injuries come within the general provision of the statute of limitations, chapter 104, § 12, of the Code of West Virginia (corresponding to chapter 149, § 11, of the Code of Virginia) by which the period of limitation of every personal action, for which no other limitation is prescribed, is fixed at five years, or at one year, depending upon the question whether "it be for a matter of such a nature that, in case a party dies, it can be brought by or against his personal representative."

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the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased: provided, that every such action shall be commenced within two years after the death of such deceased person.

CHAPTER CIV.

LIMITATION OF SUITS.

SEC. 12. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after.

[The only limitations of personal actions, otherwise prescribed in the code, are of actions for injuries causing death, in chap. 103, § 6, above quoted; of actions on recognizances, in chap. 104, § 11; on judgments, in chap. 104, § 13, and chap. 139, §§ 10, 11; on other contracts and awards, in chap. 104, §§ 6, 7; and of proceedings to avoid voluntary gifts, in chap. 104, § 14.]

CHAPTER CXXVII.

OF THE DEATH OR CHANGE OF PARTIES, AND THE DISCONTINUANCE OF CAUSES NOT PROSECUTED.

SEC. 1. Where a party dies, or becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

SEC. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

SEC. 3. If, in any case of appeal, writ of error or *supersedeas*, which is now or may hereafter be pending, there be at any time in an appellate court suggested or relied on, in abatement, the death of the party, or any other fact which, if it had occurred after the verdict in an action, would not have prevented judgment being entered as if had not occurred, the appellate court may, in its discretion, enter judgment or decree in such case as if the said fact had not occurred.

SEC. 4. In any stage of any case, a *scire facias* may be sued out for or against the committeee of any party who is insane or a convict; or for or against a party before insane, the powers of whose committee have ceased; or for or against the personal representative of the decedent who, or whose personal representative, was a party; or for or against the heirs or devisees of a decedent who was a party; or for the assignee or beneficiary party; to show cause why the suit should not proceed in the name of him or them. Or where the party dying, or whose powers cease, or such insane person or convict, is plaintiff or appellant, the person or persons for whom such *scire facias* might be sued out may, without notice or *scire facias* move that the suit proceed in his or their name. In the former case, after service of the *scire facias*, or in the latter case on such motion if no sufficient cause be be shown against it, an order shall be entered that the suit proceed according to such *scire facias* or motion. Any such new party, except in an appellate court, may have a continuance of the case at the term at which such order is entered; and the court may allow him to plead anew, or amend the pleadings, as far as it deems reasonable; but in other respects the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against him before such *scire facias* or motion.

SEC. 5. The clerk of the court in which the case is may issue such *scire facias* at any time, and an order may be entered at rules for the case to proceed in the name of the proper party, although the case be on the court docket.

[The subsequent sections as to discontinuance are not material.]

It is hardly contended that by the law of West Virginia this action could have been begun by an executor or administrator. But it is argued that, having been begun by the person injured, it may be prosecuted by his administrator since his death, under the provision of chapter 127 of the Code of West Virginia, and especially by virtue of the last clause of § 2 of this chapter.

The chapter is entitled "Of the death or change of parties, and the discontinuance of causes not prosecuted," and all its provisions relate rather to matters of procedure than of substantial right.

697] *By the rule of common law, *actio personalis moritur cum persona*, the death of the sole plaintiff or of the sole defendant before final judgment abated any personal action, except that, if the death occurred in vacation after verdict, judgment might be entered as of the preceding term. *Hatch* v. *Eustis*, 1 Gall. 160, 162; *Green* v. *Watkins*, 19 U. S. 6 Wheat. 260, 262 [5:256]. The rule has been modified in England and in this country by various statutes, with the object of avoiding the necessity of bringing a new action when the cause of action survives to the personal representative, but not always limited to that object.

Chapter 127 of the Code of West Virginia re-enacts, with some modifications, chapter 178 of the Code of Virginia. After re-enacting the provision of § 1 that when a party dies after verdict judgment may be entered as if the death had not occurred, and the provision of § 2 that in case of the death of any of several plaintiffs or defendants "the suit may proceed for or against the others, if the cause of action survive to or against them," it adds to this section this clause: "If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

It is argued that, by virtue of this clause, all actions of tort, including libel and slander, and all actions for injury to the person, may, in case of the death of either party, be prosecuted by or against his personal representative.

However plausible that argument might be if this clause stood alone, and were to be construed by itself, and according to the literal meaning of the words, the clause assumes a different aspect upon considering the connection in which it stands, and the provisions of previous chapters, already mentioned, relating to the survivorship of causes of action.

It would be hardly consistent with the legislative intent, apparent from the objects and the limits of those provisions, to give the clause relied on the effect of allowing all actions of tort whatever to be prosecuted after the death of the original plaintiff by his personal representative; 698] and to give it that effect would permit the prosecution, after the death of a sole plaintiff or defendant, of an action which, by the first clause of the same section, if there had been several plaintiffs or defendants and one only had died, could not have proceeded for or against the others.

Moreover, by the final clause of § 4 of the same chapter, after the personal representative of either party dying has been brought in by *scire facias* or motion, "the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against him before such *scire facias* or motion." But if an action for a personal injury had been pending for or against the personal representative after the death of the person who suffered or committed the injury, the final judgment would have been that the action was abated by the death.

The reasonable inference is that the clause relied on, like the rest of the chapter, is intended only to prescribe the mode of procedure in actions the cause of which survives, either at common law, or by virtue of other chapters of the code; and that its whole effect is to avoid the necessity of bringing a new action when the right of action so survives; and not to give a new right of action, which did not exist before.

This is the view that has been taken by the highest court of the state whenever the matter has been brought before it.

In *Cunningham* v. *Sayre*, 21 W. Va. 440, that court, after observing that, at common law, "actions grounded in tort generally died with the person, and actions founded on contract generally survived," went on to say: "When the legislature, in the statute above referred to, used the language, that 'if a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution *in the same manner as if it were a cause of action arising out of contract*,' it is evident that it referred in the last clause of the section to the general common law rule that '*actions founded on contracts* survived.' It was found that great inconvenience arose in following the technical rule of the common law in abating actions, when the personal representative, his heir or devisee, *might bring another suit to accomplish [699] substantially the same object had in view by the ancestor in bringing the original suit, and the manifest object of the statute was to enlarge the remedy so that the suit might be revived. It was not the object of the statute to create any new right, and give an action to the heir, devisee or representative, which he had not at common law; but where the representative, heir, etc., had a right, by suit, to accomplish the same object, substantially, as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, but might be revived." And it was upon that construction of the statute, that the court grounded its decision that an action of unlawful entry and detainer survived, upon the death of the plaintiff, to his heir, saying: "The suit which the ancestor brought was sufficient to acquire the possession, and the statute intended, in case of his death, that his heirs or devisees, who took his place with reference to that right, may revive the suit and prosecute it." 21 W. Va. 444, 445.

In *Curry* v. *Mannington*, 23 W. Va. 14, the question whether a right of action of tort for a personal injury, not causing death, would survive to the personal representative of the person injured, was directly presented for adjudication by a plea of the statute of limita-

tions to an action against a town for a personal injury caused by a defect in a highway, and was decided in the negative, the court saying that, "under the common law, the rule was that all personal actions died with the person, according to the maxim, *actio personalis moritur cum persona;*" that by successive statutes in England and in this country, and by chapter 85, § 20, of the code, the personal representative might sue for an injury to the personal estate of the decedent in his lifetime; that "in the cases, however, of injuries to the *person*, and not to the *property* or *estate* of the decedent, whether by assault, battery, false imprisonment, slander, *negligence* or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action can be supported either by or against his representative;" and that the only exception to this rule, known to the court, 700] was in chapter 103, *§§ 5, 6, of the code, "embracing what is known as Lord Campbell's Act, giving a right of action to the representative against any party wrongfully causing the death of his decedent." 23 W. Va. 18.

In *Gainer* v. *Gainer*, 30 W. Va. 390, 398, whether a suit could be revived by the personal representative under chapter 127, was treated as depending upon the question whether, by other laws of the state, the cause of action survived.

A like view was taken by the court of appeals of Maryland of similar statutes of that state, published in 2 Kilty's Laws of Maryland. By the act of 1785, chapter 80, § 1, it was enacted "that no action, brought, or to be brought, in any court of law in this state, shall abate by the death of either of the parties to such action; but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued," and, in a real action, "the heir or devisee of the deceased, or tenant in possession, or other proper person to defend in such action," and, in an action "to recover personal chattels, debt or damages," the executor or administrator or other proper person to defend, might appear or be summoned in; "and in case the plaintiff or plaintiffs, in any action aforesaid, shall die before the same may be tried and judgment given, and such death would abate the action before this act, the appearance of the heir, devisee, executor or administrator, as the case may require, or other proper person to prosecute such suits, shall be admitted to be entered to the same." And the act of 1798, chapter 101, sub-chapter 14, § 4, provided that "no personal action shall abate by the death of either party, but executors and administrators shall notice and conform to the directions of the act of 1785, chapter 80, respecting their prosecution or defense of such action." Notwithstanding the broad terms of those statutes, the court of appeals held that an action against a railroad company for a personal injury was abated by the death of the plaintiff, saying: "Suits for injuries to the person or character die with the person, and cannot be maintained by the representatives of the deceased party. Before the acts of 1785, chapter 80, and 1798, chapter 101, sub-chapter 701] 14, § 4, all *personal actions abated by the death of a party, and it was necessary for his representatives to commence the action anew; and the object of those acts was to prevent the inconvenience and delay, and to enable the representatives of deceased parties to prosecute such actions as had been instituted by their decedents, during their lives, which did not die with the person. Those acts never were intended, however, to prevent the abatement of actions which died with the person." *Baltimore & O. R. Co.* v. *Ritchie*, 31 Md. 191, 198, 199.

In an action for personal injury, a similar decision was made in England under the Common Law Procedure Act of 1852, Stat. 15 & 16 Vict. chap. 76, which provided, in § 135, that "the death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned;" in § 136, that when one of two or more plaintiffs or defendants should die, the action should proceed, if the cause of action survived to or against the others; in § 137, that "in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed," "and such judgment shall follow upon the verdict in favor of or against the person making such suggestion, as if such person were originally the plaintiff;" and in § 138 that "in case of the death of a sole defendant or sole surviving defendant, where the action survives," the plaintiff might suggest the death and proceed with the action. It was argued for the plaintiff that § 135, which was not restricted to actions the cause of which survived, was quite large enough in its terms to include the case. But the court held that the section was not intended to give any new right of action, but only to prevent the proceedings abating by the death of the plaintiff, and to permit the personal representative to continue them, when he could have brought an action; *Mr. Justice* Crompton saying, "It would be a strange thing to hold that those sections which relate merely to matters of procedure, had the effect of doing away with the ancient common law rule—*actio personalis moritur cum persona.*" *Flinn* v. *Perkins*, 32 L. J. Q. B. 10, 11, 8 Jur. N. S. 1177.

*That case does not appear to have ever 702] been overruled or questioned, although it was cited by counsel in *Kramer* v. *Waymark*, L. R. 1 Exch. 241, 4 Hurlst. & C. 427; and again in *Hemming* v. *Batchelor*, L. R. 10 Exch. 54, 44 L. J. Exch. 54.

In *Kramer* v. *Waymark*, the point decided was that § 139 of the Common Law Procedure Act, re-enacting the general provisions of the statute of 17 Car. II. chap. 8, § 1, that the death of either party between verdict and judgment should not be alleged for error, if judgment should be entered within two terms after the verdict, included an action for a personal injury. Such an entry of judgment upon a verdict which has established the rights of the parties is equivalent, in substance and effect, to the ordinary entry of judgment *nunc pro tunc* upon such a verdict;

and is quite a different thing from permitting a litigation to be prosecuted by or against an executor or administrator.

In *Hemming* v. *Batchelor*, on the other hand, where the plaintiff, in an action for a personal injury had been nonsuited, with leave to move for a new trial at the next term, and died before that term, the court held that the action abated by the death, and, while declining to enter judgment for the defendant on the nonsuit, held that it had no authority to grant a new trial.

In *Green* v. *Watkins*, 19 U. S. 6 Wheat. 260, 262 [5: 256] it was said by *Mr. Justice* Story, following Tidd's Practice, 1096, that a writ of error in a personal action would not abate if the plaintiff in error died after assignment of errors. But the case before the court was a real action, in which, as he observed, the right descended to the heir. And there is nothing in Tidd's Practice, or in the authorities there cited, which countenances the theory that a writ of error in action, the cause of which would not survive, either to heirs or to personal representatives, would not be abated by the death of the only person who could maintain the action. Section 956 of the Revised Statutes, like the statute of 8 & 9 Wm. 703] III. chap. 11, § 7, by which *the death of one of several plaintiffs or defendants does not abate an action which survives to or against the survivor of them, has been held to extend to writs of error, because, as said by Lord Ellenborough, and repeated by *Chief Justice* Waite: "The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action." *Clarke* v. *Rippon*, 1 Barn. & Ald. 586; *Moses* v. *Wooster*, 115 U. S. 285 [29: 391]; *McKinney* v. *Carroll*, 37 U. S. 12 Pet. 66 [9: 1002]. Equally applicable to writs of error is section 955 of the Revised Statutes (following section 6 of the statute of Wm. III.) by which, as observed by *Chief Justice* Waite in *Re Schreiber*, before cited, "the personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action on account of which the suit is brought survives by law." 110 U. S. 76, 80 [28: 65, 66].

The result is, that by the law of Virginia the administrator has no right to maintain this action, and by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed *nunc pro tunc* in his favor. If the judgment below against him should now, upon the application of his administrator, be reversed and the verdict set aside for error in the instructions to the jury, or, according to the old phrase, a *venire de novo* be awarded, no new trial could be had, because the action has abated by his death. *Hemming* v. *Batchelor*, L. R. 10 Exch. 54; *Bowker* v. *Evans*, L. R. 15 Q. B. Div. 565; *Spalding* v. *Congdon*, 18 Wend. 543; *Corbett* v. *Twenty-Third Street R. Co.* 114 N. Y. 579; *Harris* v. *Crenshaw*, 3 Rand. (Va.) 14, 24; *Cummings* v. *Bird*, 115 Mass. 346.

The necessary conclusion is that, the action having abated by the plaintiff's death, the entry must be, writ of error dismissed.

Mr. Justice **Harlan** dissenting: [704

I cannot agree that this action abates or that the writ of error should be dismissed because of the death of the original plaintiff.

In the discussion at the bar of the question whether the action had abated by the death of the plaintiff, reference was made to chapter 103 of the Code of West Virginia giving to the personal representative of one whose death has been caused by the wrongful act, neglect or default of any person or corporation, a right of action for damages against such person or corporation. The right to bring such action is limited to two years, and the damages recovered cannot be subjected to the payment of the debts and liabilities of the decedent, but must be distributed to the parties and in the proportion provided by law in relation to the estate of those who die intestate. In my judgment those provisions are of no consequence in the present inquiry. This suit was brought by the person alleged to have been injured to recover compensation for such injuries as he sustained. It is not claimed that his death, since this writ of error was sued out, was caused by those injuries. And the question is whether this personal action was abated by his death. Its determination, it is agreed, depends upon the law of West Virginia.

By the Code of West Virginia, chapter 127, it is provided:

"SEC. 1. Where a party dies or becomes convicted of felony, or insane, or the powers of a party who is a personal representative or committee cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

"SEC. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of the suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

*"SEC. 3. If, in any case of appeal, [705 writ of error or supersedeas which is now or may hereafter be pending, there be at any time in an appellate court suggested or relied on, in abatement, the death of the party, or any other fact which, if it had occurred after the verdict in an action, would not have prevented judgment being entered as if it had not occurred, the appellate court may, in its discretion, enter judgment or decree in such case as if the said fact had not occurred."

Under the first section above quoted judgment could be entered without reviving the action if the party died after verdict. That section is substantially like section one of the statute 17 Car. II. chap. 8. The object of the

first clause of the second section of chapter 127 of the Code of West Virginia was to dispense with the necessity of reviving an action in which there were several plaintiffs or defendants, one of whom had died pending the action, provided the cause of suit was one which, according to the settled principles of the common law, survived to or against the other parties. This clause had the same object as the sixth and seventh sections of the statute of 8 & 9 William III. chap. 2. These English statutes were examined in *Kramer* v. *Waymark*, L. R. 1 Exch. 241, 243, in which an infant plaintiff sued by next friend to recover damages for injuries sustained through the negligence of the defendant. The child died after verdict and before judgment was signed. Upon a rule to show cause why the judgment should not be set aside, on the ground of the death of the plaintiff before judgment, the court discharged the rule, saying that the proceedings could not be stayed in face of *Palmer* v. *Cohen*, 2 Barn. & Ald. 966. In the latter case, which was an action for libel, the plaintiff died after verdict and before judgment was entered by his executor at the next term. The court refused to set aside the judgment, holding that the death of the plaintiff, after verdict, did not prevent his executor from entering judgment. In the same case the court referred to the Common Law Procedure Act, 1852, § 139, which provided that "in all actions, personal, real or mixed, the death of either party between the verdict and judgment shall not hereafter be alleged for error, so as such 706] *judgment be entered within two terms after such verdict" (Stat. 15 & 16 Vict. chap. 76, § 139) and said that it was stronger than the statute of Car. II. and applied "to all actions, whether they would have survived to an executor or not." See *Gaines* v. *Conn*, 2 Dana, 232.

The principal difference between the West Virginia statute, before it was amended in 1868, and the statutes of 17 Car. II. and 8 & 9 Wm. III. was that the latter did not apply to real actions, whereas the former embraced all actions—real, mixed and personal. The first clause of section 2 of chapter 127 of the West Virginia Code is important in the present discussion, because the words "if the cause of suit survive to or against" any one of several plaintiffs or defendants, show that even when that section was adopted the legislature had in mind the distinction at common law between actions that survived and those that did not survive. And in 1868, with this distinction still in view, the legislature added the second clause of the second section, providing that "if a plaintiff or defendant die pending any action, *whether the cause of action would survive at common law or not*, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

If the second clause of section 2 of chapter 127 had never been adopted, an action in tort would not have abated in West Virginia by reason of the death of the plaintiff after verdict, but judgment could have been entered upon the verdict. This, according to *Kramer* v. *Waymark*, L. R. 1 Exch. 241, was the construction placed on the English statute, upon which the first section and the first clause of the second section of chapter 127 of the Code of West Virginia were evidently based. But the second clause of the second section of that chapter was a step in advance. It seems to me clear that the legislature intended, by that clause and under the circumstances stated in it, to permit any action, whatever its nature, and at every stage of it, to be revived and prosecuted to judgment and execution without reference to the question whether the cause of action would or would not survive at common law. The *purpose was to remove [707 from the jurisprudence of West Virginia the distinction existing at common law between causes of action that survived and those that did not survive. Martin sued for the injury alleged to have been done to him through the negligence of the railroad company. This cause of action would not have survived at common law where death occurred before verdict. But that fact became immaterial under the legislation of 1868, which expressly provided that, whether the cause of action would survive at common law or not, the case could be revived and proceed to judgment precisely as it might do in cases of contracts. The decision now rendered makes the statute mean just what it would mean if it did not contain the words "whether the cause of action would survive at common law or not." The court holds that an action cannot be revived and prosecuted to judgment and execution if the cause of action be one that would not have survived at common law; and this, notwithstanding the statute, in plain words, says that the inquiry "whether the cause of action would survive at common law or not," is immaterial.

It is said that this conclusion cannot be sustained with due regard to the decisions of the supreme court of appeals of West Virginia. The case particularly relied on in support of this contention is *Cunningham* v. *Sayre*, 21 W. Va. 440, 444. There death occurred before verdict, and the question was whether an action for unlawful entry and detainer abated upon the death of the plaintiff. The court held that the action did not abate, and its decision of that point is expressed in the syllabus. As the constitution of the state makes it the duty of the court "*to prepare a syllabus of the points adjudicated in each case*," the profession in that state look only to the syllabus to ascertain the points in judgment. When, however, we turn to the opinion of the court, nothing, I submit, is found in it justifying the conclusion this court has reached. Referring to the last clause of section 2 of chapter 127 of the Code, the supreme court of appeals of West Virginia said: "It was not the object of the statute to create any new right, and give an action to the heir, devisee, or representative which he *had not at common law." [708 No one supposes that the clause gives a personal representative the right of action to sue for personal injuries to the decedent. The personal representative can bring an original action only where death is caused by the wrongful act or default of the defendant. He does not bring an action where one, rightfully brought by the decedent, is revived in his name as personal representative. But the supreme court of appeals of West Virginia proceeds:

"But where the representative, heir, etc., had a right by suit, to accomplish the same object substantially as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, but might be revived." Even this principle, the statement of which was not at all necessary to the decision, is sufficient to embrace the present case; for, as the suit of Martin was to recover compensation for the injuries he received, a revivor of it, in the name of his personal representative, and its prosecution to judgment and execution, would accomplish substantially the same object the decedent had in view, namely, to compel the railroad company to pay for the injury inflicted upon him as the result of its negligence.

Another case referred to in support of the contention that the action abated by the death of the plaintiff is *Curry* v. *Mannington*, 23 W. Va. 14. But that case did not involve any question in reference to the revivor of an action for personal injuries received by the plaintiff. It was a suit against a municipal corporation for injuries, alleged to have been received through the neglect of the defendant to keep its streets and walks in repair. It is that the court, in that case, said: "In the cases, however, of injuries to the *person* and not to the *property* or estate of the decedent, whether by assault, battery, false imprisonment, slander, *negligence*, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action can be supported either by or against his representative. 3 Bl. Com. 302. In this state the only exception to this rule, so far as I have been able to discover, is the provision of our statute, embracing what [709] is known as Lord Campbell's Act, *giving a right of action to the representative against any party wrongfully causing the death of his decedent. Code, chap. 103, p. 545, §§ 5, 6." But it is plain from the context that this language had reference to the meaning of a particular statute of limitations of personal actions, that used the words "if they be for matters of a nature that in case of the *death* of the party, they could not be brought by or against his representative," in effect, the court was considering the question as to whether a personal representative could bring an original action for personal injury received by his decedent. That is an entirely different question from the one here presented, which is, whether an action for the recovery of money duly brought by the person injured could, upon his death, be revived in the name of his personal representative, and be prosecuted by the latter to judgment and execution. There is not a hint, much less a distinct statement, either in the syllabus or in the opinion in *Curry* v. *Mannington*, in respect to any such question.

Suppose Martin had obtained a judgment for ten thousand dollars in damages and had died after the case was brought here by the railroad company. Could it not have been revived in this court against his personal representative? And if this court had reversed such a judgment and remanded the cause for a new trial, could the railroad company have prevented another trial in the court below by the suggestion of record, that pending the writ of error in this court, the plaintiff had died? In my opinion, this question should be answered in the negative, if any effect whatever be given to the local statute. A different rule should not be applied when the case is here upon writ of error sued by the plaintiff.

Reference has been made to the case of *Flynn* v. *Perkins*, 32 L. J. N. S. Q. B. 10, 11, 8 Jur. N. S. 1177. That was an action to recover damages for a personal injury. The plaintiff died before verdict, and the effort was to have it revived in the name of the personal representative. It was held that the Common Law Procedure Act did not permit the revivor under such circumstances. But that case differs from this in two important particulars: 1, there was *a verdict and judgment in this case [710] before the plaintiff died; 2, there was no provision in the English statute, as there is in the West Virginia Code, giving the right of revivor, where the plaintiff or defendant dies pending the action, "whether the cause of action would survive at common law or not."

But if I am wrong in my interpretation of the Code of West Virginia, there is still another view of this question which, in my judgment, is important. Martin's death occurred after the assignment of errors was filed and made part of the record. In Tidd's Practice, 1163, it is said: "A writ of error may abate by the act of God, the act of law, or the act of the party. If the plaintiff in error die before errors assigned, the writ abates, and the defendant in error may thereupon sue out a *scire facias quare executionem non* to recover the judgment against the executors or administrators of the plaintiff in error. But if the plaintiff in error die after errors assigned, it does not abate the writ. In such case the defendant, having joined in error, may proceed to get the judgment affirmed, if not erroneous, but must then revived it against the executors or administrators of the plaintiff in error." And so it was adjudged by this court in *Green* v. *Watkins*, 19 U. S. 6 Wheat. 260, 262 [5: 256] in which *Mr. Justice* Story, speaking for the court, and after referring to the rules that controlled the question of abatement, whether in real or personal actions, where the party died before judgment, said: "But in cases of writs of error upon judgments already rendered a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law the writ abates; but if after assignment of errors, it is otherwise." These authorities, I submit, indicate that the writ of error should not be dismissed after there has been an assignment of errors.

Being of opinion that the action has not abated by the death of the plaintiff, I am unable to concur in the opinion and judgment of the court.

[END OF VOL. 151.]

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IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1893.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

CHARLES W. SHIVELY, *Pl'ff. in Err.*,
v.
JOHN Q. A. BOWLBY ET AL.

(See S. C. Reporter's ed. 1-58.)

Federal question—lands under tide waters—vested in the original states—lands in territory—rights of states in tide waters and lands under them—land grant by Congress—conveys no right to lands under tide waters.

1. A state judgment that the grant from the United States passed no title or right, as against the subsequent deeds from the state, in lands below high water mark, is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this court.
2. Lands under tide waters are vested in the sovereign for the benefit of the whole people.
3. Upon the American Revolution lands under tide waters, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.
4. Upon the acquisition of a territory by the United States the title and dominion of lands under tide waters passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.
5. The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions.
6. The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters; but they have never done so by general laws.
7. Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created.
8. A donation land claim, bounded by the Columbia river, and laid out and recorded under an Act of Congress, includes no title or right in the land below high water mark; and the statutes of Oregon, providing for the sale of title lands, etc., are a constitutional and legal exercise by the state of Oregon of its dominion over the lands under navigable waters.

[No. 787.]

Submitted Dec. 2, 1892. Decided March 5, 1894.

IN ERROR to the Supreme Court of the State of Oregon, to review a judgment of that court, affirming the judgment of the Circuit Court for the County of Clatsop and State of Oregon, in a suit in equity, brought by John Q. A. Bowlby *et al.*, plaintiffs, against Charles W. Shively *et al.*, to quiet the title to lands below

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7:679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to alluvion or accretion and reliction; right to, and ownership of; by what law title to is determined; rule of division among riparian owners, see note to Kennedy v. Hunt, 12:829, and to St. Clair County v. Lovingston, 23: 59.

As to right of the United States and the states to shore lands and accretions against piers, see note to Hallett v. Beebe, 14: 35.

As to what is seashore; how far lands bounded on, extend, see note to United States v. Pacheco, 17: 865.

As to title to water by appropriation; common law rule; rule of mining states, see note to Atchison v. Peterson, 22: 414.

As to navigable waters; what are, in United States; streams and inland waters as highways, see note to United States v. The Montello, 23: 391.

high water mark in the city of Astoria; the judgment dismissed the claim of defendants, under a patent from the United States to the title to the lands, and then of motion of plaintiffs dismissed their suit without prejudice to their interest in the subject thereof. *Affirmed.*

See same case below, 22 Or. 410.

Statement by *Mr. Justice* **Gray:**

The original suit was in the nature of a bill in equity, brought June 8, 1891, by John Q. A. Bowlby and W. W. Parker against Charles W. Shively and wife, in the circuit court for the county of Clatsop and state of Oregon, to quiet the title to lands below high water mark in the city of Astoria. The case, as appearing by the record, was as follows:

On and before May 20, 1854, John M. Shively and wife were the owners of a donation land claim, as laid out and recorded by him under the Act of Congress of September 27, 1850, chap. 76 (9 Stat. at L. 496) commonly known as the Oregon Donation Act, embracing the then town and much of the present city of Astoria, and bounded on the north by the Columbia river.

On May 20, 1854, John M. Shively laid out and caused to be recorded a plat of that claim, not only of the land above high water mark, but also of adjacent tide lands and a portion of the bed of the Columbia river, including the lands in controversy, and divided into blocks three 3] hundred feet square, *and separated from each other by streets thirty or sixty feet wide, some running at right angles to, and the others nearly parallel with, high water mark, the outermost of which streets were not within eight hundred feet of the ship channel.

Blocks 4 and 9 were above ordinary high water mark. Block 146 was in front of block 4, and between high and low water mark. In front of block 9 came blocks 141, 126 and 127 successively. A strip about fifty feet wide, being the southern part of block 141 was above high water mark, and the whole of the rest of that block was below high water mark and above low water mark. The line of ordinary low tide was on September 18, 1876, at the north line of that block; but on December 15, 1890, and for some time before this date, was one hundred feet north of the north line of block 127.

On February 18, 1860, John M. Shively and wife conveyed blocks 9, 126, 127 and 146, "in the town plat of Astoria, as laid out and recorded by John M. Shively," to James Welch and Nancy Welch, whose title was afterwards conveyed to the plaintiffs.

On June 2, 1864, John M. Shively laid out and caused to be recorded an additional plat, covering all the space between blocks 127 and 146 and the channel.

In 1865, the United States issued a patent to John M. Shively and wife for the donation land claim, bounded by the Columbia river.

On September 18, 1876, the state of Oregon, by its governor, secretary and treasurer, acting as the board of school land commissioners, pursuant to the statute of Oregon of October 26, 1874 (Laws of 1874, p. 76) amending the statute of Oregon of October 28, 1872 (Laws of 1872, p. 129) the provisions of both of which statutes are set forth in the margin* (the words printed in brackets having been in the statute of 1872 only, and those printed in italics having been inserted in the statute of 1874) executed to the plaintiffs a deed of all the lands lying between high water mark and low water mark in front of block 9, including all the tide land in block 141; and also a *deed of all the tide [6 lands in block 146; but never executed to any one a deed of any tide lands north of block 146.

The plaintiffs afterwards held possession of the lands so conveyed to them, and maintained a wharf in front of block 127, which extended several hundred feet into the Columbia river, and at which ocean and river craft were wont to receive and discharge freight.

On December 15, 1890, John M. Shively, having acquired whatever title his wife still had in the lands in controversy, conveyed all his right, title and interest therein to the defendant Charles W. Shively.

*On April 7, 1891, the defendants, pre- [7 tending to act under the statute of Oregon of February 18, 1891 (Laws of 1891, p. 594) executed and recorded an instrument dedicating to

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*An Act to Provide for the Sale of Tide and Overflowed Lands on the Sea Shore and Coast.

Whereas, in many of the bays, harbors and inlets on the sea coast of this state, the sea is annually encroaching upon the land, washing away the shores and shoaling such bays, harbors and inlets; and

Whereas such encroachments can be prevented only at great expense, and by occupying and placing improvements upon the tide and overflowed lands belonging to the state; and

Whereas it is desirable that facilities and encouragement should be offered to the owners of the soil abutting upon the coast in such bays, harbors and inlets to make improvements and expenditures that will stay such encroachments;

Therefore, Be it enacted by the Legislative Assembly of the State of Oregon:

SEC. 1. That the owner or owners of any land abutting or fronting upon or bounded by the shore *of the Pacific Ocean, or* of any bay, harbor or inlet [on the sea coast of this state] *of the same, and rivers and their bays, in which the tide ebbs and flows, within this state,* shall have the right to purchase [from the state] all the tide land belonging to [the] *this* state in front of [such owner or owners] *the lands so owned:* Provided, that if valuable improvements have been made upon any of the tide lands of this state before the title to the land on the shore shall have passed from the United States, the owner of such improvements shall have the exclusive right to purchase the lands so improved, extending to low water mark, for a period of [one year] *three years* from the approval of [this act] *the act to which this is amendatory; Provided, further, that the Willamette river shall not be deemed a river in which the tide ebbs and flows, within the meaning of this act, or of the act to which this act is amendatory; and the title of this state to any tide or overflowed lands upon said Willamette river is hereby granted and confirmed to the owners of the adjacent lands, or, when any such tide or overflowed lands have been sold, then in that case to the purchaser or purchasers of such tide or overflowed lands from such owner of such adjacent lands, or some previous owner thereof, as the case may be.*

SEC. 2. The officers of this state, who now are or who may hereafter be authorized to dispose of the school lands belonging to this state, are authorized, empowered and directed to sell such tide lands, upon proper application to purchase by parties hereby authorized to purchase; and all such tide lands shall be sold, and the money resulting from such sale shall be distributed, in accordance with the laws of this state, which now are or may hereafter be in force respecting the sale of the school lands of this state; Provided, that in the certificates of sale and patents for such lands the same shall be described as —— acres of tide land, or land under water belonging to this state, in front of the following described premises. (Here describe by le-

the public their interest in some of the streets adjacent to these lands.

The plaintiffs claimed, under the deeds from the state of Oregon, the title in all the tide lands on the west half of block 141, on all of blocks 126 and 127 and north thereof, and on the west half of block 146 and north thereof, between the lines of low and ordinary high tide of the Columbia river; and also claimed all the wharfing rights and privileges in front thereof to the ship channel; and prayed that the cloud created by the defendants' instrument of dedication might be removed, and the defendants be adjudged to have no title or right in the premises, and for further relief.

The defendants denied any title or right in the plaintiffs, except in the west half of block 146; and, by counterclaim, in the nature of a cross bill, stating the facts above set forth, asserted that, under the patent from the United States to John M. Shively, and his deed to Charles W. Shiveley the latter was the owner in fee simple of so much of the east half of block 141 as was above high water mark, and of all the tide lands and riparian and wharfing rights in front thereof to the channel, excepting blocks 126 and 127; and was also the owner of all the riparian and wharfing rights in front of block 4 to the channel, excepting block 146; and contended that the second deed from the state of Oregon to the plaintiffs conveyed no title in that part of block 141 above high water mark, or in any tide lands, and that Shively's conveyance of specific blocks by reference to his plat passed no wharfing rights in front thereof; and prayed that he might have possession of said premises, and damages against the plaintiffs for withholding the same, and further relief.

The court sustained a demurrer of the plaintiffs to the counterclaim (except as to that part of block 141 above high water mark) and dismissed that claim; and then, on motion of the plaintiffs, dismissed their suit without prejudice to their interest in the subject thereof.

*The defendant, Charles W. Shively appealed to the supreme court of the state, which affirmed the judgment, upon the ground that the grant from the United States, bounded by the Columbia river, passed no title or right in [8

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gal subdivisions the lands in front of which said tide lands are located.)

SEC. 3. Every applicant for the purchase of tide land, under section 1 of this act, shall, with his application, present to the officer or officers who are or shall be authorized to sell such lands, the evidences of his title to land which abuts or fronts upon or is bounded by such tide lands; and before making such sale such officer or officers shall be satisfied that such applicant is the owner of such lands so fronting, abutting or bounded as aforesaid.

SEC. 4. The value of such tide lands shall be appraised at a certain sum per acre of the same, and such appraisal shall not value such lands at less than $1.25 for each acre of such land: Provided, the board having in charge the sale of said lands shall have power to set aside any appraisement on evidence taken of the true value of the same, and shall make another and true appraisement based on such evidence.

SEC. 5. If any person or persons who, at the passage of [this act] *the act of which this is amendatory* [shall be] *were* entitled [under section 1 thereof] to purchase any tide lands *under the provisions of section 1 thereof* shall not [within twelve months from the passage of this act, make application to purchase such tide lands] *have applied for the same within three years from the passage of said act*, or, having made such application, shall have failed to prosecute the same, as provided by law, then such [lands] *land* shall be open to purchase by any other person who is a citizen and resident of the state of Oregon: Provided, that *when any application shall be made for the purchase of any such tide land by any person or persons other than the owner or owners of the land adjacent to such tide lands, or the purchaser or purchasers of such tide lands from such owner of adjacent lands, or some previous owner thereof, notice shall be given by said board to the owner or owners of such adjacent lands, and to any parties who are in possession of, or who shall have improved such tide lands in any manner, and such owner or owners of such adjacent lands, or the person in possession of such tide lands by purchase from such owner of such adjacent lands, or any previous owner thereof, or who shall have improved the same, shall have sixty days after service of such notice to make application for the purchase of such tide lands, and such application shall have preference over all others, and in case any person to whom notice is hereby required to be given cannot, after due diligence, be found, notice may be given at the cost of the applicant by publication in the state paper for four successive weeks; and all applications to purchase tide lands by the owner of adjacent lands shall be accompanied by the affidavit of the applicant, setting forth the fact that such land is not held by any other person under a deed from said applicant, or any person under whom he holds; but this* [section] *provision* shall not apply to [any] *the tide* lands abutting *upon* [or fronting on or bounded by the sea shore, which are] *lands* owned by the United States: [And] provided further, that if the United States *has parted or* shall [hereafter] part with its title to any lands of which, at the passage of [this act] *the act of which this is amendatory* it [is] *was* the owner, [fronting or abutting upon or bounded by the sea shore] the grantee of such lands shall have [twelve months] *three years* after perfecting his title from the United States to apply for [the] *all* tide lands in front thereof *which may be owned by the state*, and, in case of his failure to make such application within said period of [twelve months] *three years*, or, having made such application [in case of his failure] *shall fail* to prosecute the same [as provided by] *according to* law, such tide [lands] *land* shall be open to purchase by any other person who is a citizen and resident of the state of Oregon.

SEC. 6. Nothing in this act provided shall prevent the Legislature of this state, or the corporate authorities of any city or town thereof, from regulating the building of wharves or other improvements in any bay, harbor or inlet of this state; and nothing in this act provided shall be construed as a grant of an exclusive right to any person or persons to use the natural oyster beds of this state; but the grantee of any land in this state, under this act, shall hold the same subject to the easement of the public, as provided by the existing laws of this state, to enter thereupon and remove, under the provisions and restrictions of the laws of this state, oysters and other shell fish therefrom.

SEC. 7. All applicants to purchase lands under the provisions of this act shall, at their own expense, cause the same to be surveyed by the county surveyor of the county in which such lands are situated, such survey to conform to and connect with the surveys of the United States adjoining, as far as may be practicable; and the certificate of the county surveyor, describing the lands applied for by metes and bounds and designating the quantity thereof, shall be forwarded under the certificate of appraisement to the officers of the state who are authorized to sell the same.

SEC. 8. Inasmuch as there is no law upon this subject at the present time, this act shall take effect from and after its passage.

The act of 1874 contains two additional sections, the one providing that *the title to all tide lands heretofore sold, and for which conveyances have already been executed, under the provisions of the act to which this is amendatory, be and the same is hereby confirmed unto the purchasers thereof;* and the other providing that, *inasmuch as the existing law does not authorize the sale of tide lands lying on the ocean beach and the rivers and bays thereof, this act shall take effect and be in force from and after its approval by the Governor.*

lands below high water mark, as against the subsequent deeds from the state of Oregon. *Bowlby* v. *Shively*, 22 Or. 410.

The said defendant thereupon sued out this writ of error, and assigned the following errors:

"First. The supreme court of Oregon decided that a grantee of the United States, under the Act of Congress of September 27, 1850, known as the Oregon Donation Land Law, of land bounded by the tidal navigable waters of the Columbia river, obtained by virtue of said grant no exclusive access to the channel of said river, and no wharfage rights below ordinary high tide of said river in front of said high land."

"Second. The supreme court of Oregon decided that said state was the absolute owner of all rights in front of the high land granted by the United States to said grantee, with said Columbia river as a boundary, below the meander line, out to the channel of said Columbia river, to the exclusion of all rights of the grantee aforesaid of the United States, under the said Act of Congress of September 27, 1850."

"Third. The supreme court of Oregon decided that said state had the absolute power to dispose of the soil of said river and of all wharfage rights in front of the high land granted by the United States to said grantee, the predecessor of the plaintiff in error, with said Columbia river as a boundary, to a private person for a private beneficial use, and had so disposed of the same to the defendants in error."

Messrs. **A. H. Garland, Sidney Dell** and *John F. Dillon*, for plaintiff in error:

The United States is the original absolute owner of all the "proprietary title" to the high land, all the beds and waters of the navigable rivers, tidal and non-tidal, and to all the fish therein in all the territory west of the Mississippi, the title to the same being acquired by the United States by discovery and occupation.

Pollard v. *Hagan*, 44 U. S. 3 How. 212 (11: 565); *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 (10: 997); *Knight* v. *United Land Asso.* 142 U. S. 161 (35: 974).

The uniform ruling, also of the Interior Department is that while the "tide land" is not included in the terms "public lands" that are by the United States laws authorized to be sold, yet in all cases of accretion that new land is also held not to be "public lands" of the United States, but the property of the bank owner.

St. Clair County v. *Lovingston*, 90 U. S. 23 Wall. 46 (23: 59).

The title of the state to the soils of the tidal navigable waters, if it has such a title, accrued only by virtue of section 2 of the Act of Congress of February 14, 1859, admitting Oregon into the Union "upon an equal footing with the other states in all respects whatever," and is purely voluntary.

In all cases of United States patents for lands meandered upon a public navigable river the river itself is the boundary and not the meandered line as actually run.

St. Paul & P. R. Co. v. *Schurmeier*, 74 U. S. 7 Wall. 272 (19: 74); *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19: 984); *Rex* v. *Russell*, 6 Barn. & C. 566; *Davenport & N. W. R. Co.* v. *Renwick*, 102 U. S. 180 (26: 51); *Lyon* v. *Fishmongers Co.* L. R. 1 App. Cas. 662; *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 68 (23: 63); *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532; Gould, Waters, § 148.

The United States is the final arbiter of the rights claimed under the United States patent. It is strictly a Federal question.

St. Louis v. *Myers*, 113 U. S. 566 (28: 1131); *Davenport & N. W. R. Co.* v. *Renwick*, 102 U. S. 180 (26: 51); *Hardin* v. *Jordan*, 140 U. S. 371 (35: 428); *Packard* v. *Bird*, 137 U. S. 661 (34: 819).

Assuming, however, that the state's title to the tide land is original and absolute, the distinction is that a grant by the United States of a river boundary is not necessarily a grant of an easement in this tide land, but is a right of access and accretion.

Davenport & N. W. R. Co. v. *Renwick, supra; Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19: 984); *Dutton* v. *Strong*, 66 U. S. 1 Black, 23 (17: 29).

There is no distinction as to any rights between navigable waters, with reference to their being tidal or non-tidal.

The Thomas Jefferson, 28 U.S. 10 Wheat. 428 (6: 358); Gould, Waters, § 66, note 3.

Nor as to the ownership by the state of the bed of the river, which fact existed in *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19: 984).

The title to riparian rights in navigable waters exists without reference to who owns the river bed; nor does it matter whether the waters are fresh or salt.

Gould, Waters, §§ 148, 149, 152, 155.

While the power and jurisdiction of the state over the state public roads is exclusive and extensive and its rules of decision controlling, yet its power and jurisdiction over these national highways is purely permissive and entirely ceases when Congress acts.

Gilman v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96); *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7: 412); *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678 (27: 442); *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 701 (27: 584, 588); *Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *South Carolina* v. *Georgia*, 93 U. S. 4 (23: 782); *Davenport & N. W. R. Co.* v. *Renwick*, 102 U. S. 180 (26: 51); Miller, U. S. Const. 457, 458.

Where parcels of tide flats are sold according to a plat as bounded upon a street or other boundary than the navigable waters of the river, the grantor reserves all of his tide flats except the lots described in like manner as in platting of uplands.

Potomac S. B. Co. v. *Upper Potomac S. B. Co.* 109 U. S. 672 (27: 1070); *Pollard* v. *Files*, 48 U. S. 2 How. 607 (11: 397); *Richardson* v. *Prentiss*, 48 Mich. 88; *Birmingham* v. *Anderson*, 48 Pa. 253; *Storer* v. *Freeman*, 6 Mass. 435; *Codman* v. *Wilson*, 10 Mass. 146; *Watson* v. *Peters*, 26 Mich. 517; *Kenyon* v. *Knipe*, 13 L. R. A. 142, 2 Wash. 394; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 (19: 984).

The riparian owners, upon waters the bed of which belongs to the public, have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation.

Dill. Mun. Corp. (4th ed.) § 106; 6 Am. &

Eng. Enc. Law, 558; Cooley, Const. Lim. (5th ed.) 675, note 1; *Lincoln* v. *Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Delaplaine* v. *Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Brisbine* v. *St. Paul & S. C. R. Co.* 23 Minn. 114; *Myers* v. *St. Louis*, 82 Mo. 367; *Thurman* v. *Morrison*, 14 B. Mon. 367; *Hickok* v. *Hine*, 23 Ohio St. 523; *Organ* v. *Memphis & L. R. R. Co.* 51 Ark. 235; *Shirley* v. *Bishop*, 67 Cal. 543; *Clement* v. *Burns*, 43 N. H. 609; *Tinicum Fishing Co.* v. *Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Clark* v. *Peckham*, 10 R. I. 35, 14 Am. Rep. 654; *Baltimore & O. R. Co.* v. *Chase*, 43 Md. 23; *Bond* v. *Wool*, 107 N. C. 189; *State* v. *Sargent*, 45 Conn. 358.

Mr. **J. N. Dolph**, for defendants in error:

There is no Federal question involved in this cause and the writ of error should be dismissed.

Fost. Fed. Pr. § 477; *Cook County* v. *Calumet & C. Canal & D. Co.* 138 U. S. 635 (34: 1110); *Hardin* v. *Jordan*, 140 U. S. 371 (35: 428).

Tide lands in Oregon belong to the state by virtue of its sovereignty.

Hinman v. *Warren*, 6 Or. 411; *Parker* v. *Taylor*, 7 Or. 446, 447; *Parker* v. *Rogers*, 8 Or. 183; *Wilson* v. *Welch*, 12 Or. 353; *McCann* v. *Oregon R. & Nav. Co.* 13 Or. 462; *Eisenbach* v. *Hatfield*, 12 L. R. A. 632, 2 Wash. 236; *Bissell* v. *Henshaw*, 1 Sawy. 579; *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 65 (21: 801); *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 68 (23: 63); *Pierce* v. *Kennedy*, 2 Wash. 324; *Barney* v. *Keokuk*, 94 U. S. 324 (24: 224); *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 688, 691 (31: 551, 552); *Packer* v. *Bird*, 137 U. S. 661 (34: 819); *Hardin* v. *Jordan*, 140 U. S. 371 (35: 428).

The decision of the board of commissioners appointed by the legislature of Oregon to make sale of the state's tide lands, was, and is, in the absence of fraud or error of law, conclusive as to the right of defendants in error to purchase the same.

Warren v. *Van Brunt*, 86 U. S. 19 Wall. 646 (22: 219); *Shepley* v. *Cowan*, 91 U. S. 330, 340 (23: 424, 427); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Hosmer* v. *Wallace*, 47 Cal. 461; *Rutledge* v. *Murphy*, 51 Cal. 388.

Mr. Justice **Gray** delivered the opinion of the court.

9] *This case concerns the title in certain lands below high water mark in the Columbia river in the state of Oregon; the defendant below, now plaintiff in error, claiming under the United States, and the plaintiffs below, now defendants in error, claiming under the state of Oregon; and is in substance this: James M. Shively, being the owner, by title obtained by him from the United States under the Act of Congress of September 27, 1850, chap. 76, while Oregon was a territory, of a tract of land in Astoria, bounded north by the Columbia river, made a plat of it, laying it out into blocks and streets, and including the adjoining lands below high water mark; and conveyed four of the blocks, one above and three below that mark, to persons who conveyed to the plaintiffs. The plaintiffs afterwards obtained from the state of Oregon deeds of conveyance of the tide lands in front of these blocks, and built and maintained a wharf upon part of them. The defendant, by counterclaim, asserted a title, under a subsequent conveyance from Shively, to some of the tide lands, not included in his former deeds, but included in the deeds from the state.

The counterclaim, therefore, depended upon the effect of the grant from the United States to Shively of land bounded by the Columbia river, and of the conveyance from Shively to the defendant, as against the deeds from the state to the plaintiffs. The supreme court of Oregon, affirming the judgment of a lower court of the state, held the counterclaim to be invalid, and thereupon, in accordance with the state practice, gave leave to the plaintiffs to dismiss their complaint, without prejudice. Hill's Code of Oregon, §§ 246, 393.

The only matter adjudged was upon the counterclaim. The judgment against its validity proceeded upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the state, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of *this court. [10 Rev. Stat. § 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the state courts. *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272, [19:74]; *Packer* v. *Bird*, 137 U. S. 661, [34:819]; *Knight* v. *United Land Asso.* 142 U. S. 161, [35:974].

It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide water, and would have been the same as it is if the grantor had been a private person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: "All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away." *The Rebeckah*, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. *Charles River Bridge Propre.* v. *Warren Bridge Propre.* 36 U. S. 11 Pet. 420, 544–548 [9: 773, 822–824]; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367, 411 [10: 997, 1013]; *Central Transp. Co.* v. *Pullman Car Co.* 139 U. S. 24, 49 [35: 55, 64.]

In *Yesler* v. *Harbor Line Comrs.* at the last term, in which the writ of error was dismissed for want of jurisdiction, it did not appear that the plaintiff in error claimed under a grant from the United States. 146 U. S. 646, 653, 654 [36: 1119, 1121].

The present case being clearly within our jurisdiction, we proceed to the consideration of its merits.

The briefs submitted to the court in the case at bar, as well as in *Yesler* v. *Harbor Line Comrs.* above cited, and in *Prosser* v. *Northern Pac. R. Co.* (which now stands for judgment) have been so able and elaborate, and have disclosed such a diversity of view as 11] to the scope and *effect of the previous decisions of this court upon the subject of public and private rights in lands below high water mark of navigable waters, that this appears to the court to be a fit occasion for a full review of those decisions, and a consideration of other authorities upon the subject.

I. By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore the title, *jus privatum*, in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion thereof *jus publicum*, is vested in him as the representative of the nation and for the public benefit.

The great authority in the law of England upon this subject is *Lord Chief Justice* Hale, whose authorship of the treatise *De Jure Maris*, sometimes questioned, has been put beyond doubt by recent researches. Moore, Foreshore (3d ed.) 318, 370, 413.

In that treatise, Lord Hale, speaking of the King's rights of propriety or ownership in "the sea and soil thereof" within his jurisdiction, lays down the following propositions: "The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river." "But though the King is the owner of this great waste, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and 12] may not without *injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some particular subject hath gained a propriety exclusive of that common liberty." "The shore is that ground that is between the ordinary high water and low water mark. This doth prima facie and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea." Hargrave, Law Tracts, 11, 12: And he afterwards explains: "Yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usuage." "But though the subject may thus have the propriety of a navigable river part of a port, yet these cautions are to be added, viz," "2d. That the people have a public interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances." "For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified." pp. 25, 86.

So in the second part, *De Portibus Maris*, Lord Hale says that "when a port is fixed or settled by" "the license or charter of the King, or that which presumes and supplies it, viz: custom and prescription;" "though the soil and franchise or dominion thereof prima facie be in the King, or by derivation from him in a subject; yet that *jus privatum* is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested, by reason of common commerce, trade and intercourse." "But the right that I am now speaking of is such a right that belongs to the King *jure prerogativae*, and it is a distinct right from that of propriety; for, as before I have said, though the dominion, either of franchise or propriety be lodged either by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men, and so it is charged or affected with that *jus regium*, or right of *prerogative of the King, so far | 13 as the same is by law invested in the King." Hargrave's Law Tracts, 84, 89.

In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage (*Fitzwalter's Case*, 3 Keb. 242, 1 Mod. 105; 3 Shep. Abr. 97; Comyn, Dig. *Navigation, A, B;* Bac. Abr. *Prerogative, B; Rex* v. *Smith*, 2 Dougl. 441; *Atty. Gen.* v. *Parmeter*, 10 Price, 378, 400, 401, 411, 412, 464; *Atty. Gen.* v. *Chambers*, 4 DeG. M. & G. 206, 4 DeG. M. & J. 55; *Malcomson* v. *O'Dea*, 10 H. L. Cas. 591, 618, 623; *Atty. Gen.* v. *Emerson*, [1891] App. Cas. 649) and that this title, *jus privatum*, whether in the King or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing. *Atty. Gen.* v. *Parmeter*, above cited; *Atty. Gen.* v. *Johnson*, 2 Wils. 87, 101-103; *Gunn* v. *Free Fishers of Whitstable*, 11 H. L. Cas. 192. The same law has been declared by the House of Lords to prevail in Scotland. *Smith* v. *Stair*, 6 Bell, App. Cas. 487; *Lord Advocate* v. *Hamilton*, 1 Macq. H. L. Cas. 46, 49.

It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high water mark, unless either the language of the grant, or long usage under it, clearly indicates that such was the intention. Lord Hale, in Hargrave's Law Tracts, 17, 18, 27; *Somerset* v. *Fogwell*, 5 Barn. & C. 875, 885, 8 Dowl. & R. 747, 755; *Smith* v. *Stair*, 6 Bell, App. Cas. 487; *United States* v. *Pacheco*, 69 U. S. 2 Wall. 587 [17: 865].

By the law of England, also, every building

or wharf erected, without license, below high water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation. Lord Hale, in Hargrave's Law Tracts, 85; Mitf. Pl. (4th ed.) 145; *Blundell* v. *Catterall*, 5 Barn. & Ald. 268, 298, 305; *Atty. Gen.* v. *Richards*, 2 Anstr. 603, 616; *Atty. Gen.* v. *Parmeter*, 10 Price, 378, 411, 464; *Atty. Gen.* **14**] v. *Terry*, L. R. 9 Ch. 429, 427, *note; *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57, 65 [21: 798, 801]; *Barney* v. *Keokuk*, 94 U. S. 334, 337 [24: 224, 227].

By recent judgments of the House of Lords, after conflicting decisions in the courts below, it has been established in England that the owner of land fronting on a navigable river in which the tide ebbs and flows has a right of access from his land to the river; and may recover compensation for the cutting off of that access by the construction of public works authorized by an act of Parliament which provides for compensation for "injuries affecting lands," "including easements, interests, rights and privileges in, over or affecting lands." The right thus recognized, however, is not a title in the soil below high water mark, nor a right to build thereon, but a right of access only, analogous to that of an abutter on a highway. *Bucclench* v. *Metropolitan Board of Works*, L. R. 5 H. L. Cas. 418; *Lyon* v. *Fishmongers Co.* L. R. 1 App. Cas. 662. "That decision," said Lord Selborne, "must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*." *North Shore R. Co.* v. *Pion*, L. R. 14 App. Cas. 612, 620, affirming 14 Can. Sup. Ct. 677.

II. The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several colonies and states, or by the Constitution and laws of the United States.

The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation; and all vacant lands, and the exclusive power to grant them, were vested in him. The various charters granted by different monarchs of the Stuart dynasty for large tracts of territory on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters. And upon the Ameri-**15**]can *Revolution all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the Constitution of the United States. *Johnson* v. *McIntosh*, 21 U. S. 8 Wheat. 543, 595 [5: 681, 694]; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367, 408-410, 414 [10: 997, 1012-1014]; *Com.* v. *Roxbury*, 9 Gray, 451, 478-481; *Stevens* v. *Paterson & N. R. Co.* 34 N. J. 532, 3 Am. Rep. 269; *People* v. *New York & S. I. Ferry Co.* 68 N. Y. 71.

The leading case in this court, as to the title and dominion of tide waters and of the lands under them, is *Martin* v. *Waddell* (1842) 41 U. S. 16 Pet. 367 [10: 997] which arose in New Jersey, and was as follows: The charters granted by Charles II. in 1664 and 1674 to his brother the Duke of York (afterwards James II.) included New York and New Jersey and the islands of Martha's Vineyard and Nantucket, and conveyed to the Duke the territories therein described, "together with all the lands, islands, soils, rivers, harbors, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings and fowling, and all other royalties, profits, commodities and hereditaments," thereto belonging or appertaining, and all the "estate, right, title, interest, benefit, advantage, claim and demand' of the King, of, in or to the same; as well as full powers of government: provided, however, that all statutes, ordinances and proceedings should not be contrary to, but, as near as conveniently might be, agreeable to the laws, statutes and government of England. All these rights, both of property and of government, in a part of those territories, were granted by the Duke of York to the Proprietors of East Jersey; and they, in 1702, surrendered to Queen Anne all "the powers, authorities and privileges of and concerning the government of" the province, retaining their rights of private property. Learning & Spicer's New Jersey Grants, 4, 5, 42, 43, 148, 149, 614, 615. An action of ejectment was brought in the Circuit Court of the United States for the District of New Jersey, for land under tide waters in Raritan bay and river, to which the plaintiff claimed title under specific conveyances of that land from the Proprietors of East Jersey, and of which the defendants were in possession, for the purpose of *planting [**16** and growing oysters, under a statute passed by the legislature of the state of New Jersey in 1824.

This court, following, though not resting wholly upon, the decision of the supreme court of New Jersey in *Arnold* v. *Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356, gave judgment for the defendants, for reasons assigned in the opinion delivered by *Chief Justice* Taney, which cannot be better summed up than in his own words: "The country mentioned in the letters patent was held by the King in his public and regal character as the representative of the nation, and in trust for them." 41 U. S. 16 Pet. 409 [10: 1012]. By those charters, in view of the principles stated by Lord Hale, in the passage above quoted concerning the right of fishing, "the dominion and propriety in the navigable waters, and in the soils under them, passed, as a part of the prerogative rights annexed to the political powers conferred on the Duke;" and "in his hands they were intended to be in trust for the common use of the new community about to be established"—"a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell fish as floating fish"—and not as "private property, to be parcelled out and sold by the Duke for his own individual emolument." "And in the judgment of the court, the lands under the navigable waters passed to the grantee as one of the roy-

alties incident to the powers of government; and were to be held by him in the same manner and for the same purposes that the navigable waters of England, and the soils under them, are held by the Crown." pp. 411-413. The surrender by the proprietors in 1702 restored to the Crown all "its ordinary and well known prerogatives," including "the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them," "in the same plight and condition in which they originally came to the hands of the Duke of York." p. 416. "When the Revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." p. 410.

17] *It was in giving the reasons for holding that the royal charters did not sever the soil under navigable waters, and the public right of fishing, from the powers of government, and in speaking of the effect which grants of the title in the sea shore to others than the owner of the upland might have, not upon any peculiar rights supposed to be incident to his ownership, but upon the public and common rights in, and the benefits and advantages of, the navigable waters, which the colonists enjoyed "for the same purposes and to the same extent that they had been used and enjoyed for centuries in England," and which every owner of the upland therefore had in common with all other persons, that *Chief Justice* Taney, in the passage relied on by the plaintiff in error, observed: "Indeed, it could not well have been otherwise; for the men who first formed the English settlements could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the waters at their very doors was liable to immediate appropriation by another as private property; and the settler upon the fast land thereby excluded from its enjoyment, and unable to take a shell fish from its bottom, or fasten there a stake, or even bathe in its waters, without becoming a trespasser upon the rights of another." 41 U. S. 16 Pet. 414 [10: 1014].

The full extent of that decision may be more clearly appreciated by referring to the dissenting opinion of *Mr. Justice* Thompson in that case, and to the unanimous judgment of the court in the subsequent case of *Den* v. *Jersey Co.* (1853) 56 U. S. 15 How. 426 [14: 757].

In *Martin* v. *Waddell*, *Mr. Justice* Thompson unavailingly contended that the title in the lands under the navigable tide water, the *jus privatum*, as distinguished from the *jus publicum*, passed as private property from the King to the Duke, and from him to the Proprietors of East Jersey, and was unaffected by their surrender to Queen Anne, and therefore passed from them to the plaintiff, subject indeed to the public rights of navigation, passing and repassing, and perhaps of fishery for float-

18] ing fish, but not to the right of *planting, growing and dredging oysters; and also that, if the King held this land as trustee for the common benefit of all his subjects, and inalienable as private property, the state of New Jersey, on succeeding to his rights at the Revolution, could not hold it discharged of the trust, and dispose of it to the private and exclusive use of individuals. 41 U. S. 16 Pet. 418-434 [10: 1015-1021].

In *Den* v. *Jersey Co.*, which was ejectment for land under tide water, that had been reclaimed and occupied as building lots by a corporation, pursuant to an act of the legislature of the state of New Jersey, the plaintiff, claiming under a conveyance from the Proprietors of East Jersey, contended that the fee of the soil under the navigable waters of that part of the state was conveyed to the Proprietors as private property, subject to the public use; that, the public use having ceased as to the land in question, they were entitled to the exclusive possession; and that nothing but the right of fishery was decided in *Martin* v. *Waddell*. But the court, again speaking by *Chief Justice* Taney, held that the decision in *Martin* v. *Waddell*, being in ejectment, necessarily determined the title to the soil, and governed this case; and therefore gave judgment for the grantee of the state, and against the claimant under the Proprietors. 56 U. S. 15 How. 432, 433 [14: 760].

III. The governments of the several colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only.

In Massachusetts, by virtue of an ancient colonial enactment, commonly called the Ordinance of 1641, but really passed in 1647, and remaining in force to this day, the title of the owner of land bounded by tide water extends from high water mark over the shore or flats to low water mark, if not beyond one hundred rods. The private right thus created in the flats is not a mere easement, but a title in fee, *which will support a real action, or an [19 action of trespass *quare clausum fregit*, and which may be conveyed by its owner with or without the upland; and which he may build upon or inclose, provided he does not impede the public right of way over it for boats and vessels. But his title is subject to the public rights of navigation and fishery; and therefore, so long as the flats have not been built upon or inclosed, those public rights are not restricted or abridged; and the state, in the exercise of its sovereign power of police for the protection of harbors and the promotion of commerce, may, without making compensation to the owners of the flats, establish harbor lines over those flats, beyond which wharves shall not thereafter be built, even when they would be no actual injury to navigation. Mass. Colony Laws (ed. 1660) 50, (ed. 1872) 90, 91; *Boston* v. *Lecraw*, 58 U. S. 17 How. 426, 432, 433 [15: 118, 121]; *Richardson* v. *Boston*, 60 U. S. 19 How. 263 [15: 639], and 65 U. S. 24 How. 188 [16: 625]; *Com.* v. *Alger*, 7 Cush. 53, 67-81. It is because of the ordinance vesting the title in fee of the flats in the owner of the upland, that

a conveyance of his land bounding on the tide water, by whatever name, whether "sea," "bay," "harbor" or "river," has been held to include the land below high water mark as far as the grantor owns. *Boston* v. *Richardson*, 13 Allen, 146, 155, and 105 Mass. 351, 355, and cases cited. As declared by *Chief Justice* Shaw, grants by the colony of Massachusetts, before the ordinance, of lands bounded by tide water did not include any land below high water mark. *Com.* v. *Alger*, 7 Cush. 53, 66; *Com.* v. *Roxbury*, 9 Gray, 451, 491-493. See also *Litchfield* v. *Scituate*, 136 Mass. 39. The decision in *Manchester* v. *Massachusetts*, 139 U. S. 240 [35: 159], affirming 9 L. R. A. 236, 152 Mass. 230, upheld the jurisdiction of the state, and its authority to regulate fisheries, within a marine league from the coast.

The rule or principle of the Massachusetts ordinance has been adopted and practised on in Plymouth, Maine, Nantucket and Martha's Vineyard, since their union with the Massachusetts Colony under the Massachusetts Province Charter of 1692. *Com.* v. *Alger*, 7 Cush. 53, 76, and other authorities collected in 9 Gray, 523.

20] *In New Hampshire, a right in the shore has been recognized to belong to the owner of the adjoining upland, either by reason of its having once been under the jurisdiction of Massachusetts, or by early and continued usage. *Nudd* v. *Hobbs*, 17 N. H. 524, 526; *Clement* v. *Burns*, 43 N. H. 609, 621; *Concord Mfg. Co.* v. *Robertson*, 18 L. R. A. 679, 66 N. H. 1, 26, 27.

In Rhode Island, the owners of land on tide water have no title below high water mark; but by long usage, apparently sanctioned by a colonial statute of 1707, they have been accorded the right to build wharves or other structures upon the flats in front of their lands, provided they do not impede navigation, and have not been prohibited by the legislature; and they may recover damages against one who, without authority from the legislature, fills up such flats so as to impair that right. Angell, Tide Waters (2d ed.) 236, 237; *Folsom* v. *Freeborn*, 13 R. I. 200, 204, 210. It would seem, however, that the owner of the upland has no right of action against any one filling up the flats by authority of the state for any public purpose. *Gerhard* v. *Seekonk River Bridge Comrs.* 15 R. I. 334; *Clark* v. *Providence*, 1 L. R. A. 725, 16 R. I. 337.

In Connecticut, also, the title in the land below high water mark is in the state. But by ancient usage, without any early legislation, the proprietor of the upland has the sole right, in the nature of a franchise, to wharf out and occupy the flats, even below low water mark, provided he does not interfere with navigation; and this right may be conveyed separately from the upland; and the fee in flats so reclaimed vests in him. *Ladies' Seamen's Friend Society* v. *Halstead*, 58 Conn. 144, 150-152; *Prior* v. *Swartz*, 18 L. R. A. 668, 62 Conn. 132, 136-138. The exercise of this right is subject to all regulations the state may see fit to impose, by authorizing commissioners to establish harbor lines, or otherwise. *State* v. *Sargent*, 45 Conn. 358. But it has been intimated that it cannot be appropriated by the state to a different public use, without compensation. *Farist Steel Co.* v. *Bridgeport*, 13 L. R. A. 590, 60 Conn. 278.

In New York, it was long considered as settled law that the state succeeded to all the rights of the Crown and Parliament *of [21 England in lands under tide waters, and that the owner of land bounded by a navigable river within the ebb and flow of the tide had no private title or right in the shore below high water mark, and was entitled to no compensation for the construction, under a grant from the legislature of the state, of a railroad along the shore between high and low water mark, cutting off all access from his land to the river, except across the railroad. *Lansing* v. *Smith*, 4 Wend. 9, 21, 21 Am. Dec. 89; *Gould* v. *Hudson River R. Co.* 6 N.Y. 522; *People* v. *Tibbitts*, 19 N. Y. 523, 528; *People* v. *Canal Appraisers*, 33 N. Y. 461, 467; *Langdon* v. *New York*, 93 N. Y. 129, 144, 154-156; *New York* v. *Hart*, 95 N. Y. 443, 450, 451, 457; *Re Staten Island Rapid Transit Co.* 103 N.Y. 251, 260. The owner of the upland has no right to wharf out, without legislative authority; and titles granted in lands under tide water are subject to the right of the state to establish harbor lines. *People* v. *Vanderbilt*, 26 N. Y. 287, and 28 N. Y. 396, 84 Am. Dec. 351; *People* v. *New York & S. I. Ferry Co.* 68 N.Y. 71. The law of that state, as formerly understood, has been recently so far modified as to hold—in accordance with the decision in *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. Cas. 418, and contrary to the decisions in *Gould* v. *Hudson River R. Co.* above cited, and in *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269,—that the owner of land bounded by tide water may maintain an action against a railroad corporation constructing its road by authority of the legislature so as to cut off his access to the water. *Williams* v. *New York*, 105 N. Y. 419, 436; *Kane* v. *New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164, 184; *Rumsey* v. *New York & New England R. Co.* 15 L. R. A. 618, 133 N. Y. 79, and 136 N.Y. 543.

The law of New Jersey upon this subject was recognized and clearly stated in a recent judgment of this court, in which a grant by commissioners under a statute of the state to a railroad corporation, of a tract of land below high water mark, was held to preclude a city from continuing over the flats a highway dedicated to the public by the owner of the upland. "In the examination of the effect to be given to *the riparian laws of the state of New Jer- [22 sey," said *Mr. Justice* Matthews, speaking for the court, "it is to be borne in mind that the lands below high water mark, constituting the shores and submerged lands of the navigable waters of the state, were, according to its laws, the property of the state as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. The object of the legislation in question was evidently to define the relative rights of the state, representing the public sovereignty and interest, and of the owners of land bounded by high water mark." "The nature of the

title in the state to lands under tide water was thoroughly considered by the court of errors and appeals of New Jersey in the case of *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269. It was there declared (p. 519) 'that all navigable waters within the territorial limits of the state, and the soil under such waters, belong in actual propriety to the public; that the riparian owner, by the common law, has no peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses by the local custom or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high water mark.' It was therefore held, in that case, that it was competent for the legislative power of the state to grant to a stranger lands constituting the shore of a navigable river under tide water, below high water mark, to be occupied and used with structures and improvements in such a manner as to cut off the access of the riparian owner from his land to the water, and that without making compensation to him for such loss." *Hoboken* v. *Pennsylvania R. Co.* (1887) 124 U. S. 656, 688, 690, 691 [31: 543, 551, 552].

23] *The arguments on both sides of that proposition, upon general principles, as well as under the law of New Jersey, are nowhere more strongly and fully stated than by *Chief Justice* Beasley de ivering the opinion of the majority of the court, and by *Chancellor* Zabriskie speaking for the dissenting judges, in *Stevens* v. *Paterson & N. R. Co.* above cited, decided in 1870. Two years later, *Chancellor* Zabriskie recognized it as settled by that case, "that the lands under water, including the shore on the tide waters of New Jersey, belong absolutely to the state, which has the power to grant them to any one, free from any right of the riparian owner in them." *Pennsylvania R. Co.* v. *New York & L. B. R. Co.* 23 N. J. Eq. 157, 159. See also *State* v. *Yard*, 43 N. J. L. 632, 636; *American Dock & Imp. Co.* v. *Trustees for Support of Public Schools*, 39 N. J. Eq. 409, 445.

In Pennsylvania, likewise, upon the Revolution, the state succeeded to the rights, both of the Crown and of the Proprietors, in the navigable waters and the soil under them. *Rundle* v. *Delaware & R. Canal Co.* 55 U. S. 14 How. 80, 90 [14: 335, 339]; *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713, 726 [18: 96, 99]. But by the established law of the state, the owner of lands bounded by navigable water has the title in the soil between high and low water mark, subject to the public right of navigation, and to the authority of the legislature to make public improvements upon it, and to regulate his use of it. *Tinicum Fishing Co.* v. *Carter*, 61 Pa. 21, 30, 31, 100 Am. Dec. 597; *Wainwright* v. *McCullough*, 63 Pa. 66, 74; *Zug* v. *Com.* 70 Pa. 138; *Philadelphia* v. *Scott*, 81 Pa. 80, 86, 22 Am. Rep. 738; *Wall* v. *Pittsburgh Harbor Co.* 152 Pa. 427.

In Delaware, as has been declared by its *Supreme Court*, "all navigable rivers within the state belong to the state, not merely in right of eminent domain, but in actual propriety." *Bailey* v. *Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389, 395. 44 Am. Dec. 593. And see *Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 251 [7: 412, 414].

In Maryland, the owner of land bounded by tide water is authorized, according to various statutes beginning in 1745, to *build [24 wharves or other improvements upon the flats in front of his land, and to acquire a right in the land so improved. *Casey* v. *Inloes*, 1 Gill, 430, 39 Am. Dec. 658; *Baltimore* v. *McKim*, 3 Bland. Ch. 453; *Goodsell* v. *Lawson*, 42 Md. 348; *Garitee* v. *Baltimore*, 53 Md. 422; *Horner* v. *Pleasants*, 66 Md. 475; *Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 672, 675, 684 [27: 1070, 1071, 1074] in which the question was who was the riparian owner, and as such entitled to wharf out into the Potomac river in the District of Columbia under the authority to do so expressly conferred under the laws of Maryland in force in the district. This court, speaking by *Mr. Justice* Curtis, in affirming the right of the state of Maryland to protect the oyster fishery within its boundaries, said: "Whatever soil below low water mark is the subject of exclusive propriety and ownership belongs to the state on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish." *Smith* v. *Maryland*, 59 U. S. 18 How. 71, 74 [15: 269, 270].

The state of Virginia was held by this court, upon like grounds, to have the right to prohibit persons not citizens of the state from planting oysters in the soil covered by tide waters within the state, *Chief Justice* Waite saying: "The principle has long been settled in this court, that each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away. In like manner, the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States." *McCready* v. *Virginia*, 94 U. S. 391, 394 [24:248.] In Virginia, by virtue of statutes *beginning in 1679, the owner of land [25 bounded by tide waters has the title to ordinary low water mark, and the right to build wharves provided they do not obstruct navigation. 5 Ops. Atty. Gen. 412, 435-440; *French* v. *Bankhead*, 11 Gratt. 136, 159-161; *Hardy* v. *McCullough*, 23 Gratt. 251, 262; *Norfolk* v. *Cooke*, 27 Gratt. 430, 434, 435; *Garrison* v. *Hall*, 75 Va. 150.

In North Carolina, when not otherwise provided by statute, the private ownership of land bounded by navigable waters stops at high water mark, and the land between high and low water mark belongs to the state and may

be granted by it. *Hatfield* v. *Grimstead*, 29 N. C. 189; *Lewis* v. *Keeling*, 46 N. C. 299, 306, 62 Am. Dec. 168. The statutes of that state, at different periods, have either limited grants of land, bounded on navigable waters, to high water mark; or have permitted owners of the shore to make entries of the land in front, as far as deep water, for the purpose of a wharf; and any owner of the shore appears to have the right to wharf out, subject to such regulations as the legislature may prescribe for the protection of the public rights of navigation and fishery. *Wilson* v. *Forbes*, 13 N. C. 30; *Collins* v. *Benbury*, 25 N. C. 277, 38 Am. Dec. 722, and 27 N. C. 118, 42 Am. Dec. 155; *Gregory* v. *Forbes*, 96 N. C. 777; *State* v. *Narrows Island Club*, 100 N. C. 497; *Bond* v. *Wool*, 107 N. C. 139.

In South Carolina, the rules of the common law, by which the title in the land under tide waters is in the state, and a grant of land bounded by such waters passes no title below high water mark, appears to be still in force. *State* v. *Pacific Guano Co.* 22 S. C. 50; *State* v. *Pinckney*, 22 S. C. 484.

In Georgia, also, the rules of the common law would seem to be in force as to tide waters, except as affected by statutes of the state providing that "the right of the owner of lands adjacent to navigable streams extends to low water mark in the bed of the stream." Georgia Code of 1882, §§ 962, 2229, 2230; *Howard* v. *Ingersoll*, 54 U. S. 13 How. 381, 411, 421 [14: 189, 202, 206]; *Alabama* v. *Georgia*, 64 U. S. 23 How. 505 [16: 556] *Savannah* v. *State*, 4 Ga. 26, 39; *Young* v. *Harrison*, 6 Ga. 130, 141.

26] *The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another.

IV. The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands below the high water mark, within their respective jurisdictions.

The act of 1783 and the deed of 1784, by which the state of Virginia, before the adoption of the Constitution, ceded "unto the United States in Congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction," to the Northwest Territory, and the similar cession by the state of Georgia to the United States in 1802 of territory including great part of Alabama and of Mississippi, each provided that the territory so ceded should be formed into states, to be admitted, on attaining a certain population, into the Union (in the words of the Virginia cession) "having the same rights of sovereignty, freedom and independence as the other states," or (in the words of the Ordinance of Congress of July 13, 1787, for the government of the Northwest Territory, adopted in the Georgia cession) "on an equal footing with the original states in all respects whatever;" and that "all the lands within" the territory so ceded to the United States, and not reserved or appropriated for other purposes, should be considered as a common fund for the use and benefit of the United States. Charters & Constitutions, 427 428, 432, 433; Claytons, Laws of Georgia, pp. 48-51; Acts of Congress of April 7, 1798, chap. 28 (1 Stat. at L. 549); May 10, 1800, chap. 50, and March 3, 1803, chap. 27 (2 Stat. at L. 69, 229); *Pollard* v. *Hagan*, 44 U. S. 3 How. 212, 221, 222 [11: 565, 570.]

In *Pollard* v. *Hagan* (1844) this court upon full consideration *(overruling anything [27 to the contrary in *Pollard* v. *Kibbe*, 39 U. S. 14 Pet. 353 [10: 490]; *Mobile* v. *Eslava*, 41 U. S. 16 Pet. 234 [10:948]; *Mobile* v. *Hallett*, 41 U. S. 16 Pet. 261 [10: 958]; *Mobile* v. *Emanuel*, 42 U. S. 1 How. 95 [11: 60]; and *Pollard* v. *Files*, 43 U. S. 2 How. 591 [11: 391]) adjudged that upon the admission of the state of Alabama into the Union the title in the lands below high water mark of navigable waters passed to the state, and could not afterwards be granted away by the Congress of the United States. *Mr. Justice* McKinley, delivering the opinion of the court (*Mr. Justice* Catron alone dissenting) said: "We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil, in and to the territory of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana." "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it to the same extent, in all respects, that it was held by the states ceding the territories." "When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain, which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands." 44 U. S. 3 How. 221-223 [11: 570, 571]. "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the *original states, [28 the Constitution, laws and compact to the contrary notwithstanding." "Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to

the United States." 44 U. S. 3 How. 228, 229 [11: 573].

So much of the reasoning of the learned justice, as implied that the title in the land below high water mark could not have been granted away by the United States after the deed of cession of the territory and before the admission of the state into the Union, was not necessary to the decision, which involved only a grant made by Congress after the admission of Alabama, and which was followed in two similar cases in which Congress, after the admission of the state, had undertaken to confirm Spanish grants, made after the Treaty of San Ildefonso of 1800, and therefore passing no title whatever. *Goodtitle* v. *Kibbe* (1850) 50 U. S. 9 How. 471 [13: 220]; *Hallett* v. *Beebe* (1851) 54 U. S. 13 How. 25 [14: 35]. In the first of these cases, *Chief Justice* Taney, speaking for the whole court, of which *Mr. Justice* McKinley was still a member, said: "Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a state, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the state." 50 U. S. 9 How. 478 [13: 223].

V. That these decisions do not, as contended by the learned counsel for the plaintiff in error, rest solely upon the terms of the deed of cession from the state of Georgia to the United States, clearly appears from the constant recognition of the same doctrine as applicable to California, which was acquired from Mexico by the Treaty of Guadalupe Hidalgo of 1848. 9 Stat. at L. 926: *United States* v. *Pacheco* (1864) 69 U. S. 2 Wall. 587 [17: 865]; *Mumford* v. *Wardwell* (1867) 73 U. S. 6 Wall. 423 [18: 756]; *Weber* v. *State Harbor Comrs.* (1874) 85 U. S. 18 Wall. 57 [21: 798]; *Packer* v. *Bird* (1891) 137 U. S. 661, 666 [34: 819, 820]; *San Francisco* v. *LeRoy* (1891) 138 U. S. 656, 671 [34: 1096, 1101]; *Knight* v. *United Land Asso.* (1891) 142 U. S. 161 [35: 974].

29] *In *United States* v. *Pacheco* it was decided that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of Congress, of land bounded "by the bay" of San Francisco, did not include land below ordinary high water mark of the bay; because, as was said by *Mr. Justice* Field, in delivering judgment, "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican government, the result will be equally against the position of the *appellants.*" 69 U. S. 2 Wall. 590 [17: 866].

The state of California was admitted into the Union in 1850, and within a year afterwards passed statutes, declaring that a certain line designated upon a recorded plan should "be and remain a permanent water front" of the city of San Francisco; reserving to the state "its right to regulate the construction of wharves or other improvements, so that they shall not interfere with the shipping and commercial interests of the bay and harbor;" and providing that the city might construct wharves at the end of all the streets commencing with the bay, not exceeding two hundred yards beyond that line, and that the spaces beyond between the wharves should remain free from obstructions and be used as public slips. In *Weber* v. *State Harbor Comrs.*, it was held that a person afterwards acquiring the title of the city in a lot and wharf below high water mark had no right to complain of works constructed by commissioners of the state, under authority of the legislature, for the protection of the harbor and the convenience of shipping, in front of his wharf, and preventing the approach of vessels to it; and *Mr. Justice* Field, in delivering judgment, said: "Although the title to the soil under the tide waters of the bay was acquired by the *United States by [30 cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." 85 U. S. 18 Wall. 65, 66 [21: 801, 802].

In the very recent case of *Knight* v. *United Land Association*, *Mr. Justice* Lamar, in delivering judgment, said: "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original states were reserved to the several states; and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original states possess within their respective borders. Upon the acquisition of the territory from Mexico, the United States acquired the title to tide lands, equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory." 142 U. S. 183 [35: 981]. In support of these propositions he referred to *Martin* v. *Waddell*, *Pollard* v. *Hagan*. *Mumford* v. *Wardwell* and *Weber* v. *State Harbor Comrs.* above cited.

In that case, it was further held, as it had previously been declared in *San Francisco* v. *Le Roy*, above cited, that "this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way;" and that when the United States acquired California from Mexico by the treaty, they were

bound by its stipulations, and by the principles of international law, to protect all rights of property acquired under previous lawful grants from the Mexican government. 142 U. 31]S. 183, 184 [35: 981, 982]. *And it was therefore adjudged that under a boundary "by the bay," in the Mexican grant of the pueblo of San Francisco, duly confirmed by a decree of a court of the United States, and defined by a survey under the authority of the Secretary of the Interior as following the general line of high water mark of the bay, crossing the mouth of a tide water creek, the title of lands inside of that line, although below high water mark of the creek, was included, and therefore did not pass by a deed from the state.

VI. The decisions of this court, referred to at the bar, regarding the shores of waters where the ebb and flow of the tide from the sea is not felt, but which are really navigable, should be considerd with reference to the facts upon which they were made, and keeping in mind the local laws of the different states, as well as the provisions of the acts of Congress relating to such waters.

By the law of England, Scotland and Ireland, the owners of the banks prima facie own the beds of all fresh water rivers above the ebb and flow of the tide, even if actually navigable, to the thread of the stream, *usque ad filum aquæ*. Lord Hale, in Hargrave's Law Tracts, 5; *Bickett* v. *Morris*, L. R. 1 H. L. 47; *Murphy* v. *Ryan*, 2 I. R. C. L. 143; *Orr Ewing* v. *Colquhoun*, L. R. 2 App. Cas. 839.

The rule of the common law on this point appears to have been followed in all of the original states—except in Pennsylvania, Virginia and North Carolina, and except as to great rivers such as the Hudson, the Mohawk and the St. Lawrence in New York—as well as in Ohio, Illinois, Michigan and Wisconsin. But it has been wholly rejected, as to rivers navigable in fact, in Pennsylvania, Virginia and North Carolina, and in most of the new states. For a full collection and careful analysis of the cases, see Gould on Waters (2d ed.) §§ 56-78.

The earliest judicial statement of the now prevailing doctrine in this country as to the title in the soil of rivers really navigable, although above the ebb and flow of the tide, is to be found in a case involving the claim of a riparian proprietor to an exclusive fishery in the 32]Susquehanna river, in which *Chief Justice Tilghman, in 1807, after observing that the rule of the common law upon the subject had not been adopted in Pennsylvania, said: "The common law principle is, in fact, that the owners of the banks have no right to the water of navigable rivers. Now the Susquehanna is a navigable river, and therefore the owners of its banks have no such right. It is said, however, that some of the cases assert that by navigable rivers are meant rivers in which there is no flow or reflow of the tide. This definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches." *Carson* v. *Blazer*, 2 Binn. 475, 477, 478, 4 Am. Dec. 463.

It was because of this difference in the law of Pennsylvania from that of England and of most of the older states, and because the decisions of the supreme court of Pennsylvania upon the subject were deemed binding precedents, that this court, speaking by *Mr. Justice* Grier, held that riparian owners, erecting dams on navigable rivers in Pennsylvania, did so only by license from the state, revocable at its pleasure, and could therefore claim no compensation for injuries caused to such dams by subsequent improvements under authority of the state for the convenience of navigation; and also that by the law of Pennsylvania preemption rights to islands in such rivers could not be obtained by settlement. *Rundle* v. *Delaware & R. Canal Co.* (1852) 55 U. S. 14 How. 80, 91, 93, 94 [14: 335, 339-341]; *Fisher* v. *Haldeman*, (1857) 61 U. S. 20 How. 186, 194 [15: 879, 882].

By the acts of Congress for the sale of the public lands, those lands are to be divided into townships, six miles square, unless the line of an Indian reservation, or of land previously surveyed and patented, or "the course of navigable rivers, may render it impracticable," and into sections and quarter sections, bounded by north and south and east and west lines, running to the corners, or, when the corners cannot be fixed, then "to the water course," "or other external boundary:" and it is provided "that all navigable rivers within the territory to be disposed of by virtue of this Act shall be deemed to *be and remain public high-[33 ways; and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall be common to both." Acts of May 18, 1796, chap. 29, §§ 2, 9 (1 Stat. at L. 464); May 10, 1800, chap. 55, § 3; March 3, 1803, chap. 27, § 17; March 26, 1804, chap. 35, § 6; February 11, 1805, chap. 14 (2 Stat. at L. 73, 235, 279, 313); Rev. Stat. §§ 2395, 2396, 2476.

Those acts also provide that when, in the opinion of the President, "a departure from the ordinary method of surveying land on any river, lake, bayou or watercourse, would promote the public interest," the land may be surveyed and sold in tracts of two acres in width, fronting on any such water, and running back the depth of forty acres. Act of May 24, 1844, chap. 141 (4 Stat. at L. 34); Rev. Stat. § 2407.

By the Ordinance of 1787 for the government of the Northwest Territory, "the navigable waters leading into the Mississippi & St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy." Charters & Constitutions, 432; Act of August 7, 1789, chap. 8 (1 Stat. at L. 50). And the acts relating to the territories of Louisiana and Missouri contained similar provisions. Acts of March 3, 1811, chap. 46, § 12; June 4, 1812; chap. 95, § 15 (2 Stat. at L. 666, 747).

In the acts for the admission of the states of Louisiana and Mississippi into the Union, it was likewise declared that "the river Mississippi, and the navigable rivers and

waters leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said state, as to other citizens of the United States." Acts of February 20, 1811, chap. 21, § 3; April 8, 1812, chap. 50, § 1 (2 Stat. at L. 642, 703); March 1, 1817, chap. 23, § 4 (3 Stat. at L. 849).

In *Withers* v. *Buckley*, (1857) 61 U. S. 20 How. 84 [15: 816], this court, affirming the judgment of the highest court of Mississippi, in 29 Miss. 21, held that this did not prevent the legislature of the state from improving by a canal the navigation of one of those navigable rivers, and thereby diverting without compen-
34] sation the *flow of water by the plaintiff's land; and *Mr. Justice* Daniel, in delivering judgment, said: "It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the state of Mississippi, the power of improving the interior of that state, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the state. Could such an intention be ascribed to Congress, the right to enforce it may be confidently denied. Clearly, Congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign independent state or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the Federal compact. Obviously, and it may be said primarily, among the incidents of that equality is the right to make improvements in the rivers, watercourses and highways situated within the state." 61 U. S. 20 How. 93 [15: 820]. See also *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 9-12 [31: 629, 632, 633]; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 329-333 [37: 463, 469, 470].

In *The Genesee Chief* v. *Fitzhugh* (1851) 53 U. S. 12 How. 443 [13: 1058] in which this court, overruling its earlier decisions, held that the admiralty and maritime jurisdiction of the courts of the United States extended to all public navigable waters, although above the flow of the tide from the sea, *Chief Justice* Taney, taking the same line of argument as *Chief Justice* Tilghman, in *Carson* v. *Blazer*, 2 Binn. 475, 4 Am. Dec. 463, said that in England, where there were no navigable streams beyond the ebb and flow of the tide, the description of the admiralty jurisdiction as confined to tide waters was a reasonable and convenient one, and was equivalent to saying that it was confined to public navigable waters; but that, when the same description was used in this country, "the description of a public navigable river was substituted in the place of the thing intended to be described; and, under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased,
35]from a change in *circumstances, to be the true description of public waters." 53 U. S. 12 How. 454, 455 [13: 1063].

In *Jones* v. *Soulard* (1860) 65 U. S. 24 How. 41 [16: 604] the decision was that a title acquired under the Act of June 13, 1812, chap. 99 (2 Stat. at L. 748) to land in St. Louis, bounded by the Mississippi river, included an island west of the middle of the river, then only a sand bar, covered at ordinary high water and surrounded on all sides by navigable water, but which, after the admission of Missouri into the Union as a state, became, by the gradual filling up of the island and the intervening channel, connected with the shore as fast land. *Mr. Justice* Catron, indeed, in delivering the opinion, spoke of the rule of the common law, that "all grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream and entitle him to the accretions," as a general and well settled rule, and applicable to the Mississippi river. 65 U. S. 24 How. 65 [16: 608]. But, as stated in that opinion, the charter of the city of St. Louis extended to the eastern boundary of the state of Missouri in the middle of the Mississippi river. By the law of Missouri, as theretofore declared by its supreme court, the title of lands bounded by the Mississippi river extended to low water mark and included accretions. *O'Fallon* v. *Daggett*, 4 Mo. 343; *Shelton* v. *Maupin*, 16 Mo. 124; *Smith* v. *St. Louis Public Schools*, 30 Mo. 290. And the only question in *Jones* v. *Soulard*, was of the title, not in the bed or shore of the river, but only in accretions which had become part of the fast land.

The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the state as to private persons; and is independant of the law governing the title in the soil covered by the water. Lord Hale, in Hargrave's Law Tracts, 5, 14, 28; *Rex* v. *Yarborough*, in the King's Bench, 3 Barn. & C. 91, and 4 Dowl. & R. 790, and in the *House [36
of Lords, 1 Dow. & C. 178, 2 Bligh, N. S. 147, and 5 Bing. 163; *Doe* v. *East India Co.* 10 Moore, P. C. 140; *Foster* v. *Wright*, L. R. 4 C. P. Div. 438; *Handly* v. *Anthony*, 18 U. S. 5 Wheat. 374, 380 [5: 113, 114]; *Jefferies* v. *East Omaha Land Co.* 134 U. S. 178, 189-193 [33: 872, 876, 877]; *Nebraska* v. *Iowa*, 143 U. S. 359 [36: 186]; *Minto* v. *Delaney*, 7 Or. 337.

Again, in *St. Clair County* v. *Lovington* (1874) 90 U. S. 23 Wall. 46 [23: 59] the right of a riparian proprietor in St. Louis, which was upheld by this court, affirming the judgment of the supreme court of Illinois in 64 Ill. 56, and which *Mr. Justice* Swayne, in delivering the opinion, spoke of as resting in the law of nature, was the right to alluvion or increase of the upland by gradual and imperceptible degrees. And, as if to prevent any possible inference that the decision might affect the title in the soil under the water, the learned justice after quoting the opinion in *Jones* v. *Soulard*, above cited, expressly reserved the expression of any opinion upon the question whether the limit of the land was low water or the middle thread of the river; and repeated the propositions established by the earlier decisions of this court, already referred to: "By the American Revolution, the people of each state, in their sovereign character, acquired the absolute

right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the states respectively. And new states have the same rights of sovereignty and jurisdiction over this subject as the original ones." 90 U. S. 23 Wall. 64, 68 [23: 62, 63].

Some passages in the opinions in *Dutton* v. *Strong* (1861) 66 U. S. 1 Black, 23 [17: 27]; *St. Paul & P. R. Co.* v. *Schurmeier* (1868) 74 U. S. 7 Wall 272 [19: 74]; and *Yates* v. *Milwaukee*, (1870) 77 U. S. 10 Wall. 497 [19: 984], were relied on by the learned counsel for the plaintiff in error, as showing that the owner of land adjoining any navigable water, whether within or above the ebb and flow of the tide, has, independently of local law, a right of property in the soil below high water mark, and the right to build out wharves so far, at least, as to reach water really navigable.

But the remarks of *Mr. Justice* Clifford in the 37] first of those *cases, upon which his own remarks in the second case and those of *Mr. Justice* Miller in the third case were based, distinctly recognized the diversity of laws and usages in the different states upon this subject; and went no further than to say that wharves, piers and landing places, "where they conform to the regulations of the state" and do not extend below low water mark, have never been held to be nuisances, unless they obstruct the paramount right of navigation; that the right of the riparian proprietor to erect such structures in the navigable waters of the Atlantic states has been claimed, exercised and sanctioned from the first settlement of the country to the present time; that "different states adopted different regulations upon the subject, and in some, the right of the riparian proprietor rests upon immemorial local usage;" and that "no reason is perceived why the same general principle should not be applicable to the lakes, so far as to permit the owner of the adjacent land to build out as far as where the water first becomes deep enough to be navigable. 66 U. S. 1 Black, 31, 32 [17: 32]. And none of the three cases called for the laying down or defining of any general rule, independent of local law or usage, or of the particular facts before the court.

In *Dutton* v. *Strong*, the defendants, being the owners and occupants of a pier extending into Lake Michigan at Racine in the state of Wisconsin, were sued for cutting the hawser by which the plaintiffs had fastened their vessel to the pier during a storm, in consequence of which she was driven, by the force of the wind and waves, against another pier, and injured. And, as stated in the opinion, the pier appeared to be private property of the defendants, constructed for their own use; there was no evidence that it constituted any obstruction whatever to the public right of navigation; the plaintiff's vessel was made fast to it by her master without any authority from the defendants, either express or implied; and, under the increasing strain of the hawser by the storm, the piles of the pier began to give way before the hawser was cut. The only point adjudged was that, the plaintiffs' vessel having been wrongfully attached to the pier, the defendants, after she had been requested and had refused to leave, had the *right to cut her loose, [38 if necessary to preserve the pier from destruction or injury. 66 U. S. 1 Black, 33, 34 [17: 33]. There can be no doubt of the correctness of that decision; for, even if the pier had been unlawfully erected by the defendants as against the state, the plaintiffs had no right to pull it down or injure it, and upon the facts of the case were mere trespassers upon the defendants' possession. *Linthicum* v. *Ray*, 76 U. S. 9 Wall. 241 [19: 657]; *Wetmore* v. *Brooklyn Gas Light Co.* 42 N. Y. 384; *Harrington* v. *Edwards*, 17 Wis. 604, 84 Am. Dec. 768; *Johnson* v. *Barret*, Aleyn, 10, 11.

In *St. Paul & P. R. Co.* v. *Schurmeier*, the plaintiff claimed title to lots in a block in the city of Saint Paul and state of Minnesota under a patent from the United States of a fractional section, bounded on one side by the Mississippi river. At the place in question, there was a small island, lying along the shore of the river, about four feet lower than the main land, and separated from it by a channel or slough twenty-eight feet wide, in which at very low water there was no current, and very little water, and that standing in pools; at a medium stage of the water the island was not covered, and there was a current or flow through the channel or slough: and at very high water the island was submerged. In the original government survey, the meander lines were run along the main land of the shore, the quantity of land was estimated accordingly, and the island and intervening space were not shown or mentioned. That island and space were afterwards filled up by the city as a landing place, and were claimed by the railroad company under a subsequent survey and grant from the United States. The island, therefore, was connected with the main land by a space substantially uncovered at low water; and the improvements complained of did not extend beyond high water mark of the island. The question in controversy was whether the plaintiff's patent was limited by the main shore, or extended to the outside of the island. The supreme court of Minnesota held that, by the law of Minnesota, land bounded by a navigable river extended to low water mark, at least, if not to the thread of the river; and that the plaintiff's title therefore extended to the water's edge at low *water mark and included the [39 island, and gave judgment for the plaintiff. 10 Minn. 82. This court affirmed the judgment, saying: "Express decision of the supreme court of the state was, that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion of the state court we entirely concur. Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line as actually run on the land, is the boundary." 74 U. S. 7 Wall. 286, 287 [19: 78]. The court also expressed an unhes-

stating opinion "that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable stream should stop at the stream, and that all such streams should be deemed to be and remain public highways." And the court treated it as too plain for discussion, that the island, separated from the main land only by a depression in which at low water there was no continuous flow or line of water, was included in the first survey, and therefore not affected by the subsequent survey. 74 U. S. 7 Wall. 288, 289 [19: 78].

In *Yates* v. *Milwaukee*, the material facts appear by the report to have been as follows: The owner of a lot fronting on a river in the city of Milwaukee and state of Wisconsin had built, upon land covered by water of no use for the purpose of navigation, a wharf extending to the navigable channel of the river. There was no evidence that the wharf was an obstruction to navigation, or was in any sense a nuisance. The city council afterwards, under a statute of the state, enacted before the wharf was built, authorizing the city council to establish dock and wharf lines upon the banks of the 40] *river, to restrain and prevent encroachments upon and obstructions to the river, and to cause the river to be dredged, passed an ordinance declaring this wharf to be an obstruction to navigation and a nuisance, and ordering it to be abated. The point adjudged was that the mere declaration of the city council that the wharf already built and owned by the plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the centre of the stream, subject, of course, to the public right of navigation. *Jones* v. *Pettibone*, 2 Wis. 308; *Walker* v. *Shepardson*, 2 Wis. 384, 60 Am. Dec. 423, and 4 Wis. 486, 65 Am. Dec. 324; *Mariner* v. *Schulte*, 13 Wis. 692; *Arnold* v. *Elmore*, 16 Wis. 509. See also *Olson* v. *Merrill*, 42 Wis. 203; *Norcross* v. *Griffiths*, 65 Wis. 599, 56 Am. Rep. 642. And the only decision of that court, which this court considered itself not bound to follow, was *Yates* v. *Judd*, 18 Wis. 119, upon the question of fact whether certain evidence was sufficient to prove a dedication to the public. 77 U. S. 10 Wall. 504-506 [19: 986, 987.

VII. The later judgments of this court clearly establish that the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states, subject, of course, to the rights granted to the United States by the Constitution.

In *Weber* v. *State Harbor Comrs*, above cited. *Mr. Justice* Field, in delivering judgment, while recognizing the correctness of the doctrine "that a riparian proprietor, whose land is bounded by a navigable stream, has the right of access to the navigable part of the stream in front of his land, and to construct a wharf or pier projecting into the stream, for his own *use, or the use of* others, subject to such general rules and regulations as the legislature may prescribe for the protection of the public," and admitting that in several of the states, by general legislation or immemorial usage, the proprietor of land bounded by the shore of the sea, or of an arm of the sea, has a right to wharf out to the point where the waters are *navigable, said: "In the absence of such [41 legislation or usage, however, the common law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law, the title to the shore of the sea, and of the arms of the sea, and in the soils under tide waters is, in England, in the King, and, in this country, in the state. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tends to obstruct navigation or otherwise." 85 U. S. 18 Wall. 64, 65 [21: 801].

In *Atlee* v. *Northwestern U. Packet Co.* (1874) 88 U. S. 21 Wall. 389 [22: 619], which arose in Iowa in 1871. *Mr. Justice* Miller, in delivering judgment, after referring to *Dutton* v. *Strong*, *St. Paul & P. R. Co.* v. *Schurmeier*, and *Yates* v. *Milwaukee*, above cited, disclaimed laying down any invariable rule as to the extent to which wharves and landing places might be built out into navigable waters by private individuals or municipal corporations; and recognized that a state might, by its legislation, or by authority expressly or impliedly delegated to municipal governments, control the construction, erection and use of such wharves or landings, so as to secure their safety and usefulness, and to prevent their being obstructions to navigation. 88 U. S. 21 Wall. 392, 393 [22: 620]. And it was adjudged, following in this respect the opinion of the circuit court in 2 Dill. 479, that a riparian proprietor had no right, without statutory authority, to build out piers into the Mississippi river as necessary parts of a boom to receive and retain logs until needed for sawing at his mill by the water side.

In *Davenport & N. W. R. Co.* v. *Renwick* (1880) 102 U. S. 180 [26: 51], affirming the judgment of the supreme court of Iowa in 49 Iowa, 664, it was by virtue of an express statute passed by the legislature of Iowa in 1874, that the owner of a similar pier and boom recovered compensation for the obstruction of access to it from the river by the construction of a railroad in front of it.

In *Barney* v. *Keokuk* (1876) 94 U. S. 324 [24: 224], the owner, under a grant from the United States, of two lots of land in *the city of [42 Keokuk and state of Iowa, bounded by the Mississippi river, brought an action of ejectment against the city and several railroad companies and a steamboat company to recover possession of lands below high water mark in front of his lots, which the city, pursuant to statutes of the state, had filled up as a wharf and levee, and had permitted to be occupied by the railroads and landing places of those companies. The plaintiff's counsel relied on *Dutton* v. *Strong*, *St. Paul & P. R. Co.* v. *Schurmeier*, and *Yates* v. *Milwaukee*, above cited. 94 U. S. 329, 331 [24: 225]. But this court, affirming the judgment of the circuit

court of the United States, held that the action could not be maintained; and, *Mr. Justice* Bradley, in delivering judgment, summed up the law upon the subject with characteristic power and precision, saying: "It appears to be the settled law of that state that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state. This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and it principal branches. The question as to the extent of the riparian title was elaborately discussed in the case of *McManus* v. *Carmichael*, 3 Iowa, 1. The above conclusion was reached, and has always been adhered to in that state. *Haight* v. *Keokuk*, 4 Iowa, 199; *Tomlin* v. *Dubuque, B. & M. R. Co.* 32 Iowa, 106, 7 Am. Rep. 176." "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself. By the common law, as before remarked, such additions to the land on navigable waters belong to the Crown; but, as [43] the only waters recognized in *England as navigable were tide waters, the rule was often expressed as applicable to tide waters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and, under the like influence, it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 [10: 997]; *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 [11: 565], and *Goodtitle* v. *Kibbe*, 50 U. S. 9 How. 471 [13: 220]. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief* v. *Fitzhugh*, 53 U. S. 12 How. 442 [13: 1058], has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond *the limits of [44] high water. The cases in which this court has seemed to hold a contrary view, depended, as most cases must depend, on the local laws of the states in which the lands were situated. In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject." 94 U. S. 336-338 [24: 227, 228].

In *St. Louis* v. *Myers* (1885) 113 U. S. 566 [28: 1131], the court, speaking by *Chief Justice* Waite, held that the Act of Congress for the admission into the Union of the state of Missouri, bounded by the Mississippi river, which declared that the river should be "a common highway and forever free," left the rights of riparian owners to be settled according to the principles of state law; and that no Federal question was involved in a judgment of the supreme court of the state of Missouri as to the right of a riparian proprietor in the city of Saint Louis to maintain an action against the city for extending one of its streets into the river so as to divert the natural course of the water and thereby to injure his property.

In *Packer* v. *Bird* (1891) 137 U. S. 661 [34: 819], the general rules governing this class of cases were clearly and succinctly laid down by the court, speaking by *Mr. Justice* Field, as follows: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream." 137 U. S. 669, 670 [34: 821]. And it was accordingly held, affirming the judgment of the supreme court of California in 71 Cal. 134, and referring to the opinion in *Barney* v. *Keokuk*, above cited, as specially applicable to the case, that a person holding land under a patent from the United States, confirming a Mexican grant bounded by *the [45] Sacramento river, which was navigable in fact, took no title below the high water mark, either under the acts of Congress or by the local law.

In *St. Louis* v. *Rutz* (1891) 138 U. S. 226 [34: 941], the court, speaking by *Mr. Justice* Blatchford, and refering to *Barney* v. *Keokuk*,

St. Louis v. *Myers* and *Packer* v. *Bird*, above cited, said: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois." And it was because "the supreme court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi river extends to the middle line of the main channel of that river," that it was decided that a deed of land in Illinois, bounded by the Mississippi river, passed the title in fee in the bed of the river to the middle line of the main channel, and to all islands found in the bed of the river east of the middle of that channel; and, "that being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the state of Missouri, to extend his ownership, by mere accretion, to land situated in the state of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that state." 138 U. S. 242, 250 [34: 947, 951].

In the recent case of *Hardin* v. *Jordan*, (1891) 140 U. S. 371 [35: 428] in which there was a difference of opinion upon the question whether a survey and patent of the United States, bounded by a lake which is not navigable, in the state of Illinois, was limited by the margin, or extended to the centre of the lake, all the justices agreed that the question must be determined by the law of Illinois. *Mr. Justice* Bradley, speaking for the majority of the court, and referring to many cases already cited above, said: "With regard to grants of the government for lands bordering on tide water; it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enures to the 46] state within which they are *situated, if a state has been organized as established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Such title being in the state, the lands are subject to state regulation and control, under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. The state may even dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities; also, by the reclamation of submerged flats, and the erection of wharves and piers and other adventitious aids of commerce. Sometimes large areas so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of commerce. This right of the states to regulate and control the shores of *tide waters and* the land under them is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as islands seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised." 140 U. S. 381, 382 [35: 433]. And *Mr. Justice* Brewer, in beginning the dissenting opinion, said: "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnished the best and final authority." 140 U. S. 402 [35: 440].

In the yet more recent case of *Illinois Cen. R. Co.* v. *Illinois* (1892) which also arose in [47 Illinois, it was recognized as the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce. 146 U. S. 387, 435–437, 465, 474 [36: 1018, 1036, 1037, 1047, 1050].

VIII. Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.

Chief Justice Taney, in delivering the opinion already cited, after the subject had been much considered in the cases from Alabama, said: "Undoubtedly Congress might have granted this land to the patentee or confirmed his Spanish grant, before Alabama became a state." *Goodtitle* v. *Kibbe*, 50 U. S. 9 How. 471, 478 [13: 220, 223]. In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands below high water mark, was treated as depending on the terms of the decree of confirmation by a court of the United States under authority of Congress. By the application of that test, no such lands were held to be included in *United States* v. *Pacheco*, 69 U. S. 2 Wall. 587 [17: 865] and some such lands were held to be included in *Knight* v. *United Land Asso.* 142 U. S. 161 [35: 974]. And in *Packer* v. *Bird*, 137 U. S. 661, 672 [34: 819, 822], *Mr. Justice* Field, speaking for the court, after referring to the rule, as stated in *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272, 288 [19: 74, 78], above quoted, that Congress, by the provisions of the land laws, intended that the title to lands bordering on navigable streams should stop at the stream,

said: "The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equi-[48] ty of the *patentee to the lands, which in the absence of such rights or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream."

By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territorities, so long as they remain in a territorial condition. *American Ins. Co* v. *356 Bales of Cotton*, 26 U. S. 1 Pet 511, 542 [7: 242, 255]; *Benner* v. *Porter*, 50 U. S. 9 How, 235, 242 [13: 119, 122]; *Cross* v. *Harrison*: 57 U. S. 16 How. 164, 193[14: 889, 901]; *First Nat. Bank of Brunswick* v. *Yankton County*, 101 U. S. 129, 133 126: 1046, 1047]; *Murphy* v. *Ramsey*, 114 U. S. 15, 44 [29: 47, 57]; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43 [34: 478, 491]; *McAllister* v. *United States*, 141 U. S. 174, 181 [35: 691, 695].

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order so perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory.

IX. But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek.

As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, "charged with and subject to that *jus publicum* which belongs to the King's subjects," or, or he elsewhere puts it, "is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse." Hargrave's Law Tracts, 36, 34. In the words of *Chief Justice* Taney, "the country" discovered and settled by Englishmen "was held by the King in his public and regal character as the representative of the nation, and in trust for [49] them;" and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established;" and, upon the American Revolution, vested absolutely in the people of each state "for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367, 409-411 [10: 997, 1012, 1013]. As observed by *Mr. Justice* Curtis, "This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights." *Smith* v. *Maryland*, 59 U. S. 18 How. 71, 74 [15: 269, 270]. The title to the shore and lands under tide water, said *Mr. Justice* Bradley, "is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery." *Hardin* v. *Jordan*, 140 U. S. 371, 381 [35: 428, 433]. And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, "in trust for the future states." *Pollard* v. *Hagan*, 44 U. S. 3 How. 212, 221, 222 [11: 565, 570]; *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57, 65 [21: 798, 801]; *Knight* v. *United Land Asso.* 142 U. S. 161, 183 [35: 974, 981].

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, *shall not be granted away during the [50] period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

X. The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States, authorized or approved by the government of the United States; as well as upon the cession of the Louisiana territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. American State Papers, 6 Foreign Relations, 666; Barrow's History of Oregon, chap. 22; 8 Stat. at L. 202, 256. While the right to Oregon was in contest between the United States and Great Britain, the citizens of the one and the subjects of the other were permitted to occupy it under the Conventions of 1818 and 1827. 8 Stat. at L. 249, 360. Its boundary on the north was defined by the treaty with Great Britain of June 15, 1846. 9 Stat. at L. 869. So far as the title of the United States was derived from France or Spain, it stood as in other territories acquired by treaty. The independ-

ent title based on discovery and settlement was equally absolute. *Johnson* v. *McIntosh*, 21 U. S. 8 Wheat. 543, 595 [5: 681, 694]; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367, 409 [10: 997, 1012]; *Jones* v. *United States*, 137 U. S. 202, 212 [34: 691, 695].

By the Act of 1848, establishing the territorial government of Oregon, "all laws heretofore passed in said territory, making grants of land, or otherwise affecting or incumbering the title to lands," were declared to be void; and the laws of the United States were "extended over and declared to be in force in said territory, so far as the same, or any provision thereof, may be applicable." Act of Au-
51 gust 14, 1848, chap. *177, § 14 (9 Stat. at L. 329). The land laws adopted by the provisional government of Oregon, established by the people while the sovereignty was in dispute between the United States and Great Britain, regulated the occupation only. The settlers had no title in the soil. The United States, on assuming undisputed dominion over the territory, owned all the lands therein; and Congress had the right to confine its bounties to settlers within just such limits as it chose. The provisions of the general land laws of the United States were not applicable to the Oregon territory. And before 1850 there was no statute under which any one could acquire a legal title from the United States to lands in Oregon. *Lowndsdale* v. *Parrish*, 62 U. S. 21 How. 290, 293 [16: 80, 81]; *Stark* v. *Starr*, 73 U. S. 6 Wall. 402 [18: 925]; *Davenport* v. *Lamb*, 80 U. S. 13 Wall. 418, 429, 430 [20: 655, 658]; *Lamb* v. *Davenport*, 85 U. S. 18 Wall. 307, 314 [21: 759, 761]; *Stark* v. *Starr*, 94 U. S. 477, 486 [24: 276, 279]; *Barney* v. *Dolph*, 97 U. S. 652, 654 [24: 1063]; *Hall* v. *Russell*, 101 U. S. 503, 507, 508 [25: 829, 831]; *Missionary Society of M. E. Church* v. *Dalles*, 107 U. S. 336, 344 [27: 545, 548].

The first Act of Congress which granted to settlers titles in such lands was the Oregon Donation Act of September 27, 1850, chap. 76. That Act required the lands in Oregon to be surveyed as in the Northwest territory; and it made grants or donations of land, measured by sections, half sections and quarter sections, to actual settlers and occupants. It contains nothing indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers. 9 Stat. at L. 496; Rev. Stat. §§ 2395, 2396, 2409.

It is evident, therefore, that a donation claim under this Act, bounded by the Columbia river, where the tide ebbs and flows, did not, of its own force, have the effect of passing any title in lands below high water mark. Nor is any such effect attributed to it by the law of the state of Oregon.

The southern part of the territory of Oregon was admitted into the Union as the state of Oregon, "on an equal footing with the other states in all respects whatever," by the Act of February 14, 1859, chap. 33; and the Act of admission provided that "the said state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters
52] bordering *on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said State, shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States." 11 Stat. at L. 383.

The settlers of Oregon, like the colonists of the Atlantic states, coming from a country in which the common law prevailed to one that had no organized government, took with them, as their birthright, the principles of the common law, so far as suited to their condition in their new home. The jurisprudence of Oregon, therefore, is based on the common law. *Van Ness* v. *Pacard*, 27 U. S. 2 Pet. 137, 144. 7: 374, 377; *Norris* v. *Harris*, 15 Cal. 226, 252; *Cressey* v. *Tatom*, 9 Or. 541; *Lamb* v. *Starr*, Deady, 350, 358.

By the law of the state of Oregon, as declared and established by the decisions of its supreme court, the owner of upland bounding on navigable water has no title in the adjoining lands below high water mark, and no right to build wharves thereon, except as expressly permitted by statutes of the state; but the state has the title in those lands, and, unless they have been so built upon with its permission, the right to sell and convey them to any one, free of any right in the proprietor of the upland, and subject only to the paramount right of navigation inherent in the public. *Hinman* v. *Warren*, 6 Or. 408; *Parker* v. *Taylor*, 7 Or. 435; *Parker* v. *Rogers*, 8 Or. 183; *Shively* v. *Parker*, 9 Or. 500; *McCann* v. *Oregon R. & Nav. Co.* 13 Or. 455; *Bowlby* v. *Shively*, 22 Or. 410. See also *Shively* v. *Welch*, 10 Sawy. 136, 140, 141.

In the case at bar, the lands in controversy are below high water mark of the Columbia river where the tide ebbs and flows; and the plaintiff in error claims them by a deed from John M. Shively, who, while Oregon was a territory, obtained from the United States a donation claim, bounded by the Columbia river, at the place in question.

The defendants in error claim title to the lands in controversy by deeds executed in behalf of the state of Oregon, by *a board of [53 commissioners, pursuant to a statute of the state of 1872, as amended by a statute of 1874, which recited that the annual encroachments of the sea upon the land, washing away the shores and shoaling harbors, could be prevented only at great expense by occupying and placing improvements upon the tide and overflowed lands belonging to the state, and that it was desirable to offer facilities and encouragement to the owners of the soil abutting on such harbors to make such improvements; and therefore enacted that the owner of any land abutting or fronting upon, or bounded by the shore of any tide waters, should have the right to purchase the lands belonging to the state in front thereof; and that, if he should not do so within three years from the date of the Act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase; and make provisions for securing to persons who had actually made improvements upon tide lands a priority of right so to purchase them.

Neither the plaintiff in error nor his grantor appears to have ever built a wharf or made any other improvement upon the lands in controversy, or to have applied to the state to purchase them. But the defendants in error, after their purchase from the state, built and maintained a wharf upon the part of these lands nearest the channel, which extended several hundred feet into the Columbia river, and at which ocean and river craft were want to receive and discharge freight.

The theory and effect of the statutes were stated by the supreme court of the state, in this case, as follows: "Upon the admission of the state into the Union, the tide lands became the property of the state, and subject to its jurisdiction and disposal. In pursuance of this power, the state provided for the sale and disposal of its tide lands by the act of 1872 and the amendments of 1874 and 1876. Laws 1872, p. 129; Laws 1874, p. 77; Laws 1876, p. 70. By virtue of these acts, the owner or owners of any land abutting or fronting upon or bounded by the shore of the Pacific Ocean, or of any bay, harbor or inlet of the same, and rivers and their bays in which the tide ebbs [54]*and flows within this state, were given the right to purchase all the tide lands belonging to the state, in front of the lands so owned, within a certain time and upon conditions prescribed; and providing further that in case such owner or owners did not apply for the purchase of such tide lands, or, having applied, failed to prosecute the same as provided by law, then that such tide lands shall be open to purchase by any other person who is a resident and citizen of the state of Oregon; but in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property, and sometimes improved by expensive structures, the acts further provided, in such cases, that where the bank owners had actually sold the tide lands, then the purchaser of the tide lands from the bank owner, or a previous bank owner, should have the right to purchase from the state. These statutes are based on the idea that the state is the owner of the tide lands, and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey private interests therein, except such as the state saw fit to give the adjacent owners, and, to acknowledge in them and their grantees when they had dealt with such tide lands as private property, subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon, and many titles acquired under them to tide lands. In the various questions relating to tide lands which have come before the judiciary, the validity of these statutes has been recognized and taken for granted, though not directly passed upon." 22 Or. 415, 416.

The substance and scope of the earlier statute of Oregon of October 14, 1862 (Gen. Laws of 1862, p. 96; Hill's Code of Oregon, §§ 4227, 4228) which is copied in the margin,* were *stated by that court as follows: "It is [55 true, the legislature of this state had made provision by which the upland owner within the corporate limits of any incorporated town might build wharves, prior to the acts of 1872 and 1874, *supra;* but within the purview of our adjudications it would, as a matter of power, have been equally competent to have given this privilege to others. But this act is not a grant. It simply authorizes upland owners on navigable rivers within the corporate limits of any incorporated town to construct wharves in front of their land. It does not vest any right until exercised. It is a license, revocable at the pleasure of the legislature until acted upon or availed of. Shively did not avail himself of the license, nor is there any pretense to that effect. The plaintiffs have built a wharf upon and in front of their tide land. If the act is as applicable to the tide lands as uplands on navigable waters, they have exercised the right." 22 Or. 420, 421.

Upon a review of its prior decisions, the court was of opinion that by the law of Oregon, in accordance with the law as formerly held in New York in *Gould* v. *Hudson River R. Co.* 6 N. Y. 522; with the law of New Jersey as declared in *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269, and recognized in *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 656 [31:543]; and with the law of the state of *Washington, on the other side of the [56 Columbia river, as declared in *Eisenbach* v. *Hatfield*, 12 L. R. A. 632, 2 Wash. 236; and upon the principles affirmed in decisions of this court, above cited, and especially in *Hardin* v. *Jordan*, 140 U. S. 371, 382 [35:428, 433]; the authority conferred by the statutes of Oregon upon upland owners on navigable rivers to construct wharves in front of their land did not vest any right until exercised, but was a mere license revocable at the pleasure of the legislature until acted upon; and that the state had the right to dispose of its tide lands free from any easement of the upland owner.

The court thus stated its final conclusion: "From all this it appears that when the state of Oregon was admitted into the Union, the tide lands became its property and subject to its jurisdiction and disposal; that in the absence of legislation or usage, the common law rule would govern the rights of the upland proprietor, and by that law the title to them is in the state; that the state has the right to dispose of them in such manner as she might deem proper, as is frequently done in various ways, and whereby sometimes large areas are reclaimed and occupied by cities, and are put to public and private uses, state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce. The whole question is for the state to determine for itself; it can say to what extent it will preserve its rights of ownership in them, or confer them on others. Our state has done that by the legislation already referred to, and our courts have declared its absolute property in and dominion over the tide lands, and its

* An act to authorize the owners of land lying upon a navigable stream or other like water to build wharves into such stream or other water, beyond the line of low water mark.

Be it enacted by the Legislative Assembly of the state of Oregon, as follows:

Sec. 1. The owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream

right to dispose of its title in such manner as it might deem best, unaffected by any 'legal obligation to recognize the rights of either the riparian owners, or those who had occupied such tide lands,' other than it chose to resign to them, subject only to the paramount right of navigation and the uses of commerce. From these considerations it results, if we are to be bound by the previous adjudications of this court which have become a rule of property, and upon the faith of which important rights and titles have become vested, and large expenditures have been made and incurred, that the defendants have no rights or interests [57] in the lands in question. *Upon this point there is no diversity of judgment among us. We all think that the law as adjudicated ought not to be disturbed, independent of other reasons and authorities suggested in its support." 22 Or. 427.

By the law of the state of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case.

The conclusions from the considerations and authorities above stated may be summed as follows:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory.

The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or *littoral proprietors in the soil [58] below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union.

Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States.

The donation land claim, bounded by the Columbia river, upon which the plaintiff in error relies, includes no title or right in the land below high water mark; and the statutes of Oregon; under which the defendants in error hold, are a constitutional and legal exercise by the state of Oregon of its dominion over the lands under navigable waters.

Judgment affirmed.

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*W. F. PROSSER ET AL., *Appts.*, [59

v.

THE NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 50-65.)

Power of Congress over tide waters—harbor lines in navigable waters—not restrained by injunction.

1. Congress has the power, in chartering a corporation to construct and maintain a railroad, to grant to the corporation such title or rights in lands below high water mark of tide waters of a territory as may be necessary or convenient for

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or other like water, beyond low water mark, so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.

Sec. 2. The corporate authorities of the town, wherein such wharf or wharves is proposed to be constructed, shall have power to regulate the exercise of the privilege or franchise herein granted; and upon the application of person entitled to and desiring to construct such wharf or wharves, such corporate authorities shall by ordinance, or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low water mark, so that such wharf or wharves shall not be constructed any farther into such stream or other water beyond such low water line than may be necessary and convenient for the purpose of expressed in the first section of this act, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water.

NOTE.—*As to navigable waters; what are, in United States; streams and inland waters as highways,* see note to United States v. The Montello, 22: 391.

As to nuisance, when injunctions against, will be granted, see note to Irwin v. Dixion, 13: 25.

the building, maintenance, use and enjoyment of such structures as may be required for commerce and transportation on the railroad and by sea, and for transferring goods and passengers between the railroad and sea going vessels.

2. A state may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress, limiting the building of wharves and other structures upon lands not already built upon.

3. The establishment of general harbor lines, of itself, takes or injures no one's property, and cannot, consistently with the interests of the public, or with the principles of equity, be restrained by injunction.

[No. 837.]

Argued Jan. 16, 17, 1893. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Washington, in favor of the Northern Pacific Railroad Company, plaintiff, against Prosser and others, constituting the Board of Harbor Line Commissioners, of the state of Washington, *et al.*, defendants, enjoining defendants from establishing harbor lines, etc., in the harbor of Tacoma over the plaintiff's wharves and lands, etc. *Reversed, and suit dismissed.*

Statement by *Mr. Justice* **Gray:**

This was a bill in equity, filed December 29, 1891, and amended May 27, 1892, in the Circuit Court of the United States for the District of Washington, by the Northern Pacific Railroad Company, a corporation created and existing under the laws of the United States, for an injunction to prevent Prosser and four other persons, constituting the board of harbor line commissioners of the state of Washington, from establishing harbor lines and lines of water ways in front of the city and in the harbor of Tacoma, over the plaintiff's wharves and lands; and to prevent the secretary of state of the state and the clerk of the city from receiving or filing a plat of such lines made by the commissioners, covering lands included in a strip two hundred feet wide on either side of the plaintiff's railroad.

On the day of the filing of the amended bill, a general demurrer was filed by the defendants, and overruled by the court; and, the defendants standing upon their demurrer and declining to answer further, a final decree was entered for the plaintiff, as prayed for in the bill; and the defendants appealed to this court.

By the Act of Congress of July 2, 1864, chap. 217, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound [60] on the *Pacific Coast by the Northern Route," the Northern Pacific Railroad Company was incorporated, and authorized to construct and maintain a railroad, "beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound;" and for the purpose of aiding in the construction of the railroad, and of a telegraph line, to the Pacific coast, there was granted to the company "the right of way through the public lands" to the extent of two hundred feet in width on either side of the railroad, as well as every alternate section of the public lands on either side of the line; and it was authorized to take lands within the two hundred feet, "and also any lands or premises that may be necessary and proper for turnouts standing places for cars, depots, station houses or any other structures required in the construction and working of said road;" and it was provided that the railroad should "be a post route and a military road, subject to the use of the United States, for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose, restricting the charges for such government transportation;" that the acceptance of the terms and conditions of the act should be signified by the company in writing to the President of the United States within two years after its passage; and that, "the better to accomplish the object of this Act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes," Congress might, at any time, having due regard to the rights of the company, add to, alter, amend or repeal this Act. 13 Stat. at L. 365.

The bill alleged that after the passage of the Act, and before March 9, 1865, the company determined upon and selected the general line of its main road from Lake Superior to Puget *Sound; that on March 9, 1865, it duly sig [61] nified to the President of the United States its acceptance of the Act, and therewith presented and filed with the Secretary of the Interior a map showing the general route of its main line; that the general route so selected and designated was by way of the Columbia river to Puget Sound and north of the forty-fifth degree of latitude, and was "the most eligible railroad route for the main line of said railroad and telegraph line from Lake Superior to Puget Sound, and was at the time aforesaid selected and determined upon as such;" and that many years before November 11, 1889, and while the state of Washington was still a territory, the plaintiff constructed and fully completed, and had since continuously maintained, its railroad from the city of Portland, in the state of Oregon, to the city of Tacoma, in the state of Washington.

The bill alleged that the main line of the plaintiff's railroad, as so constructed and maintained, extended to the eastern boundary of the Tacoma Mill Company's property at a point upon Commencement Bay, an arm or indentation of Admiralty Inlet, near its junction with Puget Sound. The bill, with a map annexed to it, showed that the railroad was laid out for about two miles along the edge of the harbor and in front of the city of Tacoma from a point opposite Fifteenth street to the termination aforesaid, and that the greater part of the space two hundred feet in width on either side of the railroad, throughout these two miles, was below high water mark. And the bill

alleged that the whole of that space between those point was, at the time of the passage of the Act of 1864, "a part of the public domain, subject to no rights save those of the United States; and those at that date granted to this plaintiff by said Act of Congress."

The bill further alleged that the plaintiff was the owner of the lands next the inner boundary of the right of way aforesaid; "that the plaintiff is also the owner of the littoral and riparian rights, rights of access to deep water, and preference rights of purchase of the tide lands pertaining or belonging to the said lands; that said right of way and said lands are chiefly valuable 62]for their right of access to deep *water and the right to construct landings and warehouses upon the same northward and westward to the navigable waters of Commencement Bay; that many years prior to November 11, 1889, the plaintiff constructed and built upon the lands included within said right of way, and westward and northward thereof into deep water and the navigable water of the said Commencement Bay, wharves, upon which are constructed, in addition to the tracks, switches, turnouts, side tracks, spur tracks, station buildings and freight houses, and the other terminal facilities of its railroad; also warehouses for the accommodation of general commerce and shipping by water, coal bunkers for the accommodation of loading coal into ships and to facilitate the shipment thereof by water, wheat warehouses and grain elevators for the accommodation of the loading of ships with wheat and other grain, and to facilitate the shipment thereof by water, all of which were constructed for the accommodation of commerce and for the loading of ships and to facilitate navigation and all classes of shipment by water; and ever since has continuously maintained and does now maintain and use the same for the benefit of trade, commerce and navigation; that the land hereinbefore described is situated between said plaintiff's right of way and the platted portion of the city of Tacoma, and consists of a high, steep, abrupt bluff, over or across which a railroad could not be properly or safely built; that a railroad built over or across the same would not be practicable to operate so as to reach out and connect with the shipping by water on Commencement Bay; that the space included within the right of way limits designated upon the map hereto attached is the only space between the said bluff and the waters of Commencement Bay upon which the tracks, station buildings, and terminal facilities of said plaintiff's railroad could be located, and the only space within the city of Tacoma where said plaintiff could establish such facilities as are necessary to make possible and facilitate transshipment from rail to vessel and from vessel to rail; that the general warehouses, coal bunkers, and wheat and grain warehouses 63] built and constructed along said *harbor front upon and extending outward from said right of way and said abutting lands are also necessary adjuncts to the proper operating of said railroad and necessary to aid in and facilitate the said transshipment from rail to vessel and from vessel to rail;" and that a point opposite South Second street (about half way along the aforesaid two miles) was the first point on Commencement Bay, in the harbor front of the city of Tacoma, reached by the plaintiff's line of railroad, going westward towards the waters of Puget Sound, "where water can be found of sufficient depth to accommodate the navigation of deep water vessels; and that all of the space included within said right of way of the plaintiff between said point and the point of termination of said plaintiff's line is required for the accommodation of the terminal facilities necessary in the use and operation of plaintiff's said railroad."

The bill then alleged that the plaintiff's wharves, buildings and other facilities had been constructed at an expense of several millions of dollars; and were indispensable to the performance of the duties imposed upon the plaintiff by its charter; that for the public welfare and for the benefit of commerce and navigation it was necessary that they should be constructed and maintained upon and along said water front, and be used by the plaintiff in connection with its railroad; and that, though in large part below high water mark, they were not obstructions, but were aids, to commerce and navigation.

The bill further alleged that the harbor line commissioners, pretending to act under authority of the statutes of the state, of March 28, 1890 (1 Hill's Laws of the State of Washington, title 23, chaps. 1, 3) were about to take final action in the location and establishment of the harbor lines and lines of water ways within the city of Tacoma, in such a way as to include within those lines a part or the whole of the plaintiff's right of way, wharves, warehouses and other improvements, and unless prevented by injunction, would thereby deprive the plaintiff of the use and benefit thereof, without compensation or due process of law, and would cloud the plaintiff's title.

Messrs. **W. C. Jones,** and *William Lair Hill*, for appellant:

The shore of tide waters is not "public lands of the United States," within the meaning of the Constitution or any Act of Congress in which the term "public lands" has been used.

Newhall v. *Sanger*, 92 U. S. 761 (23: 769); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 (23: 634); *Dubuque & P. R Co.* v. *Litchfield*, 64 U. S. 23 How. 66 (16: 500); *Doolan* v. *Carr*, 125 U. S. 618 (31: 844); *McManus* v. *Carmichael*, 3 Iowa, 1; *Mobile* v. *Eslava*, 9 Port. (Ala.) 577; *United States* v. *Pacheco*, 69 U. S. 2 Wall. 587 (17: 865); *Galveston* v. *Menard*, 23 Tex. 349; *Gough* v. *Bell*, 21 N. J. L. 156; *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 (11: 565); *United States* v. *Gratiot*, 39 U. S. 14 Pet. 526 (10: 573); Angell, Tide Waters, 153; 3 Kent, Com. 427.

The precise question whether Congress has the power to make a valid grant of the shore or bed of the tide waters in a territory so as to preclude the future state from the right to assert her sovereignty and proprietorship over the area thus granted has never been presented to a court of last resort. But numerous expressions have been used in the decisions of this court which could not be harmonized with the recognition of such a power on the part of Congress.

Mumford v. *Wardwell*, 73 U. S. 6 Wall. 436 (18: 761); *Barney* v. *Keokuk*, 94 U. S. 324 (24: 224); *Mobile* v. *Eslava*, 9 Port. (Ala.) 602; *Huse* v. *Glover*, 119 U. S. 546 (30. 489); *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 65 (21· 801); *Withers* v. *Buckley*, 61 U. S. 20 How. 84 (15: 816); *St. Clair County* v. *Lovingston*, 90 U S. 23 Wall. 68 (23: 63); *McCready* v. *Virginia*, 94 U. S. 391 (24: 248); *Packer* v. *Bird*, 137 U S. 661 (34: 819); *Hardin* v. *Jordan*, 140 U. S. 371 (35: 428); *Hinman* v. *Warren*, 6 Or. 408, 411; *McManus* v. *Carmichael*, 3 Iowa, 1.

The power of Congress to make such a grant as is contended for by the plaintiff in this case is extremely doubtful.

Pennsylvania R. Co. v. *Canal Comrs.* 21 Pa. 9, *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691 (8: 547); *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 (16: 500); *Rugles* v. *Illinois*, 108 U. S. 526 (27: 812); *Wright* v. *Nagle*, 101 U. S. 791 (25: 921); *Minot* v. *Philadelphia, W. & B. R. Co.* (*Delaware R. Tax*), 85 U. S 18 Wall. 206 (21:8·8); *Minturn* v. *Larue*, 64 U. S. 23 How 435 (16. 574); *St. Clair County Turnp* v. *Illinois*, 96 U. S. 63 (24 651)

Plaintiff has no rights as riparian or littoral proprietor by virtue of anything in the Constitution or laws of the United States, and any claim or right which plaintiff may have in the premises must be based upon the constitution and laws of the state.

Eisenbach v *Hatfield*, 12 L. R. A. 632, 2 Wash 236; *Pierce* v. *Kennedy*, 2 Wash. 324.

A riparian proprietor has no rights whatever in the shores of navigable waters by virtue of his riparian proprietorship which the state cannot ignore.

Harbor Line Comrs. v. *State*, 2 Wash. 530; *State* v. *Harbor Line Comrs.* 4 Wash. 6.

At common law the title to the shores and beds of navigable waters in England was vested in the crown, and the king, without parliamentary sanction, could not make a valid grant of it.

Pollard v. *Hagan*, 44 U. S. 3 How. 212 (11 565); *Mobile* v. *Eslava*, 9 Port. (Ala.) 577; *Mumford* v. *Wardell*, 73 U. S. 6 Wall. 423 (18: 756); *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57 (21: 798); *Bell* v. *Gough*, 23 N. J. L. 624.

Every state in the Union has absolute control over the shores and beds of its navigable waters.

Parker v. *Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Moor* v. *Veazie*, 31 Me. 360; *Clement* v *Burns*, 43 N. H. 609; *Com.* v. *Alger*, 7 Cush. 53; *Bowden* v. *Lewis*, 13 R. I. 189, 43 Am. Rep. 21, *Union Wharf & Pier* v. *Hemingway*, 12 Conn. 293, *Langdon* v. *New York*, 93 N. Y. 129; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 656 (31: 543); *Tinicum Fishing Co.* v. *Carter*, 61 Pa. 21, 100 Am. Dec. 597; *McCready* v. *Virginia*, 94 U. S. 391 (24: 248); *Martin* v. *O'Brien*, 34 Miss. 21, *Hart* v. *Baton Rouge*, 10 La. Ann. 171; *Galveston* v. *Menard*, 23 Tex. 349, *Shirley* v. *Bishop*, 67 Cal. 543; *Willamette Iron Bridge Co* v. *Hatch*, 125 U S. 1 (31: 629); *Tomlin* v. *Dubuque, B. & M. R. Co.* 32 Iowa, 106, 7 Am. Rep. 176.

The 5th Amendment, guaranteeing to the citizen that private property shall not be taken for public use except upon just compensation, only applies to the United States, and not to the states.

Barron v. *Baltimore*, 32 U. S. 7 Pet. 243 (8: 672), *Holmes* v. *Jennison*, 39 U. S. 14 Pet. 540 (10: 579); *Fox* v. *Ohio*, 46 U. S. 5 How. 410 (12: 213); *Smith* v. *Maryland*, 59 U. S. 18 How. 71 (15: 269); *Withers* v. *Buckley*, 61 U. S. 20 How. 84 (15: 816); *Pervear* v *Massachusetts*, 72 U. S. 5 Wall. 475 (18· 608); *United States* v. *Cruikshank*, 92 U. S. 542 (23: 588); *Presser* v. *Illinois*, 116 U. S. 252 (29: 615).

Messrs. **James McNaught** and **A. H. Garland**, for appellee:

The power of Congress to authorize an interstate railroad to build to, or below, high water mark, cannot be questioned.

Savannah v. *State*, 4 Ga. 26; *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96); *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470 (26: 1143); *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1 (24: 708).

The charter of the Northern Pacific Railroad Company, and its supplements, fully authorize the building of the railroad to its present terminus.

Com. v. *Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471; *Mohawk Bridge Co.* v. *Utica & S. R. Co.* 6 Paige, 554; *Farmers Turnp. Co.* v. *Coventry*, 10 Johns. 389; *Indiana Cent. R. Co.* v. *State*, 3 Ind. 421; *Union Pac. R. Co.* v. *Douglass County*, 31 Fed. Rep. 540, *Hazelhurst* v. *Freeman*, 52 Ga. 244; *Tennessee & A. R. Co.* v. *Adams*, 3 Head, 596; *Rio Grande R. Co.* v. *Brownsville*, 45 Tex. 88; *Com.* v. *Erie & N. E. R. Co.* 27 Pa. 359, 67 Am. Dec. 471; *Moses* v. *Pittsburg, Ft. W. & C. R. Co.* 21 Ill. 516; *Union Pac. R. Co.* v. *Hall*, 91 U. S. 343 (23: 428); *Long Branch Comrs.* v. *West End R. Co.* 29 N. J. Eq. 566; *National Docks R. Co.* v. *Central R. Co.* 32 N. J. Eq. 785.

A railroad corporation has the right to acquire lands under water with or without a water front for piers and wharves to facilitate the transportation of freight.

Re New York Cent. & H. R. R. Co. 77 N. Y. 248; *Re New York & W. S. R. Co.* 89 N. Y. 454; *Kerr* v. *West Shore R. Co.* 127 N. Y. 269; *Hanford* v. *St. Paul & D. R. Co.* 7 L. R. A. 722, 43 Minn. 110, 44 Am. & Eng. R. Cas. 205; *Re Staten Island Rapid Transit Co.* 103 N. Y. 251.

The terms "due process of law" and the "law of the land" are held to mean a judicial proceeding regularly conducted, in a court of justice, as contradistinguished from statutory enactment.

Clark v. *Mitchell*, 69 Mo. 627; *Dorman* v. *State*, 34 Ala. 216; *Saco* v. *Wentworth*, 37 Me. 171, 58 Am. Dec. 786.

Mr. Justice **Gray** delivered the opinion of the court:

It may be admitted that the Congress of the United States, while the present state of Washington was a territory, had the power, in chartering a corporation to construct and maintain a railroad from Lake Superior to the Pacific Coast, to grant to the corporation such title or rights in lands below high water mark of tide waters of the territory as might be necessary or convenient for the building, maintenance, use and enjoyment of such structures as might

be required for commerce and transportation on the railroad and by sea, and for transferring goods and passengers between the railroad and sea-going vessels. *Shively* v. *Bowlby, ante*, p. 329; *Re New York Cent. & H. R. R. Co* 77 N. Y. 248; *Re Staten Island Rapid Transit Co.* 103 N. Y. 251.

The more serious question, whether the grant of Congress to the Northern Pacific Railroad Company of the right to construct a railroad to the waters of Puget Sound can be construed as authorizing the corporation to lay out its railroad for two miles, below high water mark, along the shore of a harbor, so as practically to monopolize the use of the waters of the harbor, and of the lands under them, cannot properly be decided in this suit, and we express no opinion upon it.

There can be no doubt that a state may, by its legislature, or through a board of harbor commissioners, establish, for the protection and benefit of commerce and navigation, harbor lines in navigable waters, not inconsistent with any legislation of Congress, limiting the building of wharves and other structures upon lands not already built upon. *Walker* v. *Marks*, 84 U. S. 17 Wall. 648, [21: 744]; *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57, [21: 798]; *Atlee* v. *Northwestern U. Packet Co.* [65] 88 U. S. 21 Wall. 389, 393, *[21:619, 620]; *Com.* v. *Alger*, 7 Cush. 53; *People* v. *New York & S. I. Ferry Co.* 68 N. Y. 71; *State* v. *Sargent*, 45 Conn. 358. Such harbor lines, in order to fulfill their purpose, must be established according to a general system, having in view not only the convenience of approach to the water from the shore, but the effect of the daily ebb and flow of the tide in keeping clear or filling up the harbor. The establishment of general harbor lines, of itself, takes or injures no one's property, and cannot, consistently with the interests of the public, or with the principles of equity, be restrained by injunction. If the state of Washington, or the city of Tacoma, or any public officer or private individual, shall hereafter take active measures, or bring suit, so as to injure or affect the supposed title or rights of the plaintiff, or its use and enjoyment thereof, the dismissal of this bill will not stand in the way of a full and fair trial of the title and rights claimed.

Decree reversed, and bill dismissed, without prejudice.

Mr. Justice **Harlan** and *Mr. Justice* **Jackson** were not present at the argument and took no part in the decision of this case.

THE HUTCHINSON INVESTMENT COMPANY ET AL., *Plffs. in Err.*,
v.
JOHN CALDWELL.

(See S. C. Reporter's ed. 65-71.)

Statutes of Kansas—local law governs land—pre-emption claim.

1. By the statutes of Kansas, illegitimate children could inherit from their father when they had been recognized by him, provided such recognition was general and notorious, or in writing.

2. The disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated.

3. Where one made a pre-emption entry of land in Kansas, but died before consummating his pre-emption claim, those who would have taken the title on the death of the pre-emptor, if the patent had issued to him, are entitled on the completion of the pre-emption after his death, to the land.

[No. 190.]

Argued Jan 3, 4, 1894. Decided March 5, 1894.

IN ERROR to the Supreme Court of the State of Kansas, to review a judgment of that court, reversing the judgment of the District Court of Reno County, Kansas, in favor of defendants, in an action brought by John Caldwell, against L. B. Miller *et al.*, to recover possession of land in that county; the judgment of the supreme court remanded the cause with a direction to enter judgment in favor of Caldwell, against the defendants, for an undivided thirteen twenty-eighths of the land, etc. *Affirmed.*

See same case below, 44 Kan. 12.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought by John Caldwell against D. B. Miller (for whom the Hutchinson Investment Company *was substi- [66] tuted) and L. B. Miller in the district court for Reno county, Kansas, to have his title established and recover possession of the northeast quarter of section twelve township twenty-three south, range six west, in that county. The case was submitted to the district court for trial, a jury being waived, and the court made special findings of fact and gave judgment in favor of the defendants, whereupon the cause was taken on error to the supreme court of Kansas. The supreme court reversed the judgment of the court below and remanded the cause with a direction to enter judgment upon the findings of fact in favor of Caldwell and against the defendants for an undivided thirteen twenty-eighths of the land and damages for its detention, and thereupon this writ of error was brought.

The facts necessary to be stated were in brief these: Robert Titus was married to Phœbe Thomas in Vermont in 1809, and the sole issue of this marriage was Alden W. Titus, born in October, 1810. After the birth of this son, Robert Titus, having gone into the war of 1812, abandoned both wife and child, and, in 1818, without having obtained a divorce, had a marriage ceremony performed between him and Miriam Lee in the state of New York. By her he had five children, of whom the youngest was a daughter, Lois, who married D. B. Miller. From 1850, Robert Titus lived with Mr. and Mrs. Miller, and in 1871 the family went to Reno county, Kansas, and settled there. July 10, 1871, Robert Titus made a pre exemption entry upon the land in controversy, but died before consummating his pre-emption claim. After his death, D. B Miller, administrator, of his estate, filed the necessary papers to complete the pre emption, paying the price thereof, four hundred dollars, to the United States, with his own money, and April 20, 1874, a patent to

the land was issued, to the effect that "the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said heirs of Robert Titus, deceased, and to their heirs, the tract above described; to have and to [67] hold the same, together *with all the rights, privileges, immunities, and appurtenances of whatsoever nature belonging, unto the said heirs of Robert Titus, deceased, and to their heirs and assigns forever." The children of Robert Titus and Miriam Lee were notoriously recognized by Robert Titus as his own, and no question was ever raised as to their legitimacy until in this suit. D. B. Miller claimed the fee simple title to the land by conveyances from the heirs of Alden W. Titus, as the only heir of Robert Titus, deceased; and if the children of Robert Titus and Miriam Lee were heirs within the meaning of section 2269 of the Revised Statutes of the United States, then Caldwell was entitled to recover an undivided thirteen twenty-eighths of the land and damages. The opinion of the supreme court of Kansas, quoted by Horton, *Ch. J.*, is reported in *Caldwell* v. *Miller*, 44 Kan. 12.

Mr. **Almerin Gillet** for plaintiff in error. Court did not desire further argument.

Messrs. S. B. Bradford and *G. A. Huron* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the statutes of Kansas, which was the state of the domicil of Robert Titus at the time of his death, and of the location of the real estate in controversy, illegitimate children could inherit from their father when they had been recognized by him, provided such recognition was general and notorious, or in writing. Kan. Gen. Stat. 786, chap. 33, §§ 22, 23. Under the circumstances disclosed on this record, therefore, the grantees in a deed to the heirs of Robert Titus and to their heirs would have embraced the children of Miriam Lee and their heirs, and this would be so as respects this patent, unless section 2269 of the Revised Statutes, under which it was issued, provided otherwise.

[68] *The section reads: "Where a party entitled to claim the benefits of the pre-emption law dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned." We are unable to concur with counsel for plaintiffs in error that the intention should be ascribed to Congress of limiting the words "heirs of the deceased pre-emptor," as used in the section, to persons who would be heirs at common law (children not born in lawful matrimony being therefore excluded) rather than those who might be such according to the *lex rei sitæ*, by which, generally speaking, the question of the descent and heirship of real estate is exclusively governed. If such had been the intention, it seems clear that a definition of the word "heirs" would have been given, so as to withdraw patents issued under this section from the operation of the settled rule upon the subject.

That rule was thus referred to by this court in *United States* v. *Fox*, 94 U. S. 315, 320 [24: 192]: "It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated;" and although Congress might have designated particular grantees to whom the land should go in the first instance, it did not do so, nor make use of words indicative of any intent that the law of the state should not be followed.

But it is contended that the word "heirs" was used in its common law sense, and it is true that technical legal terms are usually taken, in the absence of a countervailing intent, in their established common law signification, but that consideration has no controlling weight in the construction of this statute. Undoubtedly the word "heirs" was used as meaning, as at common law, those capable of inheriting, but *it does not follow that [69] the question as to who possessed that capability was thereby designed to be determined otherwise than by the law of the state which was both the *situs* of the land and the domicil of the owner.

The object sought to be attained by Congress was that those who would have taken the land on the death of the pre-emptor, if the patent had issued to him, should still obtain it notwithstanding his death, an object which would be in part defeated by the exclusion of any who would have so taken by the local law if the title had vested in him. In other words, Titus intended to acquire the title and had complied, or was proceeding to comply, in good faith, with the requirements of the law to perfect his right to it, and by this statute that right could be perfected after his death for the benefit of those who would have been entitled if his death had occurred after patent instead of before. If the provision admitted of more than one construction that one should be adopted which best seems to carry out the purposes of the Act. *Bernier* v. *Bernier*, 147 U. S. 242 [37: 152].

In this view, it was held in *Brown* v. *Belmarde*, 3 Kan. 41, that the words "heirs of deceased reservees" in the Act of Congress of May 26, 1860 (12 Stat. at L. 21, chap. 61) which operated as an original grant to certain reservees and their heirs, designated the persons who were capable of inheritance by the law of the state when the Act of Congress took effect. And see *Clark* v. *Lord*, 20 Kan. 390.

So the usual rule was recognized in *Lamb* v. *Starr*, 1 Deady, 350. By the 4th section of the Oregon Donation Act (9 Stat. at L. 496) it was provided that if either the settler or his wife died before the issue of the patent, "the survivor and children or heirs of the deceased" should be intitled to the share or interest of the

deceased in equal proportions; and the late *Judge* Deady, referring to the disposal of the share of a deceased wife, said that at the time of her death "there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and, therefore, the subject was regulated by the common law. By this rule her children were 70] her heirs. *The Donation Act does not prescribe who shall be considered the heirs of a deceased settler any more than it prescribes who shall be considered the wife a settler. Both these are left to the local law—the law of Oregon. If the law of Oregon at the time of Nancy's death had prescribed that brothers and sisters should be heirs to the intestate, either exclusive or inclusive of the children, it appears to me that, under the Donation Act, then the children would take to the exclusion of the brothers and sisters. Congress seems to have intended to secure the share of the deceased, to her children, if any, whether the law of Oregon made them heirs or not. Beyond this it left the matter to the local law, by providing the alternative, that in default of children, such share should go to her heirs, whoever they might be. Who would be entitled to claim as heir of the deceased would, in all cases, depend upon the law of Oregon at the time of the death, but persons claiming as children are by the Donation Act preferred to those claiming simply as heirs by the local law." And in *Davenport* v. *Lamb*, 80 U. S. 13 Wall. 418, 427 [22: 655, 657], it was pointed out that the Act of Congress of May 20, 1836 (5 Stat. at L. 31 Rev. Stat. § 2448) providing that where patents had been issued to persons who had died, the title should enure to and become vested in "the heirs, devisees, and assigns" of the deceased, made the title enure in a manner different from that provided by the Donation Act, upon the death of either owner before the issue of the patent, because the survivor of the husband or wife was not his or her heir by any law of Oregon at the time of the death in that case.

There is nothing to the contrary in *McCool* v. *Smith*, 66 U. S. 1 Black, 459 [17: 218], which was a case coming to this court from Illinois, in which it was held that the meaning of the words "next of kin" was to be determined by the common law of England, because the common law in that regard was then in full force in that state.

The language of the acts of Congress has not been uniform in the matter of the disposition of the public domain, after the death of the principal beneficiary. Thus under section 2443, in respect of bounty lands granted to officers 71] and soldiers of *the Revolutionary War or soldiers of the War of 1812, the patent when applied for by part of the heirs was to be issued in the name of the heirs, generally, and to enure to the benefit of the whole in such portions as they were severally entitled to by the laws of descent in the state or territory of the decedent's domicil; and other illustrations might be given.

These differences, however, cannot affect our conclusion here, which, under the circumstances, accords with that of the supreme court of Kansas.

Judgment affirmed.

THE PLANT INVESTMENT COMPANY, *Appt.*,
v.
THE JACKSONVILLE, TAMPA & KEY WEST RAILWAY COMPANY, *et al.*

(See S. C. Reporter's ed. 71-77.)

Suit by assignee of chose in action—meaning of the term "assignee"—contract for construction of railroad—dismissal of suit.

1. By U. S. Rev. Stat. § 629 the circuit court has no jurisdiction of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of foreign bills of exchange.
2. The term "assignee" in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest.
3. Where the contract under which the complainant claims is with the defendant railroad company for the construction of its road, and such contract transferred to complainant the beneficial interest of that company in the lands covered by its contract with the state trustees, the suit is within the prohibition of U. S. Rev. Stat. § 629.
4. Where the circuit court had no jurisdiction of the case and dismissed the suit generally for that reason, this court will reverse its decree and remand the case with direction to dismiss the suit for want of jurisdiction and without prejudice.

[No. 226.]

Argued Jan. 24, 1894. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Florida, sustaining a demurrer to the complaint, and dismissing a suit in equity brought by the Plant Investment Company, against the Jacksonville, Tampa & Key West Railway Company, to enforce the conveyance of certain lands in Florida, pursuant to the contract of the Trustees of the Internal Improvement Fund of Florida, made with said railway company, etc. *Reversed, and cause remanded with direction to dismiss the suit for want of jurisdiction and without prejudice.*

The facts are stated in the opinion.

Messrs. **John E. Hartridge** and *R. G. Erwin*, for appellant.

Messrs. **C. M. Cooper** and *J. C. Cooper*, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

*This case comes to us on appeal from 72] the decree of the circuit court for the Northern District of Florida, sustaining the demurrer of the bill of complaint and dismissing the suit. The bill was brought to enforce the conveyance of certain lands in Florida, pursuant to the contract of the trustees of the internal im-

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1:640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

provement fund of Florida, made pursuant to certain statutes of that state, with the Jacksonville, Tampa & Key West Railway Company, a corporation created under its laws, the beneficial results of which contract are claimed by the complainant.

The facts out of which the suit arises are given at length in the bill, and, as there set forth, may be briefly stated so far as is necessary for the presentation of the question of jurisdiction, upon which the demurrer turned.

The Plant Investment Company, the complainant, is a corporation under the laws of Connecticut, having its principal office at New Haven. The defendants are the Jacksonville, Tampa & Key West Railway Company, and the trustees of the internal improvement fund of Florida, citizens and residents of that state.

The bill of complaint sets forth: That the general assembly of Florida, by an act of January 6, 1855, "to provide for and encourage a liberal system of internal improvements in the state," declared that the lands granted to the state by the acts of Congress of March 3, 1845, and September 28, 1850, together with the proceeds thereof, accrued or that might thereafter accrue, should be set apart and made a separate fund, to be called the internal improvement fund of the state; and that, for the purpose of assuring a proper application of the fund for the objects mentioned, the lands and the funds arising from the sale thereof, after paying the necessary expenses of selection, management, and sale, should be vested in five trustees, to wit, in the governor of the state, the comptroller of public accounts, the state treasurer, the attorney general, and the register of state lands, and their successors in office, to hold the same for the uses provided in the act; and by its twenty-ninth section, the general assembly reserved the right to grant to such railroad companies, 73]thereafter chartered, as *they might deem proper, upon their compliance with the provisions of the act as to the manner of constructing the road and the drainage of the lands, the alternate sections of the "swamp and overflowed lands" for six miles on each side of the line of the road of any such company. That the Jacksonville, Tampa & Key West Railway Company was incorporated in March, 1878, under the general corporation act of the state of February, 1874, by the name of the Tampa, Peace Creek & St. John's River Railroad Company. That the legislature of Florida by act of March 4, 1879, granted to that company alternate sections of the lands given to the state by the Act of Congress of September 28, 1850, within six miles on each side of the track or line of its road, provided that the company should comply with the specified provisions of the act of January 6, 1855; and further granted to the company, in consideration of the greatly improved value which would accrue to the state from the construction of the road, ten thousand acres of the same class of lands for each mile of road it might construct, such lands to be of those nearest to the line of the road, its branches and extensions, this last named grant being made subject to the rights of all creditors of the internal improvement fund and to the trusts to which the fund was applicable under the act of January 6, 1855. That on the 27th of June, 1881, the Tampa, Peace Creek & St John's River Railroad Company, by a resolution of its board of directors, changed its corporate name to Jacksonville, Tampa & Key West Railway Company, and on the 23d of August, 1881, filed a plat of its route with the trustees of the internal improvement fund; and on the 1st of September, 1881, the trustees passed a resolution reserving from sale for the benefit of the company the even numbered sections of land for six miles on each side of its line, and again on the 21st of September, 1881, acting under the provisions of the 'act of the legislature of March 12, 1879, "to amend section 26 of the act 'to provide a general law for the incorporation of railroads and canals,' and to grant aid to railroads and canals incorporated under said act," they passed a resolution to reserve from sale, to further aid in the construction of the road, a quantity *of lands in the [74 even numbered sections within twenty miles of said road sufficient to supply the deficiency existing in the even numbered sections within six miles of the road.

The bill further avers that in 1883 the complainant entered into a contract with defendant company to construct the southern division of its road, to extend from the waters of Tampa Bay, in Hillsborough county, to Kissimmee City, in Orange county, with a branch to or near Bartow, in Polk county, and by that contract was to receive, as part of the consideration for the construction of the road, all the alternate sections of land to which defendant company was or might be entitled under any of the aforesaid acts and any of the laws of Florida for its construction; that the resolutions passed by the board of trustees September 21, 1881, had been published in the report of its official proceedings, and submitted to the legislature in January, 1883, with the reports of the heads of departments of the state government, and went forth to the world unchallenged as the official action of the trustees, with the silent approval of the legislature; and the complainant, relying on the provisions of the acts of March 4 and 12, 1879, and the resolutions of the trustees, was induced to enter into its contract with the defendant company, believing that it would receive all the lands contemplated by those acts and resolutions; that to carry out the contract made between the complainant and the defendant company, the board of directors of that company passed a resolution in November, 1883, requesting and directing the trustees of the internal improvement fund to convey to the complainant all the alternate sections of land to which the defendant company was or might be entitled by reason of the construction of the said railroad from Tampa to Kissimmee City and its branch, and a copy of that resolution was presented to the trustees and entered in the minutes of their proceedings; that, as soon as practicable, after making the contract, complainant commenced the construction of the road and completed the line from Tampa to Kissimmee, a distance of seventy-five miles, by the following January; and the completion of the road being *reported to the trustees, [75 the state engineer was directed to inspect the same, which he did, and approved it as being

built according to the specifications required; whereupon the trustees accepted the same.

That when the complainant applied for the lands which it claimed under the contract with defendant company, it discovered that not only the lands in the even sections within twenty miles, but also within six miles of the road, had been selected by one Hamilton Disston, to whom the board of trustees had contracted to sell four million acres of land to pay off a large indebtedness of their fund, as a part of his purchase; that the complainant protested to the trustees against permitting said Disston to take these lands, but the trustees decided that the claim of said Disston for any lands outside the six mile limit of said road should take precedence of the claim of the defendant company, and of the complainant contractor thereunder.

The bill further sets forth that in February, 1884, the trustees conveyed to the complainant the lands granted to the state by the Act of September 28, 1850, lying in the even numbered sections and within six miles of the line of that portion of the road constructed which then remained undisposed of, viz: 123,481 acres, for the entire seventy-five miles of the road; and that the complainant is advised and believes that, under the grant of the alternate sections, the defendant company is entitled to 3840 acres of land for each mile of road if constructed, and that, where there is not sufficient land in the alternate sections within six miles of the line of the road to make that quantity, the deficiency can be made up from the alternate sections within twenty miles, under the Act of March 12, 1879, and resolution of September 21, 1881; and that the complainant under its contract with the defendant company has the same right for such part of the road as it has constructed, and alleges that there is a deficiency in the quantity of land to which it is entitled of about 160,000 acres. After stating other matters not material for the consideration of the question presented for our determination, the bill prays that the trustees of the 76] internal *improvement fund be compelled to convey to complainant the necessary lands to make up to the complainant the deficiency claimed, according to the terms of their contract with the defendant railroad company; the complainant asserting its right to the lands necessary to make up this deficiency by virtue of its contract with the defendant railroad company for the construction of the road.

To this bill the defendant trustees of the internal improvement fund demurred, on the ground, among others, that the court had no jurisdiction in the premises.

The contract between the trustees of the internal improvement fund of Florida and the defendant railroad company, being a contract between citizens and residents of the same state, could not be enforced by suit in a Federal court. The complainant, the Plant Investment Company, claims the benefit of that contract, and seeks to have it enforced for its benefit. It occupies, in fact, the position of assignee of that contract, its only right to the lands depending upon its validity. But it cannot enforce the contract in the Federal court; because, by section 629 of the Revised Statutes, it is provided that no circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the same provision is contained in the Act of March 3, 1887, amendatory of the Act to determine the jurisdiction of the circuit court of the United States. 24 Stat. at L. chap. 373, p. 552. As we said in the case of *Shoecraft* v. *Bloxham*, 124 U. S. 730, 735 [31: 574] "the terms used—'the contents of any promissory note or other chose in action'—were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court." And in support of this doctrine the case of *Corbin* v. *Black Hawk County*, 105 U. S. 659 [26: 1136] was cited. In that case a suit brought to enforce the specific performance of *a con- [77 tract was held to be a suit to recover the contents of a close in action, and therefore could not be maintained under the statute in question in a Federal court in the name of the assignee, if the assignor could not have maintained such suit.

The complainant is not, it is true, designated in the pleadings or in any formal instrument as assignee of the contract between the trustees of the internal improvement fund and the defendant railway company, but the term "assignee" in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest. The contract under which the complainant claims, to wit, its contract with the defendant company for the construction of the road, transferred to it the beneficial interest of that company in the lands covered by its contract with the trustees, and therefore brings the suit within the prohibition of section 629 of the Revised Statutes.

It follows that the circuit court had no jurisdiction of this case in the name of complainant, but as the decree below dismissed the bill generally, that decree is reversed at the costs of appellant, and the cause remanded with a direction to dismiss the bill for want of jurisdiction and without prejudice. So ordered.

THE ST. LOUIS & SAN FRANCISCO RAILWAY COMPANY, *Plffs. in Err.*, v. GERHARD SCHUMACHER.

(See S. C. Reporter's ed. 77-81.)

When railroad not liable for injuries to an employé.

Where the foreman and the trainmaster on a railroad had warned the men employed thereon, not to ride on the flat cars and had provided a caboose in which plaintiff, a laborer upon a gravel train, was told it was safer to ride, and he selected a place he knew to be dangerous, when cars were being coupled; sat with his legs hanging over the side of a flat car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he, he cannot recover of the company for being thrown off and injured by the backing down of the train at too great speed.

[No. 239.]

Submitted Feb. 1, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment for the plaintiff, Gerhard Schumacher, in an action brought by him against the St. Louis & San Francisco Railway Company, for personal injuries received by him while in the employ of the defendant railway company, as a laborer upon a gravel train. *Reversed, and cause remanded for further proceeding.*

See same case below, 39 Fed. Rep. 174.

Statement by *Mr. Justice* **Brown**:

78] *This was an action by Schumacher to recover for personal injuries received by him while in the employ of the defendant railway company as a laborer upon a gravel train, which was engaged in "surfacing" or ballasting defendant's tracks in the Indian territory.

The complaint alleged that the plaintiff boarded the train at Tuscahoma, to aid in unloading the gravel when the car should reach its destination; that when the train reached Talihina, it was stopped on the main track to take [illegible]eral cars loaded with gravel which [illegible] on the side track; that after these c[illegible] witched t[illegible]ain track from t[illegible]k, they w[illegible]se from the en[illegible]n with g[illegible]d violence d[illegible] until th[illegible]e train on w[illegible]iff was [illegible]he brakeman [illegible]o dimi[illegible] check th[illegible]n of a [illegible] th[illegible] the d[illegible]

or might with proper diligence have had notice; and that by reason of the negligence of the defendant in permitting such defective brake to be used, plaintiff was, by the striking of the cars against the train on which he was riding, violently thrown from the car upon the track, the wheels running over his left foot and inflicting painful and serious injuries. In a supplemental complaint, plaintiff further charged the defendant with negligence in failing to make and enforce suitable regulations as to the manner of switching and making up trains, regulating the speed thereof, and providing a sufficient number of brakemen to check and control the cars.

The answer put in issue all these allegations and pleaded contributory negligence on the part of the plaintiff.

Upon the trial the case was submitted to the jury, who returned a verdict for the plaintiff in the sum of $8000, upon which judgment was entered, and defendant sued out this writ of error.

Messrs. **George R. Peck, Edward D. Kenna, A. T. Britton** and **A. B. [illegible]** for plaintiff in error:

When an employé needlessly [illegible] in a place of danger and, by [illegible] ing himself, is injured, he [illegible] tributory negligence and [illegible] the master therefor; and if [illegible] use his eyes and ears when [illegible] reason to anticipate action [illegible] ers which may make his [illegible] one, and is injured by [illegible] pated act being [illegible] unexpectedly increasing [illegible] could have discovered [illegible] by reasonable use of [illegible] have saved himself [illegible] cover from the [illegible]

Abend v. *Terre* [illegible] 53 Am. Rep. [illegible] *Jones*, 95 U. S. [illegible] *R. Co.* v. *Mar*[illegible] *ten*, 82 Mich. [illegible] *Pac. R. Co.* [illegible] *Chicago, R. I.* [illegible] Am. & Eng. R. Ca[illegible] v. *Greiner*, [illegible] Cas. 397; [illegible] 14 L. R. A. [illegible] R. Cas. [illegible] (26: 840).

Mr. **A. E.** [illegible] ror:

No [illegible] defendant [illegible] therefore [illegible] sufficient.

The [illegible] ed [illegible] is [illegible] ep [illegible] 34 [illegible] hat [illegible] an- [illegible] am- [illegible] d;" [illegible] re- [illegible] the [illegible] need [illegible] was [illegible] plain-

mon, 147 U. S. 571 (37: 284); 1 Shearm. & Redf. Neg. § 99. See opinion of the court below in this case, 39 Fed. Rep. 174.

There are no degrees of negligence. Gross negligence is simply negligence. It is want of due care according to circumstances.

Milwaukee & St. P. R. Co. v. *Arms*, 91 U. S. 494 (23: 376); 16 Am. & Eng. Enc. Law, 426.

That the evidence was ample to show a case of negligence on the part of the defendant, is quite obvious. However the defendant's omission of due care may be denounced as willful, gross, reckless or wanton, it will still remain he was guilty of negligence.

Chicago & N. W. R. Co. v. *Bayfield*, 37 Mich. 205; *Chicago, St. P., M. & O. R. Co.* v. *Lundstrom*, 16 Neb. 254, 49 Am. Rep. 718; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 (28: 787).

79] **Mr. Justice* **Brown** delivered the opinion of the court:

We do not find it necessary to consider in detail the specification of errors assigned to the charge of the court in this case, as we are of opinion that, upon the conceded facts, there was such contributory negligence on the part of the plaintiff as required the court to direct a verdict for the defendant.

The testimony showed that plaintiff was employed as a common laborer by defendant; that it was his duty to assist in loading cars with gravel and then ride down on the train to that portion of the track where the gravel was to be used, and there to assist in unloading and placing the gravel between the ties. At the time of his injury, plaintiff was sitting on the end of a loaded flat car next to the caboose, with his feet hanging over the side of the car. The train had stopped at Talihina, a station between the gravel pit and its destination, to take up ten additional carloads of gravel, which were standing upon a side track, the original train consisting of four cars and a caboose. On arriving at Talihina, the engine left the cars and caboose on the main track, went in on the siding, coupled on thirteen cars that were standing on the side track, three of which next the engine were not wanted. When the engine and thirteen cars got on to the main track, the ten cars that were wanted were cut loose from the engine, and allowed to go down the grade. The grade proved to be a little steeper than the brakeman in charge of the cars supposed, and, to use his own words, "The cars got the start of me a little, and when I saw they were going to hit a little too hard, I hallooed to the men 'Look out!' I saw they were going to hit harder than I thought, harder than cars ought to strike in making a coupling." They came in contact with that portion of the train on which plaintiff sat with a violent jar or shock, which caused him to lose his balance, fall with his feet upon the track, when the wheels passed over a portion of his right foot, necessitating amputation.

The testimony showed that the train was manned by the usual complement of trainmen, 80] namely, a conductor, two *brakeman, an engineer, and a fireman, and that each was competent. At the time of the injury, the conductor was near the forward end of the four stationary cars for the purpose of making the coupling. The engineer and fireman were in their proper positions upon the engine. One brakeman was with the engine and three cars, which were being replaced on the side track; and the other was on the ten cars which were to be attached to the train. There was no evidence of any defect in the brakes, machinery, or appliances, or any failure to make or enforce suitable regulations, and these issues were not submitted to the jury. There was evidence tending to show that the place where the plaintiff sat when he fell was a dangerous place to be when cars were being coupled, and plaintiff testified that he knew that they were about to couple some cars, but was not watching and did not see the other cars come down. There was evidence tending to show that both the brakeman and the foreman shouted to the men on the flat cars to look out, and that they were distinctly heard by persons in a less favorable place to hear than the plaintiff. There was also evidence tending to show that the men had been warned by their foreman and by the train master not to ride on the flat cars, but to ride in the caboose, and that the conductor had told this same gang of laborers that morning that they had better ride in the caboose, and that there was plenty of room there. There was also testimony that the men often rode on flat cars with the knowledge of the foreman and conductor.

The gist of all this testimony is that, notwithstanding the foreman and the trainmaster had warned the men not to ride on the flat cars, and had provided a caboose in which he was told it was safer to ride, plaintiff selected a place he knew to be dangerous, when cars were being coupled, sat with his legs hanging over the side of the car in a position in which he could be easily jostled off, and paid so little attention to what he knew was going on that he not only did not watch or see the other cars coming down, but failed to hear a warning shout heard by others in the vicinity, at least one of whom was more remote than he. Under such circumstances, *he has no right to [81 call upon the company to pay him damages. Had he been riding in the caboose he would have been safe. Had he taken the precaution to notice what was going on, he could not have failed to see that a collision was imminent, and could have jumped off. The only negligence chargeable against the defendant was in backing the train down at too great speed. But, giving to his own conduct as well as that of the defendant the construction most favorable to the plaintiff, there was no theory upon which it was proper to submit the case to the jury. There was no negligence by the defendant shown as occurring subsequent to the negligence of the plaintiff, since his negligence was continuous down to the moment of the injury. Neither was there any evidence of a willful or intentional negligence on the part of the defendant for the purpose of injuring the plaintiff. None such was averred in the complaint, and none such was shown in the testimony. The case of *Baltimore & O. R. Co.* v. *Jones*, 95 U. S. 439 (24: 506], is directly in point, and is decisive of this. See also *St. Louis & S. F. R. Co.* v.

Marker, 41 Ark. 452; *Glover* v. *Scotten*, 82 Mich. 369.

The judgment of the court below must be reversed, and the cause remanded with directions to set aside the verdict and for further proceedings in conformity with this opinion.

SAM LAZARUS, *Plff. in Err.*, *v.* WILLIAM WALTER PHELPS.

(See S. C. Reporter's ed. 81-87.)

Liability for pasturage lands.

1. Where one encloses the lands of another with his own, in a common enclosure, and puts therein to pasture more cattle than are sufficient to consume the grass on his own lands, he is liable to such other for the rental value of such other's lands so enclosed; although, by the laws of the state, the owner of land trespassed upon by cattle cannot recover damages for the trespass, unless his land is fenced.
2. Where the facts show an intent by defendant to avail himself of the pasturage of plaintiff's lands, the law raises an implied promise to pay for such use and occupation of the lands by him.

[No. 225.]

Argued and Submitted Jan. 23, 24, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of plaintiff, William Walter Phelps, against the defendant, Sam Lazarus, for the rental value of certain lands in Texas. *Affirmed.*

Statement by *Mr. Justice* **Brown**:

82] *This was an action brought in the Circuit Court of the United States for the Northern District of Texas, September 17, 1888, by William Walter Phelps, to recover of the plaintiff in error, Sam Lazarus, the rental value of 176,000 acres of land in Texas, from April 15, 1887, at eight cents per acre per annum. The facts of the case, as shown by the pleadings and proofs, were substantially as follows:

In 1882 Phelps's vendor leased these lands, the sections of which alternated with sections owned by the Texas public school fund, to the firm of Curtis and Atkinson for five years, at two cents per acre, for grazing purposes. It was agreed in the contract of lease that all improvements made by the lessee should become the property of the lessor at the expiration of the lease. Curtis and Atkinson, in conjunction with adjoining owners, built a fence around the north, east, and west sides of their land. These fences included the school sections as well as those of Phelps. They did not separate the sections leased by them from the alternate school sections by fence, nor did they apply for a lease of these alternate sections from the state until June 12, 1887. Before the lease was granted, however, Curtis and Atkinson sold nearly all the cattle and horses owned by them on the enclosure to Sam Lazarus, plaintiff in error and defendant below. Lazarus applied to the state for a lease of these alternate school lands, and, in September, 1887, a lease was delivered to him to take effect from the date of the application of Curtis and Atkinson, June 12, 1887. There was a penalty under the law of Texas for using the public lands without a lease.

Phelps became the owner of 168,300 acres April 15, 1887, and Curtis and Atkinson held under him as tenants at will up to the date of the sale of their stock. After the purchase of this stock by Lazarus, some negotiations were entered into with Phelps for a lease of the lands, but nothing came of them. Subsequently he secured the lease of the alternate school sections to the amount of 162,270 acres.

In the fall of 1887, the owners of the land on the south of these sections in dispute erected a fence dividing their lands from those of Phelps, thus entirely enclosing the 168,300 acres belonging *to Phelps and the alternating [83 school sections in one continuous tract of land.

During the tenancy of Curtis and Atkinson they had erected two tanks, one upon the land of Phelps. The location of the other was not proven. These tanks were subsequently used by Lazarus. After the purchase by defendant of the stock of Curtis and Atkinson, he contracted to pasture upon this land, besides his own stock, one herd of 3500 head, for which he received $5000 for the first year, and $1.65 per head until purchased by him in 1889; and 3000 calves for which he received $2500. The cattle owned and controlled by Lazarus were not confined to the school sections leased by him, but grazed upon the lands of Phelps; and the undisputed proof was that the entire tract was overstocked, but in no other way than by having his cattle in this enclosure, did Lazarus prevent the owner of the 168,300 acres from taking possession or from grazing other stock thereon.

Upon this state of facts and proof as to the rental value of the land, Phelps secured a verdict and judgment for $8417. The defendant thereupon sued out this writ of error.

Mr. **Henry C. Coke** for plaintiff in error.

Messrs. **Leigh Robinson** and *Leake, Henry & Reeves* for defendant in error.

Mr Justice **Brown** delivered the opinion of the court:

But a single error is assigned to the action of the court below, and that is to the charge that defendant was liable to the plaintiff for the value of the use and occupation of the plaintiff's land, if he had in the common enclosure more cattle than were sufficient to consume the grass on the lands leased of the state of Texas by the defendant.

The defendant, upon the contrary, requested the court to charge that "in Texas, the law is that the owner of stock is not required to keep them in an enclosure, or to prevent *them [84 from ranging on the land of others; and that the owner of land trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass, unless his land is fenced;" and further, "that to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common enclosure around the lands of plain-

tiff and those leased by defendant and no fence separating such lands, then the plaintiff cannot recover." The views of the court below, concisely stated, are contained in the instruction that if the defendant kept the enclosure so overstocked, as plaintiff claimed, then he is liable for the value of the rent of plaintiff's lands. The request of defendant, taken in connection with the instruction given, presents the respective views of the law entertained by counsel upon either side, and upon which the case turned.

The rule of the common law was admitted to be that a land owner is not bound to fence his land against the cattle of others. The owner of such cattle must confine them to his own land, and will be liable for trespasses committed by them upon the unenclosed lands of others. This rule, however, has been modified in Texas by Revised Statutes of Texas, article 2431, which enacts that "every gardener, farmer, or planter shall make a sufficient fence about his clear land under cultivation at least five feet high, and make such fence sufficiently close to prevent hogs from passing through the same." And by article 2434: "If it shall appear that the said fence is insufficient, then the owner of such cattle, horses, hogs, or other stock shall not be liable to make satisfaction for such damages." Construing this statute, the supreme court of Texas held, in *Sabine & E. T. R. Co.* v. *Johnson*, 65 Tex. 389, 393, that "since the fence law of 1840 the owner of unenclosed land has no right of action for the intrusion of stock upon it. . . . The appellee had no right to graze his cattle on these leagues, but in doing so was guilty of no actionable wrong. In letting his stock range on this land he asserted no right in the land and acquired none." See also *Pace* v. *Potter*, 85] 85 Tex. 476. This custom of *permitting cattle to run at large without responsibility for their straying upon the lands of others was also recognized by this court in *Buford* v. *Houtz*, 133 U. S. 320 [33: 618].

The object of the statute above cited is manifest. As there are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands has been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land, adjoining an unenclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such a case. In *St. Louis Cattle Co.* v. *Vaught*, 1 Tex. Civ. App. 388, 390, the court observed: "This doctrine, however, does not authorize the owner of cattle by affirmative conduct on his part to appropriate the *use of [86 such lands to his own benefit. He will not be permitted thus to ignore the truth that every one is entitled to the exclusive enjoyment of his own property. In this case, the appellant, by means of a fence constructed or maintained by it, enclosed the lands of the appellee in such manner as to reap from it those benefits, which as a rule are incident exclusively to ownership. The use and enjoyment of the property under such circumstances import necessarily the idea of liability." In this case it was held that, where the owner of several tracts of land, in enclosing them within a larger enclosure, necessarily enclosed a tract belonging to another, this was such an appropriation of the lands of such person as rendered the defendant liable for the reasonable value of the tract so enclosed. See also *Kerchacker* v. *Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Union Pac. R. Co.* v. *Rollins*, 5 Kan. 167, 177; *Larkin* v. *Taylor*, 5 Kan. 433; *Delaney* v. *Errickson*, 11 Neb. 533; *Otis* v. *Morgan*, 61 Iowa, 712; *Willard* v. *Mathesus*, 7 Colo. 76.

In the case under consideration, the testimony showed that for five years before the plaintiff acquired title to the lands in question, they had been leased to Curtis and Atkinson for pasturage purposes, at a rental of two cents per acre, with the stipulation that all permanent improvements erected by the lessees during the term should, at the end of the term, remain on the leased lands, and become the property of the lessor; and that they were about leasing the alternate sections of school lands when they failed; that in September, 1887, defendant, who, in the June previous, had bought out the stock of Curtis and Atkinson, together with all their interest in the fences, corrals, water tanks (one of which was upon plaintiff's land) and other property within the common enclosure of plaintiff and the public school lands, leased of the state the alternate sections of school lands within this enclosure for four years at four cents per acre. It seems, too, that negotiations were had, after defendant bought the cattle and horses from Curtis and Atkinson, between him and the plaintiff's agent respecting the lease of plaintiff's lands, but no agreement was reached between the parties as to the price to be paid, and the *same were not leased by the de- [87 fendant or held by him as tenant of the plaintiff. The testimony further showed that, from

the time defendant obtained the lease of the state until the date of the trial, the stock owned or controlled by him was more than sufficient to consume the grass on the plaintiff's lands, and the sections alternating therewith leased by the defendant from the public school fund. Defendant not only pastured his own stock upon these lands but 3500 head of cattle owned by one Evans, for which he received $5000 the first year, and for the remaining period up to the year 1889, when he purchased them, $1.65 per head, as well as $2500 for the pasturage of 3000 calves belonging to another party.

These facts certainly showed an intent on the part of the defendant to avail himself of the pasturage of plaintiff's lands, and fully authorized the instruction of the court to the jury that, if the defendant overstocked the enclosure, he should be held liable to the plaintiff for the rental value of the lands. In such case the law raises an implied promise to pay a reasonable sum for the use and occupation of the lands, even though negotiations for a new lease had proven unsuccessful. *Schuyler* v. *Smith*, 51 N. Y. 309, 10 Am. Rep. 609.

There was no error in the action of the court below, and its judgment is, therefore, affirmed.

ALFRED ROWE ET AL., *Plffs. in Err.*,
v.
WILLIAM WALTER PHELPS.

(See S. C. Reporter's ed. 87, 88.)

Dismissal of writ of error.

Where there is no assignment of errors sent up with the record in the case, as required by Rev. Stat. § 997, and no "specification of the errors relied upon," as required by Rule 21 of this court, and no such plain error as the court, at its option, will review, the writ of error will be dismissed.

[No. 237.]

Argued and Submitted Feb. 1, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of William Walter Phelps, plaintiff, in an action brought by him against Alfred Rowe *et al.*, to recover the rental value of certain sections of land, depastured by defendants. *Dismissed.*

Statement by *Mr. Justice* **Brown:**

This was, as in the preceding case, an action by the defendant in error to recover the rental value of certain sections of land alleged to have been depastured by the plaintiffs in error, constituting the firm of Rowe Bros.

*Upon the trial of the case the jury re- [88
turned a verdict for the plaintiff in the sum of $7739, for which judgment was entered, and defendant sued out this writ of error.

Mr. **M. L. Crawford** for plaintiff in error.

Messrs. **Leigh Robinson** and *Leake, Henry & Reeves* for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

There is no assignment of errors sent up with the record in this case, as required by Rev. Stat. § 997, and no "specification of the errors relied upon," as required by Rule 21 of this court. This rule requires that the specification "shall set out separately and particularly each error assigned and intended to be urged," and there is no such "plain error not assigned or specified," as calls upon the court to exercise its option to review the questions involved. It would seem that unless the statute and rule are be entirely disregarded, this writ of error must be dismissed, and it is so ordered.

AUGUSTUS R. GUMAER ET AL., *Appts.*,
v.
THE COLORADO OIL COMPANY.

(See S. C. Reporter's ed. 88-95.)

Action for injunction.

Where one purchases a lease of oil lands and takes the lease to himself in his own name, letters and telegrams sent by him to another proposing to sell certain rights in the lease to such other, and the latter's answers thereto, are evidence to show that the purchaser did not buy the lease as the agent or trustee of the latter.

[No. 50.]

Argued and Submitted Oct. 24, 1893. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Colorado, in a suit in equity brought by the Colorado Oil Company, plaintiff, against Augustus R. Gumaer *et al.*, defendants, restraining the defendants from incumbering a certain leasehold estate, and from consuming any oil or mineral from said estate, or disturbing complainant's possession thereof, and ordering that certain leases be canceled and annulled, etc. *Case remanded to the court below, with direction to set aside the decree, and dismiss the suit.*

Statement by *Mr. Justice* **Shiras:**

The Colorado Oil Company describing itself as a corporation organized and existing under the laws of New York, brought its bill in equity in the Circuit Court of the United States *for the District of Colorado, on June [89
15, 1887, against Augustus R. Gumaer, a citizen of Colorado, and the Florence Oil Company of that state, praying for an injunction to restrain the defendant Gumaer from assigning or encumbering a certain leasehold estate, with certain rights and privileges thereto annexed, and to restrain the defendants and each

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NOTE.—*As to exception, when must be taken, to be available on review*, see note to Phelps v. Mayer, 14: 643.

As to what particularity in exceptions is necessary in order to a review in appellate court, see note to Moore v. Bank of the Metropolis, 10: 172.

That, in equity cases, admission of illegal evidence is not, of itself, ground of reversal or a bill of exception, see note to Field v. United States, 9: 94.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, see note to Parks v. Turner, 13: 883.

of them from consuming any oil, gas, metal, or mineral from the leasehold premises, or disturbing the complainant's possession thereof, or destroying its property thereon. The court entered an order on the following day, restraining the defendants from doing any of the acts which the complainants sought to have enjoined until the 27th of the same month, the day set for a hearing of the cause. On that day it was ordered, in accordance with the stipulation of counsel, that the restraining order should remain in force until the final hearing, and that the defendants should answer to the merits on or before September 15, 1887. On the 12th of that month the defendant Gumaer filed his answer, and on the 3d of the following month the company filed a formal replication thereto.

A judgment *pro confesso* against the Florence Oil Company was entered on February 6, 1888. The cause as against Gumaer was heard in the said court upon bill, answer, and evidence, and on December 22, 1888, the court entered a final decree embodying the relief by injunction prayed for in the bill, and ordering that a lease from Stephen J. Tanner to Gumaer, dated October 6, 1886, be surrendered and delivered, for the use of the complainant, into the office of the clerk of the court, and that two other leases, dated respectively October 12, 1886, and December 20, 1886, by which it appeared that Gumaer had granted and demised certain parts of the property to the company, be cancelled and annulled, and all parties thereto be relieved from the conditions thereof. The defendants appealed from that decree to this court.

Mr. **Thomas M. Patterson** for appellants.

Messrs. **E. T. Wells, R. T. McNeal** and *Jno. G. Taylor* for appellee.

90] **Mr. Justice* **Shiras** delivered the opinion of the court:

The Colorado Oil Company, a corporation organized under the laws of the state of New York, and whose purpose was to mine, produce, refine, and deal in petroleum and its products, procured from the owners of lands, situated in the county of Fremont and state of Colorado, leases authorizing said company to sink wells on such lands and to extract oil therefrom. On or about the 18th day of July, 1886, the company appointed Augustus R. Gumaer, then a resident of Cañon City, Colorado, its general manager in that state.

Gumaer acted as general manager of the company until December 21, 1886, when his resignation was accepted by the company, through its vice president, in a letter containing the following terms: "In accepting your resignation as general manager of the Colorado Oil Company for Colorado, I beg to express to you the regrets of the company and myself in losing your valuable services. You accepted the position when the company was in a precarious condition. Under your able management, its affairs to-day are in a much different condition, and prospects brighter than ever. I beg to express to you, for the company and myself, our thanks for the interest which you have taken in our affairs; and I beg to express the wish that our friendly relations may always continue."

On the 15th day of June, 1887, the Colorado Oil Company filed a bill of complaint against Gumaer and the Florence Oil Company, in which it sought to have Gumaer declared a trustee for it as to a certain lease for oil lands in Fremont county, which had been granted by one Stephen J. Tanner to Gumaer in his own name, but in such circumstances as that in equity it was the property of the company. The bill further alleged that certain leases of portions of the Tanner tract, subsequently executed by Gumaer to the Colorado Oil Company were in fraud of the company's rights in the entire tract, and intended to operate as a fraud and deceit. It was also alleged that the Florence Oil Company, organized and controlled by Gumaer, had entered into possession of a part of the tract.

*A decree *pro confesso* was taken against [91 the Florence Oil Company. Gumaer answered, averring that the lease by Tanner to him was in his own right, and not as trustee, and that the leases of portions of the tract to the complainant had been made in good faith, and were binding, and that the rights of the complainant in the Tanner tract were limited and defined by those leases.

The cause was put at issue, and a large amount of evidence was put in by both parties. The result in the court below was a decree in favor of the complainant, declaring that Gumaer had taken the Tanner lease in trust for the complainant company, and commanding the defendant to surrender and assign the same to the complainant, and also to surrender the leases made by Gumaer, of portions of said tract, to be canceled.

We are compelled to pass upon this case without the assistance of any opinion or finding of facts by the court below, and, hence, it has been necessary for us to consider all the evidence. The bill is definite and precise in its allegations, and waives answer under oath. The answer, although without weight as evidence, is also precise and specific in its allegations denying the equity of the bill.

There is no view that we can take of the evidence that enables us to reconcile the conflicting testimony of the witnesses respectively examined in behalf of the parties.

The principal witnesses who testified in behalf of the complainant were Jacob Wallace, president; Isaiah Josephi, vice president, and Simeon E. Josephi, brother of Isaiah, and who succeeded Gumaer as manager of the company. Their testimony sustained in substance the allegations of the bill.

These witnesses were confronted by Stephen J. Tanner, the owner of the tract in question; by Samuel H. Baker, who had acted as attorney for Gumaer, and also, for a part of the time, as attorney for the company, and by Gumaer himself; and their testimony is, in essential particulars, directly contradictory to that given by the complainant's witnesses.

The principal matter in controversy is, whether Gumaer took the lease from Tanner for himself, or whether he took it *in [92 circumstances that in equity prevent him from asserting his personal ownership of it against the company.

It was shown that the lease of Tanner to Gumaer was dated October 6, 1886, and when the latter was acting as general manager of the company, and it was claimed that he procured the lease by representing to Tanner that he was taking it for the company. It was testified by Wallace that he had, as president, directed Gumaer to procure additional leases, and particularly of the Tanner tract. He denied that Gumaer had informed him, before he agreed to become manager, that he had a contract of any kind with Tanner, and he denied that Gumaer had ever pretended to own a lease from Tanner. He also denied that Isaiah Josephi, the vice president, had been authorized by the company to accept leases from Gumaer of portions of the Tanner tract.

Simeon Josephi testified that Tanner had told him that he had given Gumaer a lease, knowing him to be the general manager of the Colorado Oil Company, and believing that the company would carry out the conditions of the lease; that when Isaiah Josephi came to Colorado in December, 1886, and had learned that Gumaer held a lease from Tanner, he demanded that it be turned over to the company; and that, on Gumaer's refusal to turn over the Tanner lease, Josephi had, in order to avoid jeoparding the fixtures and property of the company that were on certain portions of the Tanner tract, accepted leases from Gumaer of such portions.

Isaiah Josephi testified that he had accepted the leases from Gumaer under protest.

On behalf of the defendants it was shown that while it was true that the lease from Tanner to Gumaer was executed on October 6, 1886, after he had been appointed manager, yet that it was given in pursuance of a contract in writing between Tanner and Gumaer, dated December 10, 1885, long before he had any connection with the company, which contract gave an option to Gumaer to purchase the tract.

Tanner testified to the existence of the contract of December 10, 1885, between himself and Gumaer, and also that he made the lease of October 6, 1886, to Gumaer directly, with-[93] out *any reference to the Colorado Oil Company, believing that he was able to execute the terms of the lease which required him to enter upon the land and commence operations within ten days.

Gumaer testified that he had a contract with Tanner, and also with other parties, before he was appointed manager of the Colorado Company; that he had informed Wallace, the president, of his option for the Tanner tract before he was so appointed; that he subsequently offered to give an interest in the tract to the company on certain terms. He denied that he had ever received any instructions, either orally or in writing, from the company to get for it any interest in the Tanner lands. He also testified that he gave the leases to the Colorado Oil Company of certain parts of the Tanner tract, after a conference with Isaiah Josephi, the vice president, in full and satisfactory settlement.

Samuel H. Baker, who was then acting as the company's attorney, testified that he had learned from Wallace that Gumaer had explained to him about Gumaer's connection with the Tanner lands. He also testified that he was present at the settlement between Gumaer and Josephi, vice president, and that the lease from Gumaer to the company was given for "the purpose of adjusting a small difference between the company and Gumaer, and was received by the company as a sort of compromise and settlement."

It must be apparent from this brief statement of the testimony of these witnesses, that the principal matters on which the complainant's right to relief depends are left in doubt and uncertainty.

Nor are our doubts resolved in favor of the complainant, when we turn from the irreconcilable statements of the witnesses to the letters and telegraphic messages that passed between Gumaer and Wallace, president of the company. On the contrary, the impression made upon our minds by their perusal is favorable to the defendants.

Thus, on August 21, 1886, Gumaer wrote a letter to Wallace, in which he distinctly adverts to his option on the Tanner tract, and says: "My option does not expire before the middle *of December, but I want to call your [94 attention to the fact that time is passing by, and after we see the result of No. 5, something must be done. I am confident that I can handle it with Denver parties, but, as promised, I will give you first chance."

In letter dated October 3, 1886, he wrote: "I will make this proposition to the company: If you will sink one well immediately, one within a year and three more within the second and third years, I will give you the right to put the five wells on the one hundred and sixty acre lease that belongs to me, at one eighth royalty, and in such places as you may select, from time to time; however, this lease will not prohibit me from leasing or sinking other wells on said lease." This was followed by a telegraphic dispatch, dated October 7, as follows:

"To Jacob Wallace, President,
304 Greenwood Street, New York:
"Six down five hundred feet. Ignore my proposition third: make new one to-day.
"A. R. Gumaer, General Manager."

A letter of the same date read as follows:

"Cañon City, Col., Oct. 7th, 1886.
"Jacob Wallace, Esq., President.
"I wired you to ignore my proposition of the 3d, and that see new one which I make, viz:
"If you will drill two wells on Tanner tract, adjoining McCandless lease, say one in pumping distance from No. 6 and the other east side of said tract, and commence derrick for third rig, I will give you forty acres of the McCandless lease, all at one eighth royalty; that is to say, the three wells' product and the forty acres, all for one eighth royalty.
"You are not required to do any work on the forty acre tract; both leases are given for twenty years, or as long as the oil is found in paying quantities. . . .
"You understand, these are lands I have held options on before I acted for the company. I consider this very valuable territory, and I cannot get you as favorable a lease, considering *location, from any one. . . . Please [95 wire me on receipt of this whether to go on

deceased in equal proportions; and the late *Judge* Deady, referring to the disposal of the share of a deceased wife, said that at the time of her death "there was no statute in Oregon regulating the descent of real property, or declaring who should be the heirs of an intestate, and, therefore, the subject was regulated by the common law. By this rule her children were 70] her heirs. *The Donation Act does not prescribe who shall be considered the heirs of a deceased settler any more than it prescribes who shall be considered the wife a settler. Both these are left to the local law—the law of Oregon. If the law of Oregon at the time of Nancy's death had prescribed that brothers and sisters should be heirs to the intestate, either exclusive or inclusive of the children, it appears to me that, under the Donation Act, then the children would take to the exclusion of the brothers and sisters. Congress seems to have intended to secure the share of the deceased, to her children, if any, whether the law of Oregon made them heirs or not. Beyond this it left the matter to the local law, by providing the alternative, that in default of children, such share should go to her heirs, whoever they might be. Who would be entitled to claim as heir of the deceased would, in all cases, depend upon the law of Oregon at the time of the death, but persons claiming as children are by the Donation Act preferred to those claiming simply as heirs by the local law." And in *Davenport* v. *Lamb*, 80 U. S. 13 Wall. 418, 427 [22: 655, 657], it was pointed out that the Act of Congress of May 20, 1836 (5 Stat. at L. 31 Rev. Stat. § 2448) providing that where patents had been issued to persons who had died, the title should enure to and become vested in "the heirs, devisees, and assigns" of the deceased, made the title enure in a manner different from that provided by the Donation Act, upon the death of either owner before the issue of the patent, because the survivor of the husband or wife was not his or her heir by any law of Oregon at the time of the death in that case.

There is nothing to the contrary in *McCool* v. *Smith*, 66 U. S. 1 Black, 459 [17: 218], which was a case coming to this court from Illinois, in which it was held that the meaning of the words "next of kin" was to be determined by the common law of England, because the common law in that regard was then in full force in that state.

The language of the acts of Congress has not been uniform in the matter of the disposition of the public domain, after the death of the principal beneficiary. Thus under section 2443, in respect of bounty lands granted to officers 71] and soldiers of *the Revolutionary War or soldiers of the War of 1812, the patent when applied for by part of the heirs was to be issued in the name of the heirs, generally, and to enure to the benefit of the whole in such portions as they were severally entitled to by the laws of descent in the state or territory of the decedent's domicil; and other illustrations might be given.

These differences, however, cannot affect our conclusion here, which, under the circumstances, accords with that of the supreme court of Kansas.

Judgment affirmed.

THE PLANT INVESTMENT COMPANY,
Appt.,
v.
THE JACKSONVILLE, TAMPA & KEY WEST RAILWAY COMPANY,
et al.

(See S. C. Reporter's ed. 71-77.)

Suit by assignee of chose in action—meaning of the term "assignee"—contract for construction of railroad—dismissal of suit.

1. By U. S. Rev. Stat. § 629 the circuit court has no jurisdiction of a suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of foreign bills of exchange.
2. The term "assignee" in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest.
3. Where the contract under which the complainant claims is with the defendant railroad company for the construction of its road, and such contract transferred to complainant the beneficial interest of that company in the lands covered by its contract with the state trustees, the suit is within the prohibition of U. S. Rev. Stat. § 629.
4. Where the circuit court had no jurisdiction of the case and dismissed the suit generally for that reason, this court will reverse its decree and remand the case with direction to dismiss the suit for want of jurisdiction and without prejudice.

[No. 226.]

Argued Jan. 24, 1894. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Florida, sustaining a demurrer to the complaint, and dismissing a suit in equity brought by the Plant Investment Company, against the Jacksonville, Tampa & Key West Railway Company, to enforce the conveyance of certain lands in Florida, pursuant to the contract of the Trustees of the Internal Improvement Fund of Florida, made with said railway company, etc. *Reversed, and cause remanded with direction to dismiss the suit for want of jurisdiction and without prejudice.*

The facts are stated in the opinion.

Messrs. **John E. Hartridge** and *R. G. Erwin*, for appellant.

Messrs. **C. M. Cooper** and *J. C. Cooper*, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

*This case comes to us on appeal from 72] the decree of the circuit court for the Northern District of Florida, sustaining the demurrer of the bill of complaint and dismissing the suit. The bill was brought to enforce the conveyance of certain lands in Florida, pursuant to the contract of the trustees of the internal im-

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1:640.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

provement fund of Florida, made pursuant to certain statutes of that state, with the Jacksonville, Tampa & Key West Railway Company, a corporation created under its laws, the beneficial results of which contract are claimed by the complainant.

The facts out of which the suit arises are given at length in the bill, and, as there set forth, may be briefly stated so far as is necessary for the presentation of the question of jurisdiction, upon which the demurrer turned.

The Plant Investment Company, the complainant, is a corporation under the laws of Connecticut, having its principal office at New Haven. The defendants are the Jacksonville, Tampa & Key West Railway Company, and the trustees of the internal improvement fund of Florida, citizens and residents of that state.

The bill of complaint sets forth: That the general assembly of Florida, by an act of January 6, 1855, "to provide for and encourage a liberal system of internal improvements in the state," declared that the lands granted to the state by the acts of Congress of March 3, 1845, and September 28, 1850, together with the proceeds thereof, accrued or that might thereafter accrue, should be set apart and made a separate fund, to be called the internal improvement fund of the state; and that, for the purpose of assuring a proper application of the fund for the objects mentioned, the lands and the funds arising from the sale thereof, after paying the necessary expenses of selection, management, and sale, should be vested in five trustees, to wit, in the governor of the state, the comptroller of public accounts, the state treasurer, the attorney general, and the register of state lands, and their successors in office, to hold the same for the uses provided in the act; and by its twenty-ninth section, the general assembly reserved the right to grant to such railroad companies, 73]thereafter chartered, as *they might deem proper, upon their compliance with the provisions of the act as to the manner of constructing the road and the drainage of the lands, the alternate sections of the "swamp and overflowed lands" for six miles on each side of the line of the road of any such company. That the Jacksonville, Tampa & Key West Railway Company was incorporated in March, 1878, under the general corporation act of the state of February, 1874, by the name of the Tampa, Peace Creek & St. John's River Railroad Company. That the legislature of Florida by act of March 4, 1879, granted to that company alternate sections of the lands given to the state by the Act of Congress of September 28, 1850, within six miles on each side of the track or line of its road, provided that the company should comply with the specified provisions of the act of January 6, 1855; and further granted to the company, in consideration of the greatly improved value which would accrue to the state from the construction of the road, ten thousand acres of the same class of lands for each mile of road it might construct, such lands to be of those nearest to the line of the road, its branches and extensions, this last named grant being made subject to the rights of all creditors of the internal improvement fund and to the trusts to which the fund was applicable under the act of January 6, 1855. That on the 27th of June, 1881, the Tampa, Peace Creek & St John's River Railroad Company, by a resolution of its board of directors, changed its corporate name to Jacksonville, Tampa & Key West Railway Company, and on the 23d of August, 1881, filed a plat of its route with the trustees of the internal improvement fund; and on the 1st of September, 1881, the trustees passed a resolution reserving from sale for the benefit of the company the even numbered sections of land for six miles on each side of its line, and again on the 21st of September, 1881, acting under the provisions of the 'act of the legislature of March 12, 1879, "to amend section 26 of the act 'to provide a general law for the incorporation of railroads and canals,' and to grant aid to railroads and canals incorporated under said act," they passed a resolution to reserve from sale, to further aid in the construction of the road, a quantity *of lands in the [74 even numbered sections within twenty miles of said road sufficient to supply the deficiency existing in the even numbered sections within six miles of the road.

The bill further avers that in 1883 the complainant entered into a contract with defendant company to construct the southern division of its road, to extend from the waters of Tampa Bay, in Hillsborough county, to Kissimmee City, in Orange county, with a branch to or near Bartow, in Polk county, and by that contract was to receive, as part of the consideration for the construction of the road, all the alternate sections of land to which defendant company was or might be entitled under any of the aforesaid acts and any of the laws of Florida for its construction; that the resolutions passed by the board of trustees September 21, 1881, had been published in the report of its official proceedings, and submitted to the legislature in January, 1883, with the reports of the heads of departments of the state government, and went forth to the world unchallenged as the official action of the trustees, with the silent approval of the legislature; and the complainant, relying on the provisions of the acts of March 4 and 12, 1879, and the resolutions of the trustees, was induced to enter into its contract with the defendant company, believing that it would receive all the lands contemplated by those acts and resolutions; that to carry out the contract made between the complainant and the defendant company, the board of directors of that company passed a resolution in November, 1883, requesting and directing the trustees of the internal improvement fund to convey to the complainant all the alternate sections of land to which the defendant company was or might be entitled by reason of the construction of the said railroad from Tampa to Kissimmee City and its branch, and a copy of that resolution was presented to the trustees and entered in the minutes of their proceedings; that, as soon as practicable, after making the contract, complainant commenced the construction of the road and completed the line from Tampa to Kissimmee, a distance of seventy-five miles, by the following January; and the completion of the road being *reported to the trustees, [75 the state engineer was directed to inspect the same, which he did, and approved it as being

[22: 46]; *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 [28: 901]; *United States* v. *Palmer*, 128 U. S. 262 [32: 442]. But we think that a promise to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited.

It is a conceded fact in the present case, by express allegation in the petition, that the claimants did not expect, during the period in which the services were performed, that the United States would compensate them; that they looked for recompense to the clients who had retained them; and that their use of the name of the United States in the litigation was consented to on their own application, and with the express understanding that they were to receive no compensation from the United States. On the first intimation that they might, in the matter of compensation, exchange their clients for the United States, their formal **100**] employment was at once *terminated. For their past services they are entitled to recover from the settlers who employed them, but the admitted facts clearly show that the United States are under no express or implied obligation to answer for a breach of contract between the appellants and their clients.

It is unnecessary to pursue the subject further. The court below committed no error in dismissing the claimants' petition, and the decree is affirmed.

THE BELDING MANUFACTURING COMPANY, *Appt.*,
v.
THE CHALLENGE CORN PLANTER COMPANY.

(See S. C. Reporter's ed. 100-107.)

Patentable invention—improvement in refrigerators.

1. A mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing, in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent.
2. In view of the state of the art as manifested by numerous prior patents, and particularly by that of Smith, the Hambrook patent for an improvement in refrigerators is void for want of patentable novelty.

[No. 285.]

Argued Jan. 31, and Feb. 1, 1894. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Michigan, dismissing a suit in equity brought by the Belding Manufacturing Company, against the Challenge Corn Planter Company, for the infringement of the patent No. 204,216, granted May 28, 1878, to Richard T. Hambrook, for an improvement in refrigerators, assigned to and owned by the Belding Manufacturing Company. *Affirmed.*

Statement by *Mr. Justice* **Shiras**:

Letters patent of the United States, No. 204,216, were granted, on May 28, 1878, to Richard T. Hambrook, for an improvement in refrigerators, and by various assignments the ownership thereof became vested, in 1885, in the Belding Manufacturing Company.

In March, 1889, in the Circuit Court of the United States for the Western District of Michigan, a bill in equity was filed *by the [**101** Belding Manufacturing Company against the Challenge Corn Planter Company, alleging infringement by the defendant of the complainant's rights, as owner of the Hambrook patent, and praying for relief. The Challenge Corn Planter Company appeared and answered. The cause was put at issue, a large amount of evidence was put in by the respective parties, and, after argument, on June 25, 1890, a final decree was entered dismissing the bill of complaint, from which decree this appeal was taken.

Messrs. **Taylor Everett Brown** and *Charles Clarence Poole* for appellant.

Messrs. **Arthur Stem** and **Edward Taggart** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

We have been aided in our consideration and decision of this case by very full and able arguments, oral and printed, on behalf of both the parties.

Hambrook's invention was described by himself as follows:

"The nature of my invention consists in the construction of a refrigerator having the ice chamber constructed in such a manner that the air will impinge upon the top, bottom, and sides of the ice, and that the continuous volume of cold air generated by the melting of the ice will descend, in a dry state, to the provision chamber without material hindrance, causing the displaced and less frigid air to ascend to the ice chamber through open spaces at each side thereof without meeting the descending current of cold air."

The specification describes the refrigerator as consisting of a cabinet or outer box, within which is an inner box, lined with metal throughout, and fastened and retained in its relative position to the outer case by any proper means used by makers of refrigerators. The

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NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see note to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement, when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 524.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

inner box is divided into several compartments —one, occupying the upper part, being the ice chamber, and a lower one, consisting of two apartments, separated from each other by a partition, which is called the provision chamber.

We accept, as a satisfactory description of the Hambrook refrigerator, that given by Melville E. Dayton, an expert examined on behalf of the complainant:

"The patent illustrates and describes a domestic or household refrigerator, containing an ice box at the top, a lid over the ice box, a provision chamber or chambers below the ice box, a partition separating the ice box from the pro-
102] vision *chamber or chambers, a central passage through this passage for the downflow of cold air from the ice box to the provision chamber, side passages rising from the provision chamber outside of the ice chamber to near the top of the latter, overhanging cleats or shields covering these side passages, gutters at the margins of the central opening in the partition to prevent the passage of water from the ice chamber into the provision chamber, a deflecting plate over said central opening, to carry the water, which would drip directly through said central opening to the top of the partition at the sides of said opening, so that the gutters shall carry away all water or moisture falling from the ice or its supporting rack, and a pipe for draining off the water delivered by the gutters. The patent shows a vertical partition dividing the provision chamber into two compartments, said partition being extended up through the central opening in the horizontal partition and into the ice chamber."

The court below did not deem it necessary to consider and pass upon the question of infringement, but being of opinion that, in view of former inventions and of the state of the art in reference to the construction of refrigerators, there was no patentable invention in the Hambrook patent, dismissed complainant's bill; and if we are satisfied to adopt that conclusion of the court no other question in the case need be considered.

Quite a number of prior patents were put in evidence by the defendant, beginning with patent to Sanford in 1855, followed by one to Lyman in 1856, to Banta in 1867, to Chase in 1869, to Hunt in 1870, to Rohrer in 1871, to Butler in 1875, and to Smith in 1877.

Without going into a minute comparison of the features of these respective patents, it may be safely said that they closely resemble each other in the main particulars of their construction and in the objects sought to be effected. Certain disadvantages were overcome and improvements added from time to time.

Litigation took place in which the courts were called upon to consider conflicting claims under some of these patents. The most important case, and the only one which we need to no-
103] tice, *involved a contest between the Lyman and Sanford patents, and came to this court on appeal from the Circuit Court of the United States for the Southern District of New York. *Roberts* v. *Ryer*, 91 U. S. 150 [23: 267].

The bill was filed by Roberts, assignee of Sanford, alleging an infringement of the patent to Sanford for an improvement in refrigerators. The principal defense relied upon was the prior invention of Lyman, and this defense was sustained in the court below, whose decree, dismissing the bill, was affirmed by this court in an opinion by *Chief Justice* Waite.

In that opinion the Sanford patent is described to be for a combination of three elements, to wit: 1, an open bottom ice box, or its equivalent, so constructed that the air may pass freely down through it, while, at the same time, the drip of the water from the melting ice is prevented by collecting the water and taking it in an escape pipe outside of the refrigerator; 2, a dividing partition, open above and below, separating the refrigerator into two apartments; and, 3, a chamber directly under the open bottom ice box, in which articles to be refrigerated may be placed in such manner as to receive the descending current of air from the ice box directly upon them.

The court proceeded to compare these devices with those found in the Lyman patent, in which were found an open bottom ice box, and a partition open above and below, dividing the refrigerator into two apartments, in one of which the air passed downward only, and in the other upward only. Each called for the circulation of air, and each obtained it substantially by the same device. They each passed the air cooled in the ice box through convenient openings downwards in one apartment, and upwards through the other. In each device the cooled air passed through the opening in the bottom of the partition, and the warm air through that in the top. All this was done in both cases for the purpose of cooling, desiccating, and purifying the confined air, and to prepare it for the purposes of refrigeration. There was, therefore, one common object to be accomplished by both inventors; and they each devised substantially the same plan for that *purpose. With both [104 of the inventors, the circulation by means of an ascending and descending current was the principal object to be obtained. One considered the greatest benefit for the purposes of refrigeration was to be derived from the use of the descending current, while the other saw more particularly the advantage of the ascending current, but they each had both, and could utilize both. The court, therefore, concluded that the effort to distinguish the two devices was futile; that if there was any change of construction suggested, it was only to increase its capacity for usefulness; that it was a carrying forward of new or more extended application of the original thought—a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results.

Bearing in mind the reasoning and conclusion of the court in that case, we shall pass by the patents subsequently granted till we reach that granted to Smith in 1877, reissued in 1878, and in which the court below found all the essential features of the Hambrook invention.

Smith described his theory and devices in the following language:

"My invention relates to that class of refrigerators wherein a constant circulation of air is

maintained through the ice box and provision chambers; and its object is to increase the circulation, reduce the air to a lower temperature than heretofore, and to deliver such air into the provision chambers deprived of all odor and free from sweating, preventing the sides of said provision chambers from sweating, and better preserving the articles placed therein.

"My invention therein consists in the combination of an ice box of the entire width of the refrigerator, except the air passages at its end, said ice box having a central air-discharge opening in its bottom, the provision chambers and the air passages leading out of the same; also, in the combination of the same elements and an air discharge opening above the center of the ice box; also, in the combination of the ice box with the central air-discharge opening and a false bottom, raised above the bottom of **105**] the ice box, having openings near *its ends and an air passage under it; also, in the combination of the various principal operative parts, all constructed and arranged as more fully hereinafter described."

In this description we recognize the principal features of those contained in the prior patents to Lyman and Sanford, and, without pausing to consider whether the art was thereby advanced within the meaning of the patent law, it is obvious that the territory for further invention, in this kind of refrigerator, was still further restricted.

The appellant's expert, Dayton, on rebuttal, limited the Hambrook patent as follows:

"The Hambrook patent is not broadly for the idea or discovery that cold air is heavier than warm air, and will fall by its greater specific gravity, and thus cause the warm air which it displaces, to rise; nor is it for the general location of an ice chamber above a provision chamber, by which the difference in specific gravity between the cold and warm air may induce a circulation; nor is it for a particular form of grate or support on which the ice may rest while allowing air to move downward in contact with the ice; nor is it for the idea of inclining a watershed in order to permit water to flow therefrom; nor is it for the provision of an air passage broadly, by which air may descend from the ice chamber, or ascend from the provision chamber. All these things, broadly considered, were well known in various forms at the date of the Hambrook invention."

These admissions were plainly constrained by the claims and descriptions contained in the prior patents.

So, too, the learned counsel for the appellant in his supplemental brief concedes that the Smith patent shows the provision chambers, the ice chamber, an ice table or rack equivalent to the rack of Hambrook, the equivalent of the double inclined bottom pieces of Hambrook provided with a central opening —that it has also the equivalents of the gutters, and that it has the waste water pipe.

But it is claimed that the Smith patent does not contain the side passages of Hambrook or their equivalents, and that it does not have the deflector plate or any equivalent, and that these *missing elements are material[**106** to the combination; and hence it is argued that the Smith patent, omitting these two elements of the Hambrook combination, did not anticipate the latter.

Yet appellant's expert witness, Dayton, in his analysis of the Smith patent admits—as of course he had to do—that it contained an uptake flue or passage at each end of the ice box, though he endeavors to distinguish them from the end passage ways of Hambrook, in that the former do not discharge into the sides of the ice chamber at the top thereof, but are continued or prolonged through spaces in the cover, which meet and open at the middle of the lid, which results, as he contends, in a retardation of the air currents.

So, too, the same witness admits that the imperforate ice rack in the Smith patent operates to prevent the water from dripping, and thus performs the function of the Hambrook deflector, though less advantageously, and he argues that an imperforate ice rest is an entirely different thing from a separate deflector interposed between such ice rest and a subjacent opening.

Whether the device in the Smith patent, to prevent the water from dripping into the provision chamber, by the use of an imperforate ice rack can be deemed an equivalent for the Hambrook deflector, we need not decide, because the evidence is clear that the refrigerators made by the defendant company do not have the Hambrook deflector, but the ice is carried on an imperforated plate of corrugated metal, through which no water can drip Either, then, this imperforate ice rest *is* an equivalent of the Hambrook deflector, in which case the Smith patent was an anticipation, or it is *not* an equivalent, in which case the defendant's refrigerator does not infringe in that particular.

Nor do we think the distinction pointed out between the uptake flues or side passages in the Smith and Hambrook patents amounts to a patentable difference. The purpose of the flues is the same and their mode of operation is the same. The fact that Hambrook did not prolong these air passages along the lid or cover might perhaps be a better way *of [**107** introducing the air into the ice chamber, but it does not amount to a patentable improvement.

As was said in *Roberts* v. *Ryer*, 91 U. S. 150 [23: 267], "it was a mere carrying forward, a change only in form, proportions, or degree, doing the same thing, in the same way, by substantially the same means, with better results."

In view, then, of the state of the art as manifested by numerous prior patents, and particularly by that of Smith, we conclude that the Hambrook patent is void for want of patentable novelty; and the decree of the court below, dismissing the bill for that reason, is affirmed.

Mr. Justice **Gray** was not present at the argument, and took no part in the decision of the case.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,
v.
JANE EVERETT, Administratrix of WILLIAM J. EVERETT, deceased.

Injuries while coupling cars—contributory negligence.

(See S. C. Reporter's ed. 107-113.)

1. In an action against a railroad company for damages for injuries received by plaintiff, an employé, while coupling together a box car and a car loaded with bridge timbers, extending so far beyond the end of the car as to leave insufficient space to couple with safety, of which manner of loading he had no notice, an instruction to the jury that if the car was negligently loaded with the sticks of timber extending too far beyond the end of the car, and if plaintiff could not, in the exercise of proper diligence, have perceived the projecting timber in time to escape, he was entitled to recover, is not erroneous.

2. It is not conclusive evidence of contributory negligence, that an employé of a railroad who was injured while coupling cars, did not observe the projecting timber on one of the cars which caused his injury, while he was in the discharge of his duty, and while his attention was directed to the work in which he was engaged.

[No. 188.]

Submitted Dec. 21, 1893. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the District of North Dakota, to review a judgment against the Northern Pacific Railroad Company, for damages for injuries received by William J. Everett, while coupling cars of said company as a switchman. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

William J. Everett brought an action in the District Court of the Sixth Judicial Circuit of the Territory of Dakota on November 13, 1889, against the Northern Pacific Railroad Company, seeking to recover from it the sum of thirty thousand dollars as damages for injuries received by him in coupling cars owned and controlled by the company, alleging that he had received such injuries while in the employ of the company, as a yard switchman, in its yards at Jamestown, Dakota territory, and while there engaged in the performance of his regular duties. The accident had happened, as he stated in his complaint, under the following circumstance: On July 6, 1889, he was at work in the yard, and was ordered by the yard foreman to couple together a car loaded with bridge timbers and a box car which was standing upon a side track. The car bearing the timbers was moved by a switch engine. This car was loaded in an unusual and dangerous manner, in that the timbers extended so far beyond each end of the car as to leave insufficient space for coupling with safety. The plaintiff had, however, no notice or knowledge of this fact. He attempted to carry out the orders which he had received, and in so doing his head was caught between the box car and the end of a heavy timber which projected over the end of the other car a distance of twenty-

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NOTE.—*As to liability of railroad companies to switchmen or brakemen for injuries while coupling cars; violation of rules*, see note to Kohn v. McNulta, 37: 150.

As to contributory negligence; imputed negligence; negligence of parent or child or husband or driver; intoxication; see note to Union Pac. R. Co. v. Botsford, 35: 734.

As to freedom of plaintiff from contributory negligence, necessary to entitle him to recover, see note to Stokes v. Saltonstall, 10: 115.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

Railroad company; liability of to employé for injuries received while coupling cars.

A railroad company is negligent in attempting to use upon its road a car from another road, the drawbar of which is so constructed that it will slide past those on its cars, and permit the cars to come so close together as to endanger the lives of its employés whose duty it is to couple such cars, without notifying them of its condition. Ohio & M. R. Co. v. Wangelin, 43 Ill. App. 324.

The want of any bumpers on freight cars, whether received from another company or not, renders a railroad company liable for injury received in consequence thereof by a brakeman who is suddenly called upon in the night to couple the cars, and who has no knowledge of their defects. Mason v. Richmond & D. R. Co. 18 L. R. A. 845, 111 N. C. 482, 53 Am. & Eng. R. Cas. 183.

It is not negligence in a railway company to haul cars of another company with double deadwoods or double buffers, while couplings of a different pattern are in use on its own road. Louisville & N. R. Co. v. Boland, 18 L. R. A. 260, 96 Ala. 625, 53 Am. & Eng. R. Cas. 169.

It is the duty of a railway company to furnish cars with reasonably safe coupling appliances in good order, so far as it can by the exercise of ordinary care; and an employé has the right to assume that the couplings of a car are in proper order, unless he knows, or by ordinary care ought to know, the contrary, it not being his duty to examine or inspect the attachments of the car. Fordyce v. Yarbrough, 1 Tex. Civ. App. 260.

A railway company is liable for injuries to an employé who was caught between cars while coupling them because the company allowed the coupling apparatus to become defective. Fordyce v. Yarbrough, 1 Tex. Civ. App. 260.

An engine wiper in a railway yard, who knows that the foreman of the yard is a machinist, and not a regular engineer, and is not well qualified to manage an engine in switching cars, assumes the risk of the foreman's lack of qualifications in attempting to make a coupling while the latter is in charge of the engine coupled to. Gulf, C. & S. F. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573.

A switchman who has been engaged in coupling cars in a railroad company's yard for over two months before the accident, and is familiar with the tracks and the yard, and experienced in the business, cannot recover of the receiver of the company by whom he was employed, for an injury to his arm by its being caught between the deadwoods and crushed while coupling cars, although such cars were those of another company and different from those of his own company, where he had before coupled similar cars, and where the deadwoods were obvious to any one attempting to make the coupling, and the danger from them apparent. Kohn v. McNulta, 147 U. S. 238 (37: 150.)

An adult of ordinary intelligence who voluntarily seeks the position of railway brakeman, which he knows to be dangerous, assumes the apparent and ordinary risks of the employment—such as

two inches. His injuries, thus received, were of a serious and permanent character, and consisted in the impairment, not only of his physical powers and senses, but also of his mental faculties.

The defendant admitted, in its answer, its ownership and control of the cars mentioned, but denied generally all the other averments of the complaint upon which were founded the plaintiff's alleged right to a recovery from it, and averred that the injuries, if any, received by the plaintiff were the result of his own negligence, and not of that of the defendant. 109] *After the deposition, on behalf of the plaintiff, of a witness residing in the state of Washington had been taken, in pursuance of a commission to take testimony, issued out of the said territorial court, the portion of the territory in which the action was pending became a part of the state of North Dakota, and before further proceedings were had in the case it was removed into the Circuit Court of the United States for the District of North Dakota, in which court a trial was had before the court and a jury.

On the trial, after all the evidence for both parties had been heard, the defendant moved the court to instruct the jury to return a verdict for the defendant for the reason that the evidence in the case would not warrant a verdict for the plaintiff. The court refused to so instruct the jury, and the defendant excepted to this ruling.

The court instructed the jury as follows:

"The fact that the plaintiff was injured in an effort to couple defendant's cars at the time and place mentioned has not on the trial been contested, but the defendant says the plaintiff's injury was the result of his own negligence, or that his own negligence contributed to his injury; and if this answer of the defendant is true, it is a complete defense to this action.

"To entitle the plaintiff to a verdict he must satisfy you by a preponderance of the evidence of these two principal facts: First, that his injury was the result of the negligence of the railroad company; and, second, that his own neglect was not the occasion of the injury, and did not in any manner contribute to it. If the plaintiff's injury resulted from his own negligence, or if his own negligence contributed to his injury, he cannot recover.

"The particular act which the plaintiff alleges constitutes the neglect on the part of the defendant which resulted in his injury is that the flat car, which was in motion, and which he was ordered to couple to a box car standing on the track, was loaded with lumber, which projected twenty-two inches, or about that distance, over the end of the car where the coupling was to be made.

*"The first question for you to deter- [110 mine is, was this an unusual or improper or negligent manner of loading lumber on a flat car? If you answer this question in the negative, you need inquire no further, but will return a verdict for the defendant.

"If you answer this question in the affirmative, you will then inquire whether such negligent loading of the lumber on the car was the cause of the plaintiff's injury, unmixed with any negligence on his part; and if you find that it was, your verdict will be for the plaintiff.

"The plaintiff was bound to exercise care and diligence in his employment of coupling cars; he was bound to use all his senses as

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that of having his arm caught between two deadwoods while he is between two cars attempting to draw a coupling pin,—and cannot urge his lack of previous experience as a basis of recovery. Dysinger v. Cincinnati, S. & M. R. Co. 93 Mich. 646.

The extra hazard to a brakeman by the use of cars with couplings of different patterns, some of which have double deadwoods, or double buffers, is one of the risks or dangers assumed by entering the employment. Louisville & N. R. Co. v. Boland, 18 L. R. A. 260, 96 Ala. 625, 53 Am. & Eng. R. Cas. 169.

A railway company cannot escape liability for an injury to a brakeman caused by a defective coupling appliance, merely because the brakeman failed to exercise care and diligence to discover the character and condition of the appliance, if he did not know of its defective condition, and an inspection thereof was not in line of his duty. Louisville & N. R. Co. v. Foley, 15 Ky. L. Rep. 17.

An employé entrusted with the pulling out of a coupling pin in good condition, in making a flying switch, who before the pin is out, signals the engineer to start, by reason of which the car is derailed and the employé killed, is guilty of such contributory negligence as will prevent a recovery for his death. Browne v. New York & N. E. R. Co. 158 Mass. 247.

A railroad employé engaged in uncoupling cars, who himself gives a signal causing a movement of the train which crushes him between the cars, is guilty of contributory negligence which will defeat his recovery for his injuries. Hudson v. Charleston, C. & C. R. Co. 55 Fed. Rep. 248.

One who engages as conductor and brakeman on a railroad train knowing that too few men are employed thereon, and that the cars are so constructed that it is unsafe to go between them to couple them, cannot recover for injuries caused by the moving of the train by the engineer after it had come to a stop, while the cars which he was seeking to couple were a short distance apart, and he had gone between them to arrange the couplings. Long v. Coronado R. Co. 96 Cal. 269.

A brakeman who neglects to familiarize himself or to comply with rules furnished him prescribing the manner of coupling cars and calling attention to the danger of coupling by hand cars loaded with certain materials, is guilty of such negligence as will prevent a recovery for his death, which would not have occurred if he had followed directions. Brennan v. Michigan Cent. R. Co. 93 Mich. 156.

A railroad brakeman who, in violation of rules known to him prohibiting brakemen from coupling or uncoupling cars except with a stick, and from going between cars under any circumstances for such purpose when an engine is attached to the train, and requiring them in all cases of doubt to take the safe course and run no risk, goes between cars for the purpose of coupling them, and is injured by the backing of the engine to slacken the couplings,—is guilty of such negligence as will preclude his recovery. Richmond & D. R. Co. v. Pannill, 89 Va. 552.

A railroad employé who attempts to couple or uncouple a moving train is guilty of negligence which will prevent his recovery for injuries thereby sustained. Hudson v. Charleston, C. & C. R. Co. 55 Fed. Rep. 248.

If uncoupling cars when they are in motion is more dangerous than when they are standing still, a brakeman who is injured while voluntarily uncoupling cars in motion cannot recover for his injury. Peoria, D. & E. R. Co. v. Puckett, 42 Ill. App. 642.

actively and intelligently as any prudent man having a knowledge of the hazardous character of his business would have done under like circumstance. The business is a dangerous one and imposed on him the duty of exercising great care and caution.

"If the plaintiff saw that the lumber projected over the end of the car before he attempted the coupling, or if he could have seen it if he had exercised great care and diligence, which, under the circumstances, it was incumbent upon him to exercise, then he can claim nothing on account of the injury resulting from such projecting lumber, and the injury must be attributed to his own negligence.

"If you find the lumber was negligently loaded—that is, in an unusual and dangerous manner—and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to assume that the car was properly loaded, and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practicable for him to do so; and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident, and in time to avoid it, he cannot recover."

The defendant objected to the last paragraph of the foregoing instructions, and moved that it be withdrawn. The motion was denied, to 111]which ruling of the court the *defendant excepted. The case was then submitted to the jury, which rendered a verdict for the plaintiff, and awarded him damages in the sum of seven thousand dollars. Judgment in accordance with the verdict was entered on April 25, 1890. The defendant thereupon sued out a writ of error from this court.

Messrs. **James McNaught, A. H. Garland** and **H. J. May,** for plaintiff in error:

A master has the right to assume that a servant hired in the ordinary course knows the dangers incident to the employment, and will avoid them. The servant tacitly assumes such risks.

2 Kent, Com. (13th ed.) 260, *note; Washington & G. R. Co.* v. *McDade,* 135 U. S. 570 (34: 241).

If you charge anybody with a loss arising from mistake, you should show that no due diligence could have been used by you which might have prevented the loss.

Hordern v. *Dalton,* 1 Car. & P. 181.

In an action for an injury occasioned by the negligence of another, it is a good defense to show that the injury so far arose from the negligence of the plaintiff himself that he might by ordinary care and caution have avoided the injury.

2 Stark. Ev. 741, title, *Nuisance.*

Though the party charged be in fault, yet, if the proximate and immediate cause of the accident be the unskillfulness of the plaintiff, there is no relief.

Flower v. *Adam,* 2 Taunt. 314; *Butterfield* v. *Forrester,* 11 East, 60; Sedgw. Dam. (2d ed.) 93 *et seq.,* 467 *et seq.*

If the circuit court, had, in its charge, given substantially the law asked for by plaintiff, that would have sufficed, but not doing this

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A brakeman in charge of the movements of his train, who, without signaling to slow up after once attempting to uncouple cars while moving rapidly, makes the second attempt and is killed, is guilty of negligence which will prevent recovery for his death, even if the railroad company was negligent in leaving a guard rail unblocked, where he must have gone from 30 to 50 feet after getting between the cars before stepping into it. Towner v. Missouri Pac. R. Co. 52 Mo. App. 648.

Failure to suitably inspect the coupling pin of an engine after it has been subjected by a collision to a strain which is likely to injure it, is such negligence as will render the company liable for an injury to a fireman caused by the breaking of the pin. Norfolk & W. R. Co. v. Nunnally, 88 Va. 546.

A defective condition of a drawbar on a freight car, allowing the deadwoods to come together, will not render a railroad company liable to a switchman whose arm is crushed between the deadwoods, where just before the accident he threw his arms between them by stumbling upon a piece of coal left upon the track through the negligence of fellow servants. Cincinnati, N. O. & T. P. R. Co. v. Mealer, 50 Fed. Rep. 725.

A railway company is liable for injuries to a brakeman whose foot was caught while he was uncoupling cars, by a brake beam which hung only 3 inches from the rails when it should have hung at least 6 inches therefrom, where the accident would not have occurred if it had hung at the usual height. Texas Pac. R. Co. v. White, 82 Tex. 543.

A railroad company is chargeable with negligence in not discovering a defect in a brake rod under a car, and either correcting it or ceasing to use the car, where ordinary inspection thereof would have disclosed the defect. Cowan v. Chicago, M. & St. P. R. Co. 80 Wis. 284.

A brakeman employed in shifting cars and making up trains, injured because of a defect in a chain on a brake of a car, without any fault on his part, is entitled to recover where the defect was or might have been known to the company by careful inspection. Richmond & D. R. Co. v. Burnett, 88 Va. 538.

The use of couplings of different types by a railroad company, although the hazard of coupling cars may be thereby increased, is not negligence *per se,* so as to prevent the assumption of the risk by an employé who uses them. Pittsburg & L. E. R. Co. v. Henley, 15 L. R. A. 384, 48 Ohio St. 608.

A brakeman on a freight train assumes the risk of injury from iron or lumber projecting over the end of a car which he is attempting to couple with another, where cars so loaded are frequently allowed in the train on which he works. Jacksonville, T. & K. W. R. Co. v. Galvin, 16 L. R. A. 337, 29 Fla. 366.

A brakeman injured in coupling cars cannot recover from the company on the ground that the appliances used were more dangerous than those of another sort, if they were in use when he entered the service, and he informed himself as to the method of using them, and assumed the risk of their use as one incident to the business. Hatter v. Illinois Cent. R. Co. 69 Miss. 642.

Failure of a railroad company to furnish an employé with a coupling stick does not make it liable to him for injuries in attempting to draw a pin from a coupling, for which purpose the stick could not have been used. Welch v. New York Cent. & H. R. R. Co. 43 N. Y. S. R. 958.

at all, it is error of which plaintiff can justly complain.

St. Louis Public School Directors v. *Risley*, 77 U. S. 10 Wall. 91 (19:850); *Iron Silver Min. Co.* v. *Cheeseman*, 116 U. S. 529 (29:712); *Patrick* v. *Graham*, 132 U. S. 627 (33:460); *Bizzell* v. *Booker*, 16 Ark. 309; *Bunt* v. *Sierra Butte Gold Min. Co.* 138 U. S. 485 (34:1032); 3 Graham & W. New Trials, 710 *et seq.*

Mr. **S. L. Glaspell,** for defendant in error:

The master must furnish his servant with a reasonably safe place in which to perform his work, and to diminish the standing room between the ends of cars to be coupled by projecting loads, so as to leave insufficient space for coupling, is negligence.

Haugh v. *Chicago, R. I. & P. R. Co.* 73 Iowa, 66; *Ayers* v. *Richmond & D. R. Co.* 84 Va. 679, 33 Am. & Eng. R. Cas. 269; *Brown* v. *Atchison, T. & S. F. R. Co.* 31 Kan. 1, 15 Am. & Eng. R. Cas. 271; *Day* v. *Toledo, C. S. & D. R. Co.* 42 Mich. 523; *Atchison, T. & S. F. R. Co.* v. *Plunkett*, 25 Kan. 188; *Northern Cent. R. Co.* v. *Husson*, 101 Pa. 1, 47 Am. Rep. 690, 12 Am. & Eng. R. Cas. 241.

Contributory negligence is a defense and the burden of showing it is upon the defendant below.

Washington & G. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 401 (21:114).

Whether Everett was guilty of contributory negligence or not was properly submitted as a fact to the jury.

Northern Pac. R. Co. v. *Herbert*, 116 U. S. 642 (29:755); *Northern Pac. R. Co.* v. *Mares*, 128 U. S. 710 (31:296); *Kane* v. *Northern Cent. R. Co.* 128 U. S. 91 (32:339); *Hungerford* v. *Chicago, M. & St. P. R. Co.* 41 Minn. 444, 41 Am. & Eng. R. Cas. 269; *Lawless* v. *Connecticut River R. Co.* 136 Mass. 1, 18 Am. & Eng. R. Cas. 96; *Greenleaf* v. *Illinois Cent. R. Co.* 29 Iowa, 14; *Ohio & M. R. Co.* v. *Pearcy*, 128 Ind. 197.

The disposition of men to care for themselves may in such cases be taken into consideration.

Washington & G. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 401 (21:114); *Seese* v. *Northern Pac. R. Co.* 39 Fed. Rep. 487; *Northern Pac. R. Co.* v. *Nickels*, 50 Fed. Rep. 718.

Where an employé has been but a short time in the service of a railroad company, knowledge of its rules must be brought home to him in order to hold him to their observance.

Dunlap v. *Northeastern R. Co.* 130 U. S. 649 (32:1058).

This case is not like the double deadwood cases, where the danger is said to be apparent and obvious.

Michigan Cent. R. Co. v. *Smithson*, 45 Mich. 212; *Baldwin* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 680; *Kohn* v. *McNulta*, 147 U. S. 238 (37:150).

Mr. Justice **Shiras** delivered the opinion of the court:

While it is true that the defendant company excepted to the court's refusal to give, on the whole evidence, a peremptory charge in favor of the defendant, and has assigned such refusals for error, yet, in the brief of plaintiff in error, the learned counsel have not thought fit to discuss those assignments, but have put their case mainly upon the error alleged to have been committed by the trial court in instructing the jury in the following terms:

"If you find the lumber was negligently loaded—that is, in an unusual manner—and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to assume that the car was properly loaded, and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practicable for him to do so; and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident, and in time to avoid it he cannot recover."

The criticism made upon this instruction is that the court erred in stating that Everett had a right to assume that the car was properly loaded; without, at the same time, telling the jury that some portion of the duties of a car inspector were cast upon Everett himself, and that he should have discharged those duties before he undertook the work.

*But though the court did say that [112 Everett had a right to assume that the car was properly loaded and to act on that assumption, yet, at the same time, the court told the jury that if Everett had discovered the projecting lumber before the peril was encountered he should have desisted from his effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, and that if by the exercise of proper diligence he might have discovered the projecting timber before the accident and in time to avoid it, he could not recover.

In effect, the jury were told to find whether the car was or was not properly loaded, and whether the plaintiff, by the exercise of proper diligence, could or could not have discovered the projecting timber before the cars came together and in time to avoid the danger. In other words, the jury were instructed that if the car was negligently loaded, with the sticks of timber extending too far beyond the end of the car, and if the plaintiff could not, in the exercise of proper diligence, have perceived the projecting timber in time to escape, then he was entitled to recover.

We are unable to detect any error or unfairness in these instructions.

It appeared that Everett was a young and inexperienced man; that this was his first service in attempting to couple a car with a projecting load; the duty he was expected to perform gave him no time to narrowly inspect the approaching car or to observe its condition. His attention was not called to the projecting timber until he was in the very act of making the coupling, and when his effort to avoid it was too late. He had first to throw the switch to receive the approaching car, and then run ahead and get ready to put the pin in the drawhead. It was shown that there was no pin in the drawhead of the stationary car, and he was obliged to pick one up and put it in place ready to make the coupling. These duties

gave him no opportunity to closely scan the car that was in rapid motion behind him. In such circumstances, when the whole transaction is the work of a moment, and when his duty calls upon him to act promptly, a man cannot be 113] expected *to act with circumspection. At all events, we think that, in view of the fact that the car was improperly loaded, that Everett was new and inexperienced in such work, and that he was required to perform the double duty of throwing the switch and making the coupling, the case was an appropriate one for submission to a jury.

In the case of *Dunlap* v. *Northeastern R. Co.* 130 U. S. 652 [32:1059], we held that the circuit court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish.

And in *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 44 [37:642], we said that where in an action against a common carrier to recover damages for injuries there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them.

In *Sullivan* v. *New York, N. H. & H. R. Co.* 154 Mass. 527, it was held that "the court is not permitted to take from the jury these questions of negligence and to decide them for the jury and for the case, unless the evidence shows that the negligence of the defendant in error was gross and willful; if it was less than that, then the questions of negligence were for the jury, and are all settled in favor of defendant in error by the verdict."

It is not easy, in a subject of this kind, to lay down unbending rules, and conflicting cases can readily be found. But, without pursuing the subject further, we are satisfied that, in the present case, there was no conclusive evidence of a want of due care on the part of Everett in not observing the projecting timber while he was in the discharge of his duty, and while his attention was directed to the work in which he was engaged.

The judgment of the court below is affirmed.

114] *THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Plff. in Err.,
v.
B. D. ROBERTS.

(See S. C. Reporter's ed. 114-122.)

Lands of Indians—grant to railway company—treaty with Indians—school lands—public lands appropriated—admission of Kansas as a state—conditions thereof.

1. Where lands of Indians are reserved by treaty for their occupation, the fee is under the control of the government, and the manner, time, and conditions on which their right shall be extinguished are matters for the determination of the government.
2. Where a grant absolute in terms is made by Congress to a railway company for its right of way, of lands reserved for the occupancy of the Indians, such grant conveys the fee and possession, leaving no rights in the Indians.
3. The setting apart by statute or treaty with Indians of lands for their occupancy is of itself a withdrawal of their character as public lands, and consequently of the lands from sale and preemption.
4. An Act of Congress reserving certain sections of public lands when surveyed for school purposes in each township does not embrace lands which had before then been set apart by statute or treaty with the Indians for their use.
5. A tract of public lands lawfully appropriated to any purposes becomes thereafter severed from the mass of public lands, and no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it.
6. By the Act for the admission of the state of Kansas into the Union, Congress reserved to itself the right to make all needful regulations for the government of the Indians, and for the use and disposition of their lands and other property.
7. By the accepted conditions upon which the state of Kansas was admitted into the Union, her original claim to the school sections in townships sixteen and thirty-six of her state was rejected by Congress, and abandoned by the state and the rights of Congress was conceded to the absolute control of the lands thus embraced and of lands set apart for the use of the Indians until such right should be extinguished by appropriate legislation.

[No. 230.]

Argued and Submitted Jan. 30, 1894. Decided March 5, 1894.

IN ERROR to the Supreme Court of the State of Kansas, to review a judgment of that court, affirming the judgment of the District Court of Labette county, Kansas, in favor of the plaintiff, B. D. Roberts, against the defendants, The Missouri, Kansas & Texas Railway Company, *et al.*, for the recovery of the possession of certain lands in said Labette county, etc. *Reversed, and case remanded for further proceedings.*

The facts are stated in the opinion.

Messrs. **T. N. Sedgwick** and **James Hagerman**, for plaintiff in error:

Kansas had not acquired title to the land when the land grant to the railroad was passed.

The land in question had been and was reserved for the use of the Osage Indians by virtue of the treaty of Dec. 30, 1825, and the treaty of March 2, 1839.

Wilcox v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 (23: 634); *Spaulding* v. *Martin*, 11 Wis. 272; *Ruggles* v. *Marsilliot*, 19 Wis. 160.

The assent of the people in coming into the Union as a state upon the terms proposed must now be regarded as binding the state.

Minnesota v. *Bachelder*, 68 U. S. 1 Wall. 109 (17: 551).

The railroad company acquired its title to right of way first.

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* see note to Worcester v. Georgia, 8:483.

As to construction and operation of treaties, see note to United States v. The Amistad, 10:826.

Congress had the power to grant a right of way over an Indian reservation.

Grinter v. *Kansas Pac. R. Co.* 23 Kan. 642; *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S 426 (26: 578); *Missouri, K. & T. R. Co.* v. *United States*, 92 U. S. 760 (23: 645).

By the Act of July 26, 1866, the title and right to occupy the land in controversy as a right of way vested in the defendant company immediately on the passage of the Act.

Rutherford v. *Greene*, 15 U. S. 2 Wheat. 196 (4: 218); *Lessieur* v. *Price*, 53 U. S. 12 How. 59 (13: 893); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491 (24: 1095); *Southern Pac. R. Co.* v. *Dull*, 22 Fed. Rep. 489; *Wilkinson* v. *Northern Pac. R. Co.* 5 Mont. 538, 20 Am. & Eng. R. Cas. 320; *Rider* v. *Burlington & M. R. Co.* 14 Neb. 120, 10 Am. & Eng. R. Cas. 688; *Central Pac. R. Co.* v. *Dyer*, 1 Sawy. 641.

The fact that the land is part of section 16 makes no difference; the power of Congress is absolute until the title has passed and vested in the state.

Minnesota v. *Bachelder*, 68 U. S. 1 Wall. 109 (17: 551); *Frisbie* v. *Whitney*, 76 U. S. 9 Wall. 187 (19: 668); *Union Pac. R. Co.* v. *Douglass County*, 31 Fed. Rep. 540.

The general government was under no obligation to the state to ever extinguish the Indian title to their right of occupancy to these lands.

Ballou v. *O'Brien*, 20 Mich. 320; *Wood* v. *Missouri, K. & T. R. Co.* 11 Kan. 323.

As to these school sections, no title vested in the state until the Indians ceded the lands to the United States or until the Indian title had been extinguished and the land surveyed.

Act of Admission, §§ 1, 2; *Natoma Water & Min. Co.* v. *Bugbey*, 96 N. S. 165 (24: 621); *Medley* v. *Robertson*, 55 Cal. 396; *Baker* v. *Newland*, 25 Kan. 25; *Union Pac. R. Co.* v. *Douglass County*, 31 Fed. Rep. 540; *Flint & P. M. R. Co.* v. *Gordon*, 41 Mich. 420.

Mr. **Nelson Case**, for defendant in error:

By virtue of section 34 of the Organic Act creating the territory of Kansas, and of the first clause of section 3 of the Act of Admission, the land in controversy became a part of the state school land, and from that time its disposition was beyond the power of Congress.

Buttz v. *Northern Pac. R. Co.* 119 U. S. 55 (30: 330).

In order that the land be excluded from the territorial limits of the state it must be so provided by treaty with the Indian tribe.

But no such provision can be found in any treaty ever negotiated between the United States and the Osage Indians.

United States v. *Ward*, 1 Woolw. 18; *Langford* v. *Monteith*, 102 U. S. 145 (26: 53); *Yellowstone County Comrs.* v. *Northern Pac. R. Co.* 10 Mont. 414.

The state took the title to the land in question for the support of common schools by virtue of its compact with the general government.

Beecher v. *Wetherby*, 95 U. S. 517 (24: 440); *Heydenfeldt* v. *Daney Gold & S. Min. Co.* 93 U. S 634 (23: 995).

The compact between the general government and the state of Kansas, expressed in the propositions submitted to the state in section 3 of the Act of Admission, and their acceptance by the state, amounted to a contract, binding alike on Congress and the state, and thereafter it was beyond the power of Congress, had it so desired, to grant said land to any other party.

Minnesota v. *Bachelder*, 68 U. S. 1 Wall. 109 (17: 551); *Union Pac. R. Co.* v. *Douglass County*, 31 Fed. Rep. 540; *McGehee* v. *Mathis*, 71 U. S. 4 Wall. 143 (18: 314); *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *New Orleans* v. *De Armas*, 34 U. S. 9 Pet. 224 (9: 109); *New Orleans* v. *United States*, 35 U. S. 10 Pet. 731 (9: 600).

Plaintiff in error took no part of these reserved lands as a grant.

Leavenworth, L. & G. R. Co. v. *United States*, 92 U. S. 733 (23: 634); *Missouri, K. & T. R. Co.* v. *United States*, 92 U. S. 760 (23: 645).

Mr. Justice **Field** delivered the opinion of the court:

This is an action of ejectment to recover possession of certain lands situated in section sixteen (16) of township thirty-four (34) in the county of Labette, state of Kansas, occupied and used by the Missouri, Kansas & Texas Railway Company as part of its right of way, to which it claims title under the Act of Congress of July 26, 1866, granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific Railway & Telegraph Company from Fort Riley, Kansas, to Fort Smith, Arkansas. 14 Stat. at L. chap. 270, p. 289.

*The Act declares that, for the purpose [115 of aiding the Union Pacific Railway Company, southern branch, that being a corporation then organized under the laws of Kansas, to construct and operate a railroad from Fort Riley, in that state, or near that military reservation, thence down the valley of the Neosha river to the southern line of the state, with a view to the extension of the same through a portion of the Indiana territory to Fort Smith, Arkansas, there was thereby granted to that state, for the use and benefit of the railroad company, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of its road, and not exceeding in all ten sections per mile; provided that in case it should appear that the United States had, when the line of the railroad was definitely located, sold any sections, or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement had attached to the same, or that it had been reserved by the United States for any purpose whatever, then it should be the duty of the Secretary of the Interior to cause to be selected for the purposes stated, from the public lands of the United States nearest to the section specified, so much land as should be equal to the amount of the lands sold, reserved, or otherwise appropriated, or to which the right of a homestead settlement or preemption had attached. But to the said act a proviso was attached that any and all lands reserved to the United States by any Act of Congress or in any other manner, by competent authority, for the purpose

of aiding in any object of internal improvement, or other purposes whatever, were reserved and excepted from the operation of the Act, except so far as it might be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, was thereby granted, subject to the approval of the President of the United States.

The Union Pacific Railway Company, southern branch, the corporation designated in the Act of Congress, was organized by the legislature of Kansas, and incorporated on the 25th day of September, 1865, under an act providing 116] for the *incorporation and regulation of railroad companies; and on the 3d day of February, 1870, its name was changed to that of the Missouri, Kansas & Texas Railway Company, under which designation it is one of the defendants therein.

Certain lands within the present state of Kansas were reserved whilst it was still a territory, and long previously, by the United States, for the use and occupation of the Osage Indians. Such reservation was made by treaty between them and the United States concluded as far back as June 2, 1825, and proclaimed in December following. 7 Stat. at L. 240, Indian Treaties. From that time, and continuously thereafter, the reserved lands were occupied by those Indians until the treaty ceding the lands, or parts thereof, to the United States, concluded in 1866 and proclaimed in January, 1867 (14 Stat. at L. 687) except such portion thereof as was appropriated and used as a right of way by the Missouri, Kansas & Texas Railway Company for its road under the grant of July 26, 1866. Prior to June 6, 1870, that company located its railroad through these reserved lands in Kansas, with the approval of the President, and constructed its road in substantial conformity with the Act of Congress. The right of way for its road, two hundred feet in width, was granted to the company unconditionally, subject only to such approval. The title to the land for the two hundred feet in width thus granted vested in the company either upon the passage of the Act of Congress, July 26, 1866, or upon the construction of the road, and so far as the present case is concerned, it does not matter which date be taken.

The United States had the right to authorize the construction of the road of the Missouri Kansas & Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government; and when transferred, without reference to the possession of the lands and without designation of any use of them requiring the delivery of their possession, the transfer was subject to 117] *their right of occupancy; and the manner, time, and conditions on which that right should be extinguished were matters for the determination of the government, and not for legal contestation in the courts between private parties. This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions. It was asserted in *Butts* v. *Northern Pac. R. Co.* 119 U. S. 55 [30: 330], and has never, as we are aware, been seriously controverted. In that case, the lands were within what is known as Indian country, where the right of the Indians to the occupancy of their lands was recognized; and in grants by the government of portions thereof for works of internal improvement there usually was a stipulation for its extinguishment as rapidly as might be consistent with public policy and the welfare of the Indians. Such a stipulation was given when the grant under consideration in the case cited was made, showing that the government intended the grant to take effect notwithstanding any existing right of occupancy by the Indians, and it was deemed a sufficient expression of its intention to that effect. No such stipulation was made when the grant of the right of way through the Osage reservation was made, but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession; and left no rights on the part of the Indians to be the subject of future consideration. Though the law as stated with reference to the power of the government to determine the right of occupancy of the Indians to their lands, has always been recognized, it is to be presumed, as stated by this court in the Buttz case, that in its exercise the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race, the court observing, however, that the propriety or justice of their action towards the Indians, with respect to their lands, is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to *dispose of the fee[118 of land occupied by them, it added, has always been recognized by this court from the foundation of the government. There are, however, certain well established doctrines controlling the action of the government, which can always be invoked to prevent hasty and improvident action against the Indians. It has always been held that the occupancy of lands set apart by statute or treaty with them for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands.

And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and pre-emption.

The right and power of the government to dispose of the fee of the lands in controversy occupied by the Osage Indians, with their rights of occupancy, having been exercised, and a grant of both fee and possession having been made to the Missouri, Kansas & Texas Railway Company, it follows that this company, the plaintiff in error, is entitled to a reversal of the judgment unless the claim of the plaintiff below, the defendant in error here, rests upon tenable grounds, and to them we will now turn our attention. Roberts, the plaintiff below, traces his title to the premises

through a patent from the state of Kansas to his grantor, dated May 25, 1871, and by conveyance from him, claiming that they constituted a portion of the lands ceded to the state for school purposes prior to the grant of Congress to the railway company under the Act of July 26, 1866.

On the 30th of May, 1854, Congress passed an Act to organize the territories of Nebraska and Kansas. The sections of the Act from the nineteenth to the thirty-seventh inclusive, relate to the territory of Kansas. Section thirty-four (34) provided "that when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen (16) and thirty-six 119] *(36) in each township in said territory shall be, and the same are, hereby reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same." 10 Stat. at L. 277, 278.

If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the territory and to the states to be created out of them, or as a dedication of them for schools it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown. As early as 1839 it was held in *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 [10: 264]: "That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it." The reservation referred to there was of land for military purposes; and in *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23: 634], it was said that this doctrine "applies with more force to Indian than to military reservations. The latter," the court observed, "are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them in a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such purpose."

The present constitution of Kansas was proposed by a convention of people in the then territory, July 29, 1859, with specified boundaries. An ordinance of the convention, preceding it, recites that, "Whereas the government of the United States is the proprietor of a large portion of the lands included in the limits of the state of Kansas as defined by the constitution [then proposed]; and whereas the state of Kansas will possess the right to tax said lands for purposes of government and for other purposes, now therefore that it be ordained by the people of Kansas that the right of the state of Kansas to said lands is relinquished 120]*forever, and the state of Kansas will not interfere with the title of the United States to such lands nor with any regulation of Congress in relation thereto, nor tax nonresidents higher *than residents*, provided always that the following conditions be agreed to by Congress," among which was the following: "That sections numbered sixteen and thirty-six in each township in the state, *including Indian reservations and trust lands*, shall be granted to the state for the exclusive use of common schools; and when either of said sections or any part thereof has been disposed of other lands of equal value, as nearly contiguous thereto as possible, shall be substituted therefor.'" 1 Charters & Constitutions, 629, 630.

Congress did not accept the proposed constitution with the conditions designated, but on the contrary, in its Act for the admission of the state into the Union, passed on the 29th of January, 1861, after declaring that the state was admitted on an equal footing with the original states in all respects whatever, and, describing its boundary (12 Stat. at L. 127) added a clause, containing the following provisions among others: "*Provided*, That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of persons or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, . . . or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to make if this Act had never been passed." By this provision Congress reserved to itself the right to make all needful regulations for the government of the Indians, and for the use and disposition of their lands and other property. The Indians continued thereafter as previously in possession of the lands, and their rights, whatever their nature and extent, were not extinguished by anything in the Act of admission of the state into the Union, nor at the time of the grant of a right of way by the Act of July 26, 1866.

*Congress went further, and rejected in[121 express terms the claims of the state asserted in the ordinance accompanying the proposed state constitution. By section 3 of the Act of admission it declared that the Act of admission should not be construed as an assent to all or any of the propositions or claims contained in the ordinance accompanying the proposed constitution or in the resolutions attached, but at the same time it made certain propositions, which it offered to the people of the state for compliance or rejection, and which, if accepted, should be held obligatory upon the United States and upon the state.

One of these propositions declared "that sections numbered sixteen and thirty-six in every township of *public lands* in said state, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands equivalent thereto and as contiguous thereto as may be, shall be granted to said state for the use of schools." And the several propositions were followed by the declaration that they were offered "on the condition that the people of Kansas shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States or with any reg-

ulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof."

These several provisions were accepted by the state of Kansas, by a joint resolution of its legislature, January 20, 1862, in this language: "That the propositions contained in the Act of Congress entitled 'An Act for the Admission of Kansas into the Union,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable, without the consent of the United States; and it is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary for securing the title to said soil, to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States."

It is clear beyond any doubt from this state-
122] ment of *the legislation of Congress and of Kansas, and the accepted conditions upon which that state was admitted into the Union, that her original claim to the school sections in townships sixteen and thirty six of her state was rejected by Congress, and abandoned by the state, and the right of Congress was conceded to the absolute control of the lands thus embraced and of lands set apart for the use of the Indians until such right should be extinguished by appropriate legislation. This rejection by Congress of the original claim of Kansas to the school lands in townships sixteen (16) and thirty six (36) and its subsequent abandonment by the state itself, and the concession to Congress of the right of absolute control of the lands until such right should be extinguished by appropriate legislation, distinguishes the case materially from that of Wisconsin, which was considered in *Beecher* v. *Wetherby*, 95 U. S. 517 [24: 440], and upon which the defendant in error principally relies. No such right was relinquished until after the grant of the right of way under the Act of Congress of July 26, 1866, to the Missouri, Kansas & Texas Railway, and the title of the lands composing that right of way had become vested in that company.

It follows, therefore, that the supreme court of the state, the court below, erred in sustaining the judgment of the inferior court of the state, in favor of the plaintiff in that court, the defendant in error here, and the judgment of the supreme court must therefore be reversed and the cause remanded with directions to take further proceedings in accordance with this opinion. And it is so ordered.

"THE MAIN," *Appt.*,
v.
WILLIAM H. WILLIAMS.

(See S. C. Reporter's ed. 122-133.)

Limited Liability Act.

Under the Limited Liability Act, U. S. Rev. Stat. § 4283, the liability of a ship owner for the "freight then pending" extends to passage money; and, to freight prepaid at the port of departure.

[No. 233.]

Argued Jan. 30, 31, 1894. Decided Mar. 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Maryland, affirming the decree of the U. S. District Court, in a proceeding taken by the owner of the steamship "Main" to limit the liability of the owners of that steamship, for a collision with the steamship "Montana," in respect to her "freight pending." *Affirmed.*

Statement by *Mr. Justice* **Brown:**

*This was an appeal from a decree en-[123
tered in a proceeding taken to limit the liability of the owners of the steamship Main for a collision with the steamship Montana, in respect to her "freight pending."

The proceedings were begun by a petition filed by the Nord Deutscher Lloyd, owner of the Main, setting forth the filing of a libel against the steamship for a collision with the steamship Montana, which occurred in the Patapsco river on January 5, 1889, wherein was claimed a sum largely in excess of the value of the Main and her freight then pending, and praying for the appointment of appraisers of the interest of petitioner in the ship and her freight for the voyage. The value of the vessel was subsequently fixed by stipulation at $70,000. The appraisers returned the amount of freight pending at $1577.38, which was disputed. The decree of the district court subsequently fixed the gross amount of freight upon the cargo on board at the time of the collision, prepaid at Bremen, as well as collectible at Baltimore, at $1870.10, and added thereto $5200, gross passage money prepaid at Bremen for the transportation of emigrant passengers for Baltimore, making in all $7070.10.

On appeal to the circuit court this decree was affirmed, and the owners of the Main appealed to this court.

Mr. **Thomas W. Hall,** for appellant:

"Freight" is the reward payable to the carrier for the safe carriage and delivery of goods.

Kirchner v. *Venus*, 12 Moore, P. C. 390; *Brittan* v. *Barnaby*, 62 U. S. 21 How. 533 [16: 179]; Scrutton, Charter Parties & Bills of Lading, art. 136; Newson, Shipping, art. 74; Machlachlan, Shipping (4th ed.) pp. 474, 475.

Not only do the definitions given of the word "freight" whether by lexicographers or by the courts, negative and exclude any idea that the money, commonly called "fares," paid for the transportation of passengers, is included in or covered by the term "freight," but the courts, when asked, have expressly refused so to extend the meaning of the word.

Abbott, Shipping (13th ed.) 538; *Lewis* v. *Marshall*, 7 Man. & G. 729; *Denoon* v. *Home & C. Ins. Co.* L. R. 7 C. P. 341; *Moffat* v.

NOTE.—*As to liability of carrier by water for loss or damage to goods*, see note to Moore v. American Transp. Co. 16: 674.

As to lien for freight; who has, and how waived or lost, see note to Raymond v. Tyson, 15: 47.

As to lien of the contract of affreightment on the

East India Co. 10 East, 468–474; *Place* v. *Norwich & N. Y. Transp. Co.* ("*The City of Norwich*") 118 U. S. 491 (30: 143).

Pending freight is of no value to the ship owner until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage.

Congress must be presumed to have understood the meaning of the words employed in the statute, and to have employed those words in their usual and ordinary sense.

Sedgw. Stat. & Const. Law, 220; *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 326 (4: 102); *Dyer* v. *National Steam Nav. Co.* ("*The Scotland*") 118 U. S. 507 (30: 153); *Thommessen* v. *Whitwill* ("*The Great Western*") 118 U. S. 520 (30: 156).

Messrs. **John H. Thomas, J. Wilson Leakin** and *George Leiper Thomas*, for appellee:

This court is bound by the findings of fact in the circuit court.

Marshall v. *The Adriatic* ("*The Adriatic*"), 103 U. S. 730 (26: 605); *The Abbotsford* v. *Johnson*, 98 U. S. 440 (25: 168); *The Benefactor* v. *Mount*, 102 U. S. 214–218 (26: 157, 158); *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.* 107 U. S. 500 (27: 342); *The Annie Lindsley* v. *Brown*, 104 U. S. 185–188 (26: 716–718).

The language, "the amount or value of the interest of such owner in such vessel and her freight then pending," as used in U. S. Rev. Stat. § 4283, is coextensive in meaning with the language, "the whole value of the vessel and her freight for the voyage," as used in U. S. Rev. Stat. § 4284.

Norwich & N. Y. Transp. Co. v. *Wright*, 80 U. S. 13 Wall. 127, 128 (20: 593).

"The amount or value" of the "owner's interest in the vessel," in the purview of this section, is the entire value of the vessel, without any deduction for liens or incumbrances.

The Leonard Richards, 41 Fed. Rep. 818; *The U. S. Grant*, 45 Fed. Rep. 642; 2 Parsons, Ship. & Adm. 125.

Courts have never deducted from the freight any expenses incident to the earning of it, or of procuring business, but have deducted salvage.

The Abbie C. Stubbs, 28 Fed. Rep. 720; *The José E. Moré*, 37 Fed. Rep. 122; *The Ettrick*, L. R. 6 Prob. Div. 127; *Gale* v. *Laurie*, 5 Barn. & C. 156–163.

Freight paid in advance is considered "freight then pending," or "freight for the voyage," in a proceeding like this.

The Express, 46 Fed. Rep. 860; *Dufourcet* v. *Bishop*, L. R. 18 Q. B. Div. 378; *Wilson* v. *Dickson*, 2 Barn. & Ald. 10–16.

The fact that the freight paid in advance was so prepaid under an agreement that it was "not to be returned, goods lost or not lost," cannot affect this question.

Liverpool & G. W. SS. Co. v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 397 (32: 788); *Inman* v. *South Carolina R. Co.* 129 U. S. 128–139 (32: 612, 615); *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357 (21: 627); *New Jersey S. Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How. 383 (12: 482).

Freight paid in advance, if not earned, may be recovered back, if there be nothing to the contrary in the contract under which it was prepaid.

1 Parsons, Ship. & Adm. 210, note 2; 3 Kent, Com. 226; *Duncan* v. *Kimball* ("*The Kimball*") 70 U. S. 3 Wall. 44, 45 (18: 54); *The Bird of Paradise* v. *Heyneman*, 72 U. S. 5 Wall. 562 (18: 666); *Re Liverpool & G. W. Steam Co.* 3 Fed. Rep. 168; *Benner* v. *Equitable S. Ins. Co.* 6 Allen, 222; *Griggs* v. *Austin*, 3 Pick. 20–22, 15 Am. Dec. 175; *Great Indian Peninsular R. Co.* v. *Turnbull*, 5 Asp. Mar. L. Cas. 465.

In *Brown* v. *Harris*, 2 Gray, 360, it was decided that passage money was freight.

Re Liverpool & G. W. Steam Co. 3 Fed. Rep. 168.

All agreements for the carriage of persons or property by vessels, are contracts of affreightment.

Ben. Adm. § 286; Pard. Droit. Com. § 704; Cleirac, Termes de la Marine, 510; The Consulat, 68; Les Bones Coutumes de la Mar., chap. 1; The Black Book of the Admiralty, appx., part 3 (ed. by Sir Travers Twiss, Q. C. D. C. L.), p. 51; *Giles* v. *The Cynthia*, 1 Pet. Adm. 203; *Howland* v. *The Lavinia*, 1 Pet. Adm. 136; *Mulloy* v. *Backer*, 5 East, 321; *Brown* v. *Harris*, 2 Gray, 359.

Passage money and freight are governed by the same rules.

Allen v. *Mackay*, 1 Sprague, 224, 225; *Flint* v. *Flemyng*, 1 Barn. & Ad. 48; *Pennsylvania R. Co.* v. *Sly*, 65 Pa. 205.

Demurrage is treated as freight, in the meaning of this statute and rule.

The Giles Loring, 48 Fed. Rep. 472, 473; *Gale* v. *Laurie*, 5 Barn. & C. 164; *The Dundee*, 1 Hagg. Adm. 120–128; *Butler* v. *Boston & S. SS. Co.* 130 U. S. 555 (32: 1023); *National Steam Nav. Co.* v. *Dyer* ("*The Scotland*") 105 U. S. 26 (26: 1002).

Mr. Justice* **Brown delivered the [126 opinion of the court:

This case raises two questions: (1) as to whether, under Revised Statutes, § 4283, the liability of a ship owner for the "freight then pending" extends to passage money; and, (2), whether it extends to freight prepaid at the port of departure.

1. By the common law, as administered both in England and America, the personal liability of the owner of a vessel for damages by collision is the same as in other cases of negligence, and is limited only by the amount of the loss and by his ability to respond. *Wilson* v. *Dickson*, 2 Barn. & Ald. 2; *The Dundee*, 1 Hagg. Adm. 120; *The Aline*, 1 W. Rob. 111; *The Mellona*, 3 W. Rob. 16, 20; *The Wild Ranger*, Lush. Adm. 553, 564; *Cope* v. *Doherty*, 4 Kay & J. 367, 378. The civil law, too, as well as the general law maritime, made no distinction in this particular in favor of ship owners. Emerigon, Contrat à la Grosse, chap.

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vessel, and for damages to goods, see note to The Freeman v. Buckingham, 15: 341.

As to lien for repairs and necessaries for vessels, domestic and foreign; and for supplies, salvage and freight; proceedings in rem for, see notes to Blaine v. The Charles Carter, 2: 636, The General Smith, 4: 609, and The Palmyra, 6: 531.

4, § 11. Nor did the ancient laws of Oleron or Wisbuy or the Hanse Towns suggest any restriction upon such liability. Indeed, it is difficult, if not impossible, to say when and where the restrictions of the modern law originated. They are found in the Consolato del Mare, which, in two separate chapters, expressly limits the liability of the part owner to the value of his share in the ship. Vinnius, an early continental writer, states that by the law of the land the owners were not chargeable beyond the value of the ship and the things that were in it. The Hanseatic Ordinance of 1644 also pronounced the goods of the owner discharged from claims for damages by the sale of the ship to pay them. But however the practice originated, it appears, by the end of the seventeenth century, to have become firmly established among the leading maritime nations of Europe, since the French Ordinance of 1681, which has served as a model for most of the modern maritime codes, declares that the owners of the ship shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight. Bk. 2, title 8, art. 2. A similar **127**] provision in *the Ordinance of Rotterdam of 1721 declared that the owners should not be answerable for any act of the master done without their order, any further than their part of the ship amounted to; and by other articles of the same ordinance it was provided that each part owner should be liable for the value of his own share. The French Ordinance of 1681 was carried, with slight change of phraseology, into the commercial code of France, and all the other maritime nations whose jurisprudence is founded upon the civil law. Code de Commerce (French) art. 216; German Mar. Code, art. 452; Code of the Netherlands, art. 321; Belgian Code, art. 216; Italian Code, art. 311; Russian Code, art. 646; Spanish Code, art. 621, 622; Portuguese Code, art. 1345; Brazilian Code, art. 494; Argentine Code, art. 1039; Chilian Code, art. 879.

The earliest legislation in England upon the subject is found in the act of 7 George II. passed in 1734, which enacted that no ship owner should be responsible for loss or damage to goods on board the ship by embezzlement of the master or mariners, or for any damage occasioned by them without the privity or knowledge of such owner, further than the value of the ship and her appurtenances, and the freight due or to grow due for the voyage, and if greater damage occurred it should be averaged among those who sustained it. By subsequent acts this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence, and to damage done by collision, while there was an entire exemption of liability, for loss or damage by fire or for loss of gold and jewelry, unless its nature and value were disclosed. In all these statutes the liability of the owner was limited to his interest in the ship and freight for the voyage.

By section 505 of the Merchants' Shipping Act of 1854, freight was deemed to include the value of the carriage of goods, and *passage money*. Owing, probably, to some difficulties encountered in determining at what point of time the value of the ship should be taken, and to establish a more uniform and equitable method of limiting the liability of the owner, the Merchant Shipping Act Amendment Act of 1862, extended the provisions of the prior acts to foreign *as well as British ships, and [**128** to cases of loss of life or personal injury, as well as damage or loss to the cargo, and provided that the owners should not be liable in damages in respect of loss of life or personal injury, "to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage," nor in respect of loss or damage to ships or their cargoes to an amount exceeding eight pounds per ton.

The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818 and revised in 1836. This was taken substantially from the statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the statute of Massachusetts.

The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of *The Lexington*, reported under the name of the *New Jersey Steam Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How. 344 [12: 465] was decided by this court. In this case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted which is commonly known as the Limited Liability Act, which has been incorporated into the Revised Statutes, sections 4282 to 4290, and amended in certain particulars not material to this case, in two subsequent acts. 23 Stat. at L. 57, § 18; 24 Stat. at L. 80, § 4.

By section 4283, upon the construction of which this case depends, "the liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

*By the law maritime the word [**129** "freight" is used to denote not the thing carried, but the compensation for the carriage of it. Prior to the era of steam navigation, travel by sea was comparatively of such little magnitude that "freight" was commonly used to denote compensation for the carriage of goods; yet, in Les Bones Costumes de la Mar, chap. 1 (Black Book, App. pt. III. p. 51) it is said "the term passenger includes all those who ought to pay freight for their persons apart from their merchandise," and "every man is called a passenger who pays freight for his own person, and for goods which are not merchandise. And every person who carries less than two quintals ought to pay freight for his own person;" and in this, one of the most ancient books

upon the maritime law (at least as old as the fourteenth century) it is also said: "And in this same manner with regard to any person who may come on board the ship without the consent of the managing owner or of the ship's clerk, it is in the power of the managing owner to take what freight he pleases." Les Bones Costumes de la Mar, chap. 1 (Black Book, App. pt. III. pp. 172-175). That passengers' fares were regarded as the substantial equivalent of freight is evident from the case of *Mulloy* v. *Backer*, 5 East, 321, in which Lawrence, *Judge*, remarks that "foreign writers consider passage money the same as freight;" and Lord Ellenborough adds, "except for the purpose of lien, it seems the same thing." In this country, as early as 1801, it was said by *Judge* Peters in the case of *Giles* v. *The Cynthia*, 1 Pet. Adm. 203, 206: "I think the force and true meaning of 'freight' has been misconceived. It is a technical expression. It does not always imply that it is the *naulum*, *merces*, or *fare*, for the transportation of goods. It is applied to all rewards, hire, or compensation, paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period. It is also called *freight* (and it is to be determined on the like legal principles) in the case of passengers, transported in vessels, for compensation. In Saxon, from which much of the English language is derived, it is called *fracht*, whether it be a compensation for transportation in ships by sea, or carriage by land, either of goods or persons, in gross, or detail." **130**] *With the introduction of steam vessels, however, the carriage of passengers became at once a most important branch of maritime industry, and modern authorities have generally placed the fare or compensation for the carriage of such passengers upon the same footing as freight for the transportation of goods. While many of the lexicographers, such as Webster, Worcester, and the Imperial Dictionary, still define freight as the sum paid by a party hiring a ship or part of a ship, or for the carriage of goods, in the Century Dictionary it is said to be, in a more general sense, the price paid for the use of a ship, including the transportation of passengers. Similar definitions are given in the law dictionaries of Burrill, Bouvier, and Anderson. See also Benedict's Admiralty, sections 283, 286, and 288.

Our attention has not been called to any express adjudications upon the question involved here, but, so far as the courts have been called upon to consider the subject, they have usually given to the word freight the same definition. Thus in *Flint* v. *Fleming*, 1 Barn. & Ad. 45, which was an action upon an insurance policy upon freight, it was held that plaintiff could recover freight upon his own goods, Lord Tenterden holding that the word "freight," as used in policies of insurance, imported the benefit derived from the employment of a ship. So in *Brown* v. *Harris*, 2 Gray, 359, the supreme court of Massachusetts, holding that passage money, paid in advance, might be recovered back, upon the breaking up of the voyage, observed that the rule was well settled as to freight for the carriage of goods; that if freight be paid in advance, and the goods not carried for any event, not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary. The court further observed: "Passage money and freight are governed by the same rules. Indeed, freight, in its more extensive sense, is applied to all compensation for the use of ships, including transportation of passengers." See also 3 Kent, Com. 219.

It is true that in the case of *Lewis* v. *Marshall*, 7 Man. & G. 729, it was said that freight was a term applicable to goods only, but this was said with reference to a *contract [**131** which made a distinction between freight upon a cargo and the fare of steerage passengers. The same remark may be made of the case of *Denoon* v. *Home & C. Ins. Co.* L. R. 7 C. P. 341, in which it was held that the question whether the term "freight" in a marine policy includes passage money, must depend upon the circumstances of each particular case, and the context of the particular policy; and, in that case, under the particular terms of the policy, which made a different rate of insurance upon freight and the transportation of coolies, it was held that the insurance did not cover the price to be paid for their transportation.

The real object of the Act in question was to limit the liability of vessel owners to their interest in the *adventure;* hence, in assessing the value of the ship, the custom has been to include all that belongs to the ship, and may be presumed to be the property of the owner, not merely the hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances, comprising whatever is on board for the object of the voyage, belonging to the owners, whether such object be warfare, the conveyance of passengers, goods, or the fisheries. *The Dundee*, 1 Hagg. Adm. 109; *Gale* v. *Laurie*, 5 Barn. & C. 156, 164. It does not, however, include the cargo, which, presumptively at least, does not belong to the owner of the ship.

There is no reason, however, for giving to the word "freight" a narrow or technical definition. The fares of the passengers are as much within the reason of the rule as the freight upon the cargo. It would be creating a distinction without a real difference to say that a transatlantic steamer laden with passengers should be wholly exempt from the payment of freight, while another, solely engaged in the carriage of merchandise, should be obliged to pay the entire proceeds of her voyage. The words "freight pending" in section 4283 or "freight for the voyage," (§ 4284) were copied from the English statute of George II. which, in turn, had taken them from the Marine Ordinance of 1681, and the prior Continental codes; but in both cases they were evidently intended to represent the *earnings* of the voyage, whether from the carriage of passengers or merchandise. If these words were used *instead of the words "freight [**132** for the voyage," it would probably more accurately express the intent of the legislature.

2. Nor by the use of the word "pending" was it intended to limit the recovery to the uncollected freight, or such as had not been completely earned at the time of the disaster. As the object of the statute was to curtail the amount that would otherwise be recoverable,

it should not be construed to abridge the rights of the owner of the injured vessel to a greater extent than its language will fairly warrant. This is the view taken in *Wilson* v. *Dickson*, 2 Barn. & Ald. 10, in which the court held the words "freight due or to grow due" included all the freight for the voyage, whether paid in advance or not.

It is worthy of remark in this connection that the codes of the Netherlands, of Chili, and of the Argentine Republic, in the sections above quoted, extend the liability for freight to such as is earned and yet to be earned.

The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, *Ch. J.*, in *Gale* v. *Laurie*, 5 Barn. & C. 156, 164: "Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports." To the same effect are the remarks of Sir Robert Phillimore in *The Andalusian*, 3 Prob. Div. 182, 190, and in *The Northumbia*, L. R. 3 Adm. 6, 13. Speaking of this statute, *Lord Justice* Brett in *Chapman* v. *Royal Netherlands Steam Nav. Co.* L. R. 4 Prob. Div. 157, 184, remarked: "A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. . . . It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties."

While, from the universal habit of insuring vessels, the application of the statute probably **133**] results but rarely in an *actual injustice to the owner of the injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress.

We are satisfied with the conclusions of the court below upon both of the points involved, and its decree is, therefore, affirmed.

GEORGE W. LAWTON ET AL., *Plffs. in Err.*,

v.

WILLIAM N. STEELE.

(See S. C. Reporter's ed. 133-144.)

New York law for preservation of fish—police power of state—power of the courts—preservation of game—fishing in state waters—duty of state—nets used in fishing—when may be destroyed.

1. Chapter 591 of the Laws of New York of 1880, as amended by chapter 317, Laws of New York of 1883, entitled "An Act for the Appointment of Game and Fish Protectors," is constitutional.
2. The police power of a state extends to everything essential to the public safety, health, morals and justifies the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance.
3. The determination of the legislature as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.
4. The preservation of game and fish is within the proper domain of the police power.
5. Where the waters referred to in a state law are within the jurisdiction of the state, such law regulating the manner in which fishing in these waters shall be carried on, is valid.
6. It is the duty of a state to preserve the fisheries of the state from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish.
7. If nets are being used in fishing in a manner detrimental to the interests of the public, it is within the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them.
8. Where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement.

[No. 203.]

Submitted Jan. 17, 1894. Decided March 5, 1894.

IN ERROR to the Supreme Court of the State of New York, to review a judgment of that court, affirming the judgment of the General Term, and ordering judgment absolute for the defendant, William N. Steele, in an action brought by George W. Lawton *et al.*, plaintiffs, for the conversion of certain fish nets, the property of the plaintiffs, taken and destroyed by the defendant, Steele. *Affirmed.*

See same case below, 7 L. R. A. 134, 119 N. Y. 226.

Statement by *Mr. Justice* **Brown:**

This was an action at law instituted in the supreme court for the county of Jefferson by the plaintiffs in error against the defendant in error, together with Edward L. Sargent and Richard U. Sherman, for the conversion of fifteen hoop and fyke nets of the alleged value of $525. Defendants Steele and Sargent interposed a general denial. Defendant Sherman pleaded that he, with three others, constituted the "Commissioners of Fisheries" of the state of New York, with power to give directions to game and fish protectors with regard to the enforcement of the game law; that defendant Steele was *a game and fish [**134** protector, duly appointed by the governor of the state of New York, and that the nets sued for were taken possession of by said Steele, as such game and fish protector, upon the ground that they were maintained upon the waters of

NOTE.—*As to measure of damages for nuisance*, see note to Baltimore & P. R. Co. v. Fifth Baptist Church, 27: 759.

As to who may maintain action for public nuisance, and when; special damage necessary; method of abatement, see note to Georgetown v. Alexandria Canal Co. 9: 1012.

As to when injunction will be granted against a nuisance, see note to Irwin v. Dixion, 13:25.

As to police power of states; instances of its exercise, see note to Barbier v. Connolly, 28:923.

the state in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance.

The facts were undisputed. The nets were the property of the plaintiffs, and were taken away by the defendant Steele and destroyed. At the time of the taking most of the nets were in the waters of the Black River Bay, being used for fishing purposes, and the residue were upon the shore of that bay, having recently been used for the same purpose. The plaintiffs were fishermen, and the defendant Steele was a state game and fish protector. The taking and destruction of the nets were claimed to have been justifiable under the statutes of the state relating to the protection of game and fish. Plaintiffs claimed there was no justification under the statutes, and if they constituted such justification upon their face they were unconstitutional. Defendant Sherman was a State Fish Commissioner. Defendant Sargent was president of the Jefferson County Fish & Game Association. Plaintiffs claimed these defendants to be liable upon the ground that they instigated, incited, or directed the taking and destruction of the nets.

Upon trial before a jury a verdict was rendered, subject to the opinion of the court, in favor of the plaintiffs against defendant Steele for the sum of $216, and in favor of defendants Sargent and Sherman. A motion for a new trial was denied, and judgment entered upon the verdict for $216 damages and $166.09 costs. On appeal to the general term this judgment was reversed, and a new trial ordered, and a further appeal allowed to the court of appeals. On appeal to the court of appeals, the order of the general term granting a new trial was affirmed, and judgment absolute ordered for the defendant. 7 L. R. A. 134, 119 N. Y. 226. Plaintiffs thereupon sued out a writ of error from this court.

Mr. **Levi H. Brown,** for plaintiffs in error:

The case involves a Federal question and is properly reviewable in this court on writ of error.

Judiciary Act of 1789, § 25; U. S. Rev. Stat. § 709; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264 (5:257); *Murray* v. *Charleston*, 96 U. S. 432 (24:760); *Miller* v. *Nicholls*, 17 U. S. 4 Wheat. 311 (4:578); *French* v. *Hopkins*, 124 U. S. 524 (31:536); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18:381); *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304 (4:97); *Medberry* v. *Ohio*, 65 U. S. 24 How. 413 (16:739); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 (28:1084); *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 (9:458); *Ryan* v. *Thomas*, 71 U. S. 4 Wall. 603 (18:460); *Simmerman* v. *Nebraska*, 116 U. S. 54 (29:535).

The amount involved is of no consequence so far as a review of the case is concerned.

Buel v. *VanNess*, 21 U. S. 8 Wheat. 312 (5:624); *Pratt* v. *Fitzhugh*, 66 U. S. 1 Black. 271, 273 (17:206, 207).

And the writ of error was properly addressed to the supreme court, as the court of appeals remitted the record to that court.

Atherton v. *Fowler*, 91 U. S. 143 (23:265); *McGuire* v. *Massachusetts*, 70 U. S. 3 Wall. 382 (18:164); *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 246 (4:381).

The legislature of the state of New York had no power under the Constitution to declare the nets in question to be public nuisances.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 660 (24:1036); *Munn* v. *Illinois*, 94 U. S. 124, 125 (14:83, 84); *Butchers Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 62 (21:404); *Re Cheesebrough*, 78 N. Y. 233; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24:527); *Patterson* v. *Kentucky*, 97 U. S. 501 (24:1115); *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 498 (19:984); 2 Kent, Com. 340; Cooley, Const. Lim. 577.

A common nuisance is defined to be a public annoyance.

3 Bl. Com. 216; Wood, Nuisances, § 1; *Cos* v. *Schultz*, 47 Barb. 67.

It is anything that worketh hurt, inconvenience or damage.

2 Broom & H. Com. (Wait's ed.) 219; 4 Wait, Act & Def. 729.

Chapter 591, Laws of New York, of 1880, as amended by chapter 317, Laws of New York, 1883, so far as it provides for the summary seizure and destruction of fishing nets, is unconstitutional.

Davidson v. *New Orleans*, 96 U. S. 97 (24:616); *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28:569); *McMillen* v. *Anderson*, 95 U. S. 37 (24:335); *Pennoyer* v. *Webb*, 95 U. S. 714 (24:565); *Kennard* v. *Louisiana*, 92 U. S. 481 (23:479); *Stuart* v. *Palmer*, 74 N. Y. 184, 191, 30 Am. Rep. 289; *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 (29:414); *Palmer* v. *McMahon*, 133 U. S. 661 (33:772); *Re McPherson*, 104 N. Y. 306, 321, 58 Am. Rep. 502; *People* v. *Essex County Suprs.* 70 N. Y. 229; *Rockwell* v. *Nearing*, 35 N. Y. 302.

The authority to abate nuisance is an exercise of the police power.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 660 (24:1036); *Re Cheesebrough*, 78 N. Y. 233, 237.

The exercise of the police power is subordinate to the constitution and must give way to the same.

New Orleans Gas Light Co. v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 (29:516); *Walling* v. *Michigan*, 116 U. S. 446 (29:691); *Mugler* v. *Kansas*, 123 U. S. 623 (31:205); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24:527); *Chy Lung* v. *Freeman*, 92 U. S. 276 (23:550); *People* v. *Gillson*, 109 N. Y. 389.

The right of an individual to abate a nuisance is a natural right, and cannot be extended by legislation.

Russell v. *New York*, 2 Denio, 461; *Wynehamer* v. *People*, 13 N. Y. 378; *Brown* v. *Perkins*, 12 Gray, 89; *Welch* v. *Stowell*, 2 Dougl. (Mich.) 332; *Cooper* v. *Marshall*, 1 Burr. 260; *Trahearn's Case*, Godbolt, 333; *Dimes* v. *Petley*, 15 Q. B. 276; *Larson* v. *Furlong*, 50 Wis. 681; *Shepard* v. *People*, 40 Mich. 487; Wood, Nuisances (3d ed.) §§ 33, 741.

There was no necessity, in this case, for the destruction of the nets. The wrongful use

may be stopped, but the property itself cannot be destroyed.

Wood, Nuisances (2d ed.) §§ 33, 738; 1 Hilliard, Torts (3d ed.) § 18a; *Rex* v. *Pappineau*, 1 Strange, 688; *Chenango Bridge Co.* v. *Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Welch* v. *Stowell*, 2 Dougl. (Mich.) 332; *Barclay* v. *Com.* 25 Pa. 505, 64 Am. Dec. 715; *Babcock* v. *Buffalo*, 56 N. Y. 268; *Brown* v. *Perkins*, 12 Gray, 89; *Larson* v. *Furlong*, 50 Wis. 631.

Nor could the property be destroyed as a penalty, for, in that case the owner would be entitled to such notice or such judicial proceedings must be had as would constitute due process of law.

Taylor v. *Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Rockwell* v. *Nearing*, 35 N. Y. 302; *Campbell* v. *Evans*, 45 N. Y. 356, 358; *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 601; *McVeigh* v. *United States*, 78 U. S. 11 Wall. 259 (20:80); *Windsor* v. *McVeigh*, 93 U. S. 274 (23:914) *Fisher* v. *McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Greene* v. *James*, 2 Curt. 187; *Hibbard* v. *People*, 4 Mich. 125; *Craig* v. *Werthmueller*, 78 Iowa, 599; *Darst* v. *People*, 51 Ill. 286, 2 Am. Rep. 301; *Dunn* v. *Burleigh*, 62 Me. 24; *King* v. *Hayes*, 80 Me. 206; *Gray* v. *Kimball*, 42 Me. 299; *Varden* v. *Mount*, 78 Ky. 86, 39 Am. Rep. 208; *State* v. *Robbins*, 8 L. R. A. 438, 124 Ind. 309; *Salter* v. *Van Derveer*, 47 Hun, 366; *Fischer* v. *Blank*, 148 N. Y. 245.

Aside from the statute under consideration, the defendant in error had no right to remove and destroy the nets as being a purpresture or nuisance.

Brookhaven Trustees v. *Strong*, 60 N. Y. 56; *Griffith* v. *McCullum*, 46 Barb. 561; Wood, Nuisances (2d ed.) §§ 74, 84, 580.

A public nuisance can only be abated by an individual when he suffers special and peculiar damages not common to the public at large.

Fort Plain Bridge Co. v. *Smith*, 30 N. Y. 44; *Harrower* v. *Ritson*, 37 Barb. 301; *Rogers* v. *Rogers*, 14 Wend. 131; *Lansing* v. *Smith*, 8 Cow. 146, 151; *Griffith* v. *McCullum*, 46 Barb. 561; *Goldsmith* v. *Jones*, 43 How. Pr. 415; *Groat* v. *Moak*, 26 Hun, 380; *Colchester* v. *Brooke*, 7 Q. B. 339; *Dimes* v. *Petley*, 15 Q. B. 276; *Brown* v. *Perkins*, 12 Gray, 89; *Cobb* v. *Bennett*, 75 Pa. 326, 15 Am. Rep. 752.

A public nuisance, when it causes no special damages to an individual, can only be abated by indictment or proceedings in equity at the suit of the people by their proper officers.

Francis v. *Schoellkopf*, 53 N. Y. 152; *Doolittle* v. *Broome County Supra*. 18 N. Y. 160; *Griffith* v. *McCullum*, 46 Barb. 561; *Taggart* v. *Com.* 21 Pa. 527; *Greenslade* v. *Halliday*, 6 Bing. 379; *Moody* v. *Niagara County Supra*. 46 Barb. 660, 666.

Chapter 141, Laws of 1886, so far as it prohibits fishing in the waters of Lake Ontario, is unconstitutional.

Powell v. *Pennsylvania*, 127 U. S. 678 (32: 253); *Butchers Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 (28: 585); *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *People* v. *Gillson*, 109 N. Y. 389; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Sloan* v. *Biemiller*, 34 Ohio St. 513; *Brookhaven Trustees* v. *Strong*, 60 N. Y. 56; *Osgood's Case*, 6 City Hall Rec. 4; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Patterson* v. *Kentucky*, 97 U. S. 501 (24: 1115); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Wynehamer* v. *People*, 13 N. Y. 378; *Roosevelt* v. *Godard*, 52 Barb. 534; *Rogers* v. *Jones*, 1 Wend. 237, 19 Am. Dec. 493; Cooley, Const. Lim. 577; Angell, Tide Waters, 21, 80, 107, 124.

The legislature had no constitutional power to pass an act forbidding the catching of fish in the waters of Lake Ontario.

Bird v. *The Josephine*, 39 N. Y. 19, 22; *The Belfast* v. *Boon*, 74 U. S. 7 Wall. 624 (19: 266); *The Moses Taylor* v. *Hammons*, 71 U. S. 4 Wall. 411 (18: 397); *Brookman* v. *Hammill*, 43 N. Y. 554, 3 Am. Rep. 731; *The Ad Hine* v. *Trevor*, 71 U. S. 4 Wall. 555 (18: 451); *The Genesee Chief* v. *Fitzhugh*, 53 U. S. 12 How. 443 (13: 1058); *The Eagle* v. *Fraser*, 75 U. S. 8 Wall. 15 (19: 365); *Baird* v. *Daly*, 57 N. Y. 236, 15 Am. Rep. 483.

Mr. **Elon R. Brown**, for defendant in error:

The 5th Amendment applies exclusively in restriction of Federal power, and has no application to the states.

Thorington v. *Montgomery*, 147 U. S. 490 (37: 252).

The 14th Amendment does not limit the subjects in relation to which the police power of the state may be exercised for the protection of its citizens.

Minneapolis & St. L. R. Co. v. *Beckwith*, 129 U. S. 26 (32: 585); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253); *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 (25: 989); *Hayes* v. *Missouri*, 120 U. S. 68 (30: 578).

Police regulations by the state which affect alike all persons similarly situated, are valid.

Barbier v. *Connolly*, 113 U. S. 27 (28: 923); *Henderson* v. *Wickham*, 92 U. S. 259 (23: 543).

The state possesses ample authority to rid the fisheries of such devices as are destructive of them, without negotiation with or judicial proceedings against the offending owners who have constructed or placed such devices in the fisheries in violation of the law protecting the same.

Phelps v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State* v. *Snover*, 42 N. J. L. 341; *Williams* v. *Blackwall*, 2 Hurlst. & C. 33; *Smith* v. *Levinus*, 8 N. Y. 472; *Wynehamer* v. *People*, 13 N. Y. 378; *Holyoke Water Power Co.* v. *Lyman*, 82 U. S. 15 Wall. 500 (21:133); *Com.* v. *Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Com.* v. *Essex Co.* 13 Gray, 247; *Inland Fisheries Comrs.* v. *Holyoke Water Power Co.* 104 Mass. 446; *Hart* v. *Albany*, 9 Wend. 500, 24 Am. Dec. 165; *Thurlow* v. *Massachusetts* (*License Tax Cases*) 46 U. S. 5 How. 504 (12: 256); *Rockwell* v. *Nearing*, 35 N. Y. 308; *Van Wormer* v. *Albany*, 15 Wend. 263; *Meeker* v. *Van Rensselaer*, 15 Wend. 397; *Lodie* v. *Arnold*, 2 Salk. 458; *American Rapid Teleg. Co.* v. *Hess*, 13 L. R. A. 454, 125 N. Y. 641; *Newark & S. O. H. C. R. Co.* v. *Hunt*, 50 N. J. L. 308; *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9; *Griffith* v. *McCullum*, 46 Barb. 561; *Harrower* v. *Ritson*, 37 Barb. 301; *Hart* v. *Albany*, 3 Paige, 216; *People* v. *Cipperly*, 37 Hun, 319, 101 N. Y. 634; *Hinckley* v. *Emerson*, 4 Cow. 351, 15 Am. Dec. 383.

The right of the legislature in the exercise of a reasonable discretion to declare that a

nuisance which was not before a nuisance cannot be questioned.

Mugler v. *Kansas*, 123 U. S. 623 (31:205); *Coe* v. *Schultz*, 47 Barb. 65; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Reg.* v. *Crawshaw*, Bell C. C. 303; *McLaughlin* v. *State*, 45 Ind. 338; *Monroe* v. *Gerspach*, 33 La. Ann. 1011; *State* v. *Towler*, 13 R. I. 661; *Davis* v. *Sawyer*, 133 Mass. 289, 43 Am. Rep. 519, 136 Mass. 239, 49 Am. Rep. 27; *Leigh* v. *Westervelt*, 2 Duer. 618; *Harris* v. *Thompson*, 9 Barb. 350; *Kellogg* v. *Thompson*, 66 N. Y. 88.

The state of New York has the power to regulate the fisheries of Lake Ontario.

Martin v. *Waddell*, 41 U. S. 16 Pet. 367 (10:997); *Den* v. *Jersey Co.* 56 U. S. 15 How. 426 (14:757); *McCready* v. *Virginia*, 94 U. S. 391 (24:248).

The right and duty to regulate, control and protect the fisheries in navigable waters along the shores of the Ocean and Great Lakes, has always been within the province of the states owning the adjacent territory.

Smith v. *Maryland*, 59 U. S. 18 How. 71 (15:269); *Smith* v. *Levinus*, 8 N. Y. 472; *State* v. *Thompson*, 85 Me. 189; *Brink* v. *Richtmyer*, 14 Johns. 255; *Hooker* v. *Cummings*, 20 Johns. 101, 11 Am. Dec. 249; *Osgood's Case*, 6 City Hall Rec. 4; *State* v. *Roberts*, 59 N. H. 256, 47 Am. Rep. 199.

The enactment of laws for the protection of fish in certain localities is constitutional.

Phelps v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *State* v. *Roberts*, *supra*.

135] *Mr. Justice* **Brown** delivered the opinion of the court:

This case involves the constitutionality of an act of the legislature of the state of New York known as chapter 591, Laws of New York of 1880, as amended by chapter 317, Laws of New York of 1883, entitled "An Act for the Appointment of Game and Fish Protectors."

By a subsequent act enacted in 1886:

"Section 1. No person shall at any time kill or take from the waters of Henderson Bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the counties of Jefferson and Oswego, . . . any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand. But this section shall not apply to or prohibit the catching of minnows for bait, providing the person using nets for that purpose shall not set them, and shall throw back any trout, bass or any other game fish taken, and keep only chubs, dace, suckers, or shiners.

"Sec. 2. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and liable to a penalty of $50 for each offense."

By the act of 1880, as amended by the act of 1883:

"Sec. 2. Any net, pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained, in or upon any of the waters of this state, or upon the shores of or islands in any of the waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish is hereby declared to be, and is, a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same, . . . and no action for damages shall lie or be maintained against any person for or on account of any such seizure and destruction."

*This last section was alleged to be [136 unconstitutional and void for three reasons: 1, as depriving the citizen of his property without due process of law; 2, as being in restraint of the liberty of the citizen; 3, as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the general term and by the court of appeals, upon the ground of its being a lawful exercise of the police power of the state.

The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passersby; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]; *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346]. *To justify the [137 state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unneces-

sary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the state against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. *Henderson* v. *Wickham*, 92 U. S. 259 [23: 543]. A simular statute of California, requiring a bond for certain classes of passengers described, among which were "lewd and debauched women," was also held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. *Chy Lung* v. *Freeman*, 92 U. S. 275 [23: 550]. So in *Hannibal & St. J. R. Co*, v. *Husen*, 95 U. S. 465 [24: 527], a statute of Missouri which prohibited the driving of Texas, Mexican, or Indian cattle into the state between certain dates in each year was held to be in conflict with the commerce clause of the Constitution, and not a legitimate exercise of the police powers of the state, though it was admitted that the state might for its self-protection prevent persons or animals having contagious diseases from entering its territory. In *Rockwell* v. *Nearing*, 35 N. Y. 302, an act of the legislature of New York, which authorized the seizure and sale without judicial process of all animals found **138**] trespassing within *private enclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See also *Austin* v. *Murray*, 16 Pick. 121; *Watertown* v. *Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Butchers Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 36 [21: 394]; *Re Cheesebrough*, 78 N. Y. 232; *Brown* v. *Perkins*, 2 Gray, 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests.

The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus in *Smith* v. *Maryland*, 59 U. S. 18 How. 71 [15: 269], it was held that the state had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the court, "the subject of the common liberty of taking oysters save for the purpose of guarding it from injury to whom it may belong and by whomsoever it may be enjoyed." It was held that the right of forfeiture existed, even though the vessel was enrolled for the coasting trade under the Act of Congress. So in *Smith* v. *Levinus*, 8 N. Y. 472, a similar act was held to be valid, although it vested certain legislative powers in boards of supervisors, authorizing them to make laws for the protection of shell and other fish. In *State* v. *Roberts*, 59 N. H. 256, 47 Am. Rep. 199, which was an indictment for taking fish out of navigable waters out of season prescribed by statute, it was said by the court: "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction *consequent upon the unrestrained [**139** exercise of the right. This is regarded as injurious to the community, and, therefore, it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Com.* v. *Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *McCready* v. *Virginia*, 94 U. S. 391 [24: 248]; *Vinton* v. *Welsh*, 9 Pick. 92; *Com.* v. *Essex Co.* 13 Gray, 248; *Phelps* v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Holyoke Water Power Co.* v. *Lyman*, 82 U. S. 15 Wall. 500 [21: 133]; *Gentile* v. *State*, 29 Ind. 409; *State* v. *Lewis* (Ind.) 20 L. R. A. 52.

As the waters referred to in the act are unquestionably within the jurisdiction of the state of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker* v. *Cummings*, 20 Johns. 91, 11 Am. Dec. 249. The duty of preserving the fisheries of a state from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within

140] *the power of the legislature to declare them to be nuisances, and to authorize the officers of the state to abate them. *Hart* v. *Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Meeker* v. *VanRensselaer*, 15 Wend. 397. An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark & S. O. H. C. R. Co.* v. *Hunt* 50 N. J. L. 308; *Blazier* v. *Miller*, 10 Hun, 435; *Mouse's Case*, 12 Coke, 62; *Stone* v. *New York*, 25 Wend. 173; *American Print Works* v. *Lawrence*, 21 N. J. L. 248, 23 N. J. L. 590, 57 Am. Dec. 420.

It is not easy to draw the line between cases where property illegally used may be destroyed 141]summarily and where judicial *proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of cards, chips, and dice of a gambling room.

The value of the nets in question was but $15 apiece. The cost of condemning one, (and the use of one is as illegal as the use of a dozen) by judicial proceedings, would largely exceed the value of the net, and doubtless the state would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, *but metes out the [142 proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan* v. *Wilson*, 127 U. S. 540 [32: 223], and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the supreme court of New Jersey in a similar case (*American Print Works* v. *Lawrence*, 21 N. J. L. 248, 259): "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become

nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (*Ely* v. *Niagara County Suprs.* 36 N. Y. 297) but where minor articles of personal 143] property are devoted to such *use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People* v. *West*, 106 N. Y. 293, 60 Am. Rep. 452) and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance.

In *State* v. *Snover*, 42 N. J. L. 341, it was held that a fish warden for a county, appointed by the governor, had the right, under an act of the legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that "after a statute has declared an invasion of a public right to be a nuisance it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance cannot sue the officer whose duty it has been made by the statute to execute its provisions." So in *Williams* v. *Blackwall*, 2 Hurlst. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value—(*Heck* v. *Anderson*, 57 Cal. 251, 40 Am. Rep. 115, boats as well as nets; *Dunn* v. *Burleigh*, 63 Me. 24, teams and supplies in lumbering; *King* v. *Hayes*, 80 Me. 206 a horse)—in others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. *Lowry* v. *Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *State* v. *Robbins*, 8 L. R. A. 438, 124 Ind. 308; *Ridgeway* v. *West*, 60 Ind. 371.

Upon the whole, we agree with the court of appeals in holding this act to be constitutional, and the judgment of the supreme court is, therefore, affirmed.

144] *Mr. Chief Justice* **Fuller** (with whom concurred *Mr. Justice* **Field** and *Mr. Justice* **Brewer**) dissenting:

In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a state the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guaranties.

I am, therefore, constrained to withhold my assent to the judgment just announced, and am authorized to say that *Mr. Justice* Field and *Mr. Justice* Brewer concur in this dissent.

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*THE SOUTHERN PACIFIC COMPANY, *Plff. in Err.*, [145
v.
ISABELLA SELEY, Administratrix of WILLIAM H. SELEY, deceased.

(See S. C. Reporter's ed. 145-156.)

Damages for death—risk assumed by employé.

1. In an action to recover from a railroad company damages for the death of an employé by catching

NOTE.—*As to responsibility of master and servant for carefulness and competency of co-servants*, see note to Wabash R. Co. v. McDaniels, 27: 605.

As to who are coemployés or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant, see note to Hough v. Texas & P. R. Co. 25: 612.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

As to liability of railroad companies to switchmen or brakemen for injuries while coupling cars; violation of rules, see note to Kohn v. McNulta, 37: 150.

Servant's assumption of risks; reliance on master's care.

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him and would have been known to one of his age, experience, and capacity, by the use of ordinary care. Bohn Mfg. Co. v. Erickson, 55 Fed. Rep. 943.

An employé assumes the risk of injury from all the ordinary dangers incident to the employment, of which he had notice before voluntarily exposing himself. Paland v. Chicago, St. L. & N. O. R. Co. 44 La. Ann. 1003.

An employé cannot be held to have assumed a

his foot in an unblocked frog, while coupling cars, and while in that condition being run over by a car, where the evidence showed that he had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them, he must be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers arising out of the use of unblocked frogs, and cannot recover.

2. Where the evidence could warrant no other conclusion than that plaintiff, an employé, took the risk of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death, the court should direct a verdict for the defendant.

[No. 119.]

Argued Nov. 27, 1893. Decided March 5, 1894.

IN ERROR to the Supreme Court of the Territory of Utah, to review a judgment of that court, affirming a judgment of the District Court, for the First Judicial District, of that territory, against the Southern Pacific Company, a railroad corporation, in an action brought by Isabella Seley, administratrix of William B. Seley, deceased, for damages for the death of her husband, caused by the negligence of said company. *Reversed, and cause remanded with directions to award a new trial.*

Statement by *Mr. Justice* **Shiras:**

This was an action in the District Court for the First Judicial District of the Territory of Utah against the Southern Pacific Company, a railroad corporation, brought by Isabella Seley, administratix of William B. Seley, deceased, to recover damages for the death of her husband caused by the alleged negligence of the defendant company. The Southern Pacific Company was incorporated under the laws of the state of Kentucky, and is engaged in operating the Central Pacific Railroad, running between the city of Ogden in Utah and a point in California.

Seley was, for seven years prior to his death, a conductor upon freight trains on the lines of the Southern Pacific Company and of its predecessor, the Central Pacific Railroad Company, and before that time had been a brakeman in the same employ. In the course of his business he was engaged in the depot yard at Humboldt Wells at least once a week and usually oftener.

*The accident in which Seley met his [146 death took place on July 7, 1887, at this depot yard, while he was making up his train, preparatory to running out with it.

The chief brakeman, named Hardy, had met with some difficulty in coupling a car, and had twice failed to make the coupling. The other brakeman had also failed in an attempt to couple the car. Seley undertook to effect the coupling. His first effort was a failure, the link slipping. At this time Hardy testifies that he warned Seley to take his foot out of the frog—that he would be caught.

Seley made a second attempt and, while endeavoring to make the coupling, again put his foot into the frog, from which he was unable to extricate it when the cars came

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risk where he was ignorant of the facts on which a proper appreciation of the risk depended. Breen v. Field, 157 Mass. 277.

Where an employé is not placed by the employer in a position of undisclosed danger, but is a mature man, doing the ordinary work which he has engaged to do, and whose risks are obvious to anyone, he assumes the risks of the employment, and no negligence can be imputed to the employer for an accident to him therefrom. Kohn v. McNulta, 147 U. S. 238 (37: 150).

An employé who is injured by defects in the instrumentalities of the business must show, in order to recover, that they were not obvious or known to him, although they were known, or might have been known, to the master by ordinary inspection; or, if the defects were obvious, that the danger was not fully appreciated by him for want of time for consideration. Reichla v. Gruensfelder, 52 Mo. App. 43.

An employé who understands or is informed and appreciates the dangerous character of machinery assumes the risk of the employment, and cannot recover for an injury caused thereby, although the master is negligent. King v. Ford River Lumber Co. 93 Mich. 172.

An employer who ties two ladders together to make one sufficiently long to reach to the roof of his barn, and directs his employé to ascend, assuring him that it is safe, and that he is an old sailor and skillful tier of knots, is liable, where the employé relies on his assurances without examining the fastening, and is injured by its giving way because it is improperly tied. Denning v. Gould, 157 Mass. 563.

An operator of a "former" machine in an oil mill who is compelled to work with such great rapidity that he cannot carefully examine all bags furnished him and placed by other employés on top of the machine, and which for his safety should be free from holes, has the right to assume, without examination, that the bags furnished him are free from holes. Carter v. Oliver Oil Co. 37 S. C. 604.

An employé who engages in using an explosive for the removal of stumps in a village park assumes the risks ordinarily incident thereto, although he is required to engage in the work on pain of losing his employment. Prentice v. Wellsville, 50 N. Y. S. R. 557.

An employé has the right to assume that his employer has complied with N. Y. Laws 1887, chap. 566, by protecting the opening of a hoistway in his warehouse by a substantial railing, or with good and sufficient trapdoors to be kept closed at all times except when in actual use, and assumes the risk of employment subject to the performance of the employer's duty. McCauley v. Smith, 47 N. Y. S. R. 500.

No amount of prudence on the part of an employé will relieve him of the risk of work undertaken by him which is patently and obviously dangerous. Gulf, C. & S. F. R. Co. v. Schwabbe, 1 Tex. Civ. App. 573.

An employé does not assume the risk of injuries arising from the employer's neglect to exercise reasonable diligence to ascertain and remedy defects in appliances used in the performance of his duties. Van Tassel v. New York, L. E. & W. R. Co. 1 Misc. 299.

An employé of a copper smelter cannot recover of his employer for personal injuries caused by the explosion of slag adhering to hot bricks of metal which it was his duty to immerse in water, which occurred in the ordinary process of the work. Fitzgerald v. Honkomp, 44 Ill. App. 365.

together. He was thrown down by the break-beam, the wheel passed over him, and he was instantly killed.

At the close of the plaintiff's evidence, the defendant moved for a non-suit. This was refused and an exception was allowed. At the close of the entire evidence, the defendant asked the court to instruct the jury to find a verdict for the defendant. This was refused, as were likewise certain instructions prayed for. A verdict for $7500 was rendered in favor of the plaintiff, on which judgment was entered, a motion for a new trial having been overruled. This judgment was affirmed by the supreme court of the territory, to whose judgment a writ of error was brought to this court.

Mr. **Maxwell Evarts** for plaintiff in error.

Messrs. **A. A. Hoehling, Jr., J. M. Wilson** and *S. Shellabarger* for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

The theory upon which the plaintiff proceeded in the court below was that Seley lost his life by reason of the negligence of the defendant, a railroad company, in using in its switches what is called an "unblocked frog."

A frog, in railroad parlance, is a section of a rail, or of several rails combined, at a point where two railways cross, or at the point of a switch from a line to a siding or to another line, and its function is to enable a car or train to be turned from one track to another. In a blocked frog the point of space between the rails, at the point where the car is switched from one track to another, is filled with wood or other material, so that the foot will not be held. There is a form of cast iron frog, in which the space between the rails at the apex of the frog is filled with cast iron. But the evidence clearly was that the defendant company used the unblocked frog, although at some places the cast iron frog was used. The weight of the evidence, as we read it in the bill of exceptions, plainly was that on the other great railroad systems of the West the unblocked frog was generally used. There was evidence tending to show that the unblocked frog is the better form—that the blocked frog is liable to be broken, get out of place, and throw the train from the track.

*In this disputable state of the facts [151 the defendants asked the court to charge the jury as follows:

"The jury are instructed that if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

This prayer should have been given by the court.

In the case of *Schroeder* v. *Michigan Car Co.* 56 Mich. 132, the supreme court of Michigan, per Cooley, *J.*, said:

"From this state of facts it will appear that if the defendant has been guilty of any negli-

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An employé who accepts service in a building having an elevator not provided with automatic doors, as required by N. Y. Laws 1887, chap. 462, § 8, knowing the fact, thereby assumes the extra risk, and waives the benefits intended by the statute. Freeman v. Glen Falls Paper Mill Co. 70 Hun, 530.

A porter in a store, familiar with the custom in operating the elevator, to warn any person using it by shaking the chain before moving it, and that the person so warned, should answer, assumes the risks of the premature movement of the elevator while he is using it, after the chain is shaken and before his answer. Beyer v. Victor, 51 N. Y. S. R. 83.

A railroad brakeman assumes the risk of injury from the jerk given to a freight train by taking up the slack. Davis v. Baltimore & O. R. Co. 152 Pa. 314.

A track repairer does not assume the risk of a switching train being driven so forcibly against a dead car so as to cause it to start suddenly forward, at a time when the track repairer has left the main track to permit a train to pass, and has taken refuge upon the track where the dead car is located. Chicago & E. I. R. Co. v. Shannon, 43 Ill. App. 540.

A railroad switchman assumes the risk of attempting to pass from his switch on to a track on which an engine is slowly following cars which he has switched, in the absence of negligence on the part of the railroad company. Dering v. New York Cent. & H. R. R. Co. 50 N. Y. S. R. 832.

A railroad brakeman assumes the risks incident to the use of an unblocked frog, where he knows of its condition or could have ascertained it by the exercise of the slightest vigilance. Spencer v. New York Cent. & H. R. R. Co. 67 Hun, 196.

An employé assumes a risk, with others incident to his employment, of which he knew or should have known by ordinary prudence and care, or of defects which were patent and open to common observation. Nix v. Texas & P. R. Co. 82 Tex. 473; Latremouille v. Bennington & R. R. Co. 63 Vt. 336, 48 Am. & Eng. R. Cas. 265.

Incompetency of the servants or managers of a railroad company is not one of the ordinary risks assumed by one entering its employ. Galveston, H. & S. A. R. Co. v. Arispe, 81 Tex. 517, 48 Am. & Eng. R. Cas. 350.

An employé assumes all dangers from the known incompetence or unskillfulness of a coemployé, which he does not complain of or make known to his employer. Latremouille v. Bennington & R. R. Co. 63 Vt. 336, 48 Am. & Eng. R. Cas. 265.

A servant does not assume risks arising from the failure of the master to provide proper rules and precautionary measures to protect him from dangers not necessarily incident to his occupation. Wild v. Oregon Short Line & U. N. R. Co. 21 Or. 159.

The assumption by an employé of apparent risks includes only such as exist d at the time or might reasonably be apprehended, and not risks arising from acts of his employer enhancing the danger or exposing him to new and unsuspected perils. Nall v. Louisville, N. A. & C. R. Co. 129 Ind. 268, 48 Am. & Eng. R. Cas. 315.

A person who gets on a freight train to assist in switching, on request of the head brakeman during the conductor's temporary absence, is a mere volunteer who assumes all the risks of the situation. Church v. Chicago, M. & St. P. R. Co. 16 L. R. A. 861, 50 Minn. 218.

An employé is not entitled to recover for injuries sustained in consequence of dangers which were understood by him as well as by his employers, who had no reason to fear an accident except from causes which were obvious to the employé. Brady v. Ludlow Mfg. Co. 154 Mass. 408.

gence contributing to the injury, it is to be found in the fact that a machine is made use of which is not so constructed as to guard as well as it might against similar accidents. Had the machine been constructed with a shield over the cog wheels, this particular accident would probably not have occurred; and any one whose attention was drawn to the danger of such accidents would probably have perceived the desirability of such a shield. But the machine is shown by the evidence to be manufactured and sold by a prominent and reputable house, and much used throughout the country, and the defendant cannot be said to be exceptionally wanting in prudence in purchasing and making use of it. Such danger as would result from making use of it was perfectly apparent, and would seem to be easily avoided."

Walsh v. *Whiteley*, L. R. 21 Q. B. Div. 371, was a case where the plaintiff was employed in defendant's mill, and it was his duty to put a band upon a vertical wheel while in motion. The disc of the wheel was not solid throughout, but had a number of holes in it. While putting the band on the wheel the plaintiff's thumb slipped into one of the holes, and was cut off. It appeared on the trial that these wheels were made sometimes with and sometimes without holes. The plaintiff's witnesses stated generally that the wheels with holes were dangerous. The plaintiff never made any complaint to his *employers. He recov- [152 ered a verdict, but the judgment was, on appeal, reversed, the court saying: "Is there any evidence of the machine being defective, even in the abstract? It was perfect in all respects. It was not impaired by use. The only suggestion is that the wheel, which might have been solid, had holes in it; and that, if the wheel had been solid the plaintiff could not have put his thumb where he did, and the accident would not have happened. But the plaintiff had used the same kind of a machine for thirteen years, and had sustained no injury. In these circumstances we can see no evidence of any defect in the condition of the machine, even apart from the negligence of the employé. It may be that a solid wheel would have been safer, but it would be placing an intolerable

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A contractor engaged in demolishing a building is not liable for the death of an employé by the falling of a chute for the removal of debris, well built and adequate for its intended purpose, but which, by the neglect of fellow servants or the act of independent persons, had been overtaxed and obstructed the day before, to the knowledge of such employé, by putting in it improper and heavy material, which he was endeavoring to remove when killed. Healey v. Smith, 43 N. Y. S. R. 804.

The breaking of timber used as a lever is a risk assumed by an employé using it, where the timber is sound and suitable for the purpose but not large enough for the strain put upon it. Bohn v. Chicago, R. I. & P. R. Co. 106 Mo. 429.

An employé using a defective machine which he helped to construct, for a period of two years, will be presumed to have known of the defect; and if he fails to notify his employers of the defect, his representatives cannot recover damages for his death, caused thereby. Litchfield Car & Mach. Co. v. Romine, 39 Ill. App. 642.

A section foreman who with full knowledge of the danger, undertakes to perform work for a railroad company with insufficient help, assumes the risk incident thereto. Atchison, T. & S. F. R. Co. v. Schroeder, 47 Kan. 315, 10 Ry. & Corp. L. J. 487.

The backing of a construction train in the usual manner of its operation does not subject a track hand employed thereon to any unusual risk not assumed as a condition of his service, although such backing causes him an injury. Galveston, H. & S. A. R. Co. v. Arispe, 81 Tex. 517, 48 Am. & Eng. R. Cas. 350.

An agreement by a railroad brakeman upon entering his employment to examine all appliances before using them, time being allowed therefor by the company, is not conclusive of his negligence in using a defective brake whose defects only an expert could have discovered. Pratt v. Lake Shore & M. S. R. Co. 63 Hun, 616.

A railroad brakeman assumes the risk of the giving way of a drawhead to a car, where the company is guilty of no negligence in respect thereto. Johnson v. Chesapeake & O. R. Co. 36 W. Va. 73.

A railroad foreman having charge of a gang of men cannot recover from the railroad company for personal injuries resulting from the breaking down of a hand car known to him to be defective where the car was proper for its use when originally furnished, but had become out of repair, and no notice of the defect or request to repair had been given the company. Reynolds v. Kneeland, 63 Hun, 283.

A section man upon a railroad does not assume the risks incident to loading rails upon a moving train in an unusual manner, when he is ignorant of the danger and is not cautioned in respect thereto. Palmer v. Michigan Cent. R. Co. 87 Mich. 281.

An engineer does not assume the risk of gravel and sand being washed upon the track, which is improperly constructed across a natural waterway without sufficient provision for the escape of the water and sand brought down with it. Union Pac. R. Co. v. O'Brien, 4 U. S. App. 221, 49 Fed. Rep. 538.

A laborer unskilled in railroad building is not necessarily chargeable with notice of the defective condition of a newly constructed roadbed, although he has engaged in its construction. Colorado M. R. Co. v. O'Brien, 16 Colo. 219, 48 Am. & Eng. R. Cas. 235.

Danger from a beam projecting from the side of an old warehouse converted into a depot, from eleven to twelve inches over the edges of cars as they pass, is not one of the risks which a freight brakeman assumes by entering upon his employment. Nance v. Newport News & M. V. R. Co. 13 Ky. L. Rep. 554.

The danger arising from a pile of logs beside a railroad track cutting off the opportunity of ready escape from the track, and from the customary running of trains in the yard of a railroad company at a speed greater than allowed by city ordinance, is assumed by a workman who goes to work upon the track with knowledge of the facts. Bengston v. Chicago, St. P. M. & O. R. Co. 47 Minn. 486.

A brakeman does not assume the risk of an unsafe telltale intended to give warning of approach to a bridge, and which should not be in itself a source of any danger,—especially where it is dangerous to brakeman on cars of more than ordinary height. Darling v. New York, P. & B. R. Co. 16 L. R. A. 643, 17 R. I. 708.

A railroad company is not liable for the death of a brakeman killed by passing under a bridge on a box car sixteen or eighteen inches higher than the ordinary car, where he was acquainted with the fact that the car was higher than an ordinary one, his view of the bridge was not obscured, and he had been on the road for some time. Lynch v. New York, L. E. & W. R. Co. 44 N. Y. S. R. 663.

burden on employers to hold that they are to adopt every fresh improvement in machinery. . . . It seems to us that in this case there is not a particle of evidence of any defect arising from the negligence of the employer. It was a machine generally used—used by the plaintiff for thirteen years without any complaint or mischief arising."

Sweeney v. *Berlin & J. Envelope Co.* 101 N.Y. 520, was a case where the plaintiff was injured by some sort of a press worked by steam. It was old fashioned and with no modern improvements. The court said: "He knew as much about it and the risk attending its use as the master. The defendant could not be required to provide himself with other machinery or with new appliances nor to elect between the expense of doing so and the imposition of damages for injuries resulting to servants from the mere use of an older or different pattern. In the absence of defective construction, or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from its use. The general rule is that the servant accepts the service subject to the risks incidental to it; and when the machinery and implements of the employer's business are, at the time, of a certain kind or condition and the servant knows it, he can make no claim upon the master to furnish other or different safeguards." *Hodgkins* v. *Eastern R. Co.* 119 Mass. 419, is to the same effect.

153] *Our own cases speak the same language. *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 [27:1003], was a case where the plaintiff was injured in the course of his employment as a brakeman. It appeared on the trial that he was hurt, while unlocking a ground switch, by a train other than his own. It was alleged that the defendant company was negligent in that it did not have an upright switch instead of a ground switch, as the former was safer. This court, affirming the judgment of the court below, said: "There was no sufficient evidence of any negligence on the part of the railroad company in the construction and arrangement of the switch to warrant a verdict for the plaintiff on that ground. The testimony of the plaintiff and his witness was too slight. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another, and any one who enters the service of a railroad company, in any work connected with the making up or moving of trains, assumes the risk of that condition of things. . . . The switch was of a form in common use, and was, to say the least, quite as fit for its place and purpose as an upright switch would have been."

In *Washington & G. R. Co.* v. *McDade*, 135 U. S. 570 [34: 241], this court used the following language: "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed."

In the case of *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189 [30: 1114], it was claimed that a brakeman, who was injured in coupling cars, had a right to go to the jury on the question whether the defendant company was not negligent in having too sharp a curve in its road where it entered a yard; but this court, by *Mr. Justice* Bradley, said: "Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law *to [154 restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. . . . It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employés have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the draw bars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed only on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it, for it is one of those things which happen, in the course of his employment, under such conditions as existed here."

It was not pretended in the present case that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of frog, not much used, and which, if used by the defendant, might have prevented the accident.

In view of these cases and many others of similar import, which it is unnecessary to cite, we think it is plain that the defendant was entitled not merely to the instruction prayed for, if the case went to the jury, but that, upon the whole evidence, the prayer for a peremptory instruction in the defendant's favor ought to have been granted.

The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of frog there in use; and it is not shown *that he[155 ever complained to his employers of the character of frogs used by them. He must, therefore, be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs.

Appel v. *Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550, was a case where the plaintiff's intestate was a brakeman employed in coupling cars in the yards of the defendant at Buffalo, N.Y., and while so engaged his foot was caught in an unblocked frog, and he was run over and killed; and the court of appeals held that, "in

accepting and continuing in the employment, the deceased assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, and of the danger to be apprehended therefrom, and therefore that a cause of action was not made out, and a refusal to nonsuit was error."

In the case of *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554 [34: 235], this court said, through *Mr. Justice* Lamar: "If the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery."

In *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189 [30: 1114], this court approved the action of the court below in holding that the plaintiff was precluded from a recovery by negligence of his own, and added that the judge was right in directing a verdict for the defendant on the broader ground that a person who enters into the service of another in a particular employment assumes the risk incident to such employment.

In *Kohn* v. *McNulta*, 147 U. S. 241 [37: 152], the case was that of a brakeman who was injured while coupling cars, and who alleged negligence in the defendant company in permitting cars of another road to be brought on defendant's road, which cars had bumpers of unusual length; and it was said by this court: "It is not pretended that these cars were **156**] out of *repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars in that they had double deadwoods or bumpers of unusual length to protect the draw bars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The employé was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and when risks in this respect were obvious to any one, under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

That Seley was guilty of contributory negligence, and therefore not entitled to recover, we think is also obvious.

Knowing, as he did, the character of the frog, and the liability of being caught in it, and after having been specially warned by the assistant brakeman, he yet persisted in exposing himself to an obvious danger. His object to couple the cars might have been successfully accomplished without placing his foot in the frog.

Recklessness could hardly go further. The evidence would warrant no other conclusion than that he took the risk of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The court should have directed a verdict for the defendant. *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 [27: 1003]; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 [29: 224]; *Gunther* v. *Liverpool & L. & G. Ins. Co.* 134 U. S. 110 [33: 857]; *Bunt* v. *Sierra Butte Gold Min Co.* 138 U. S. 483 [34: 1031].

The judgment of the court below is reversed; and the cause is remanded with directions to award a new trial.

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*EL PASO WATER COMPANY, [157
Appt.,
v.
THE CITY OF EL PASO.

(See S. C. Reporter's ed. 157-160.)

Jurisdiction as to amount.

This court has no jurisdiction of a suit brought by a water company to which a city has granted the exclusive right to supply the city with water, for a certain time, to enjoin the city from establishing any water works within its limits, during that time, where it does not appear from the record that there is over $5000 in controversy.

[No. 238.]

Submitted Feb. 1, 1894. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, sustaining a demurrer, and dismissing a suit in equity, brought by the El Paso Water Company, against the City of El Paso, to enjoin said city from establishing, maintaining or operating any water works within the limits of said city, until the expiration of the period of fifteen years, etc. On motion to dismiss or affirm. *Dismissed.*

Statement by *Mr. Justice* **Brewer:**

This is an appeal from a decree of the Circuit Court of the United States for the Western District of Texas, sustaining a demurrer to the plaintiff's original and amended bills, and dismissing the same. The facts as alleged in the bills are substantially these: By an ordinance passed May 7, 1881, the city council of the city of El Paso, Texas, assumed to grant "the sole and exclusive right, warrant, and authority, for the period of fifteen years, to manufacture, sell, and furnish water to the inhabitants of the city of El Paso, to both public and private buildings, and for irrigation within the corporate limits of said city," with "the sole and exclusive right, warrant and authority for said period to lay pipes, mains, and conductors underneath the streets, alleys, lanes and squares in said city, for the purpose of conducting water," and by a subsequent ordi-

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state law, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

nance rented hydrants at a certain annual rent. By certain assignments and transfers these rights became vested in the plaintiff, and in reliance thereon it expended a large sum of money, to wit, the sum of $150,000, in establishing its plant. The substance of these ordinances, the acts of the plaintiff, and subsequent dealings between it and the city are stated at length in the bills, but the sum of the whole matter lies in the fact of the alleged exclusive right to supply water to the city for the 158] term of *fifteen years, and to occupy the streets for the purpose of laying mains, etc.

The wrong complained of is the passage of two ordinances in 1889 and 1890, approved by a vote of the people, authorizing the issue of $25,000 and $75,000, respectively, of the bonds of the city for the avowed and declared purpose on the part of the council of sinking artesian wells and constructing a system of water works to be owned and operated by said council for supplying water to said city and inhabitants, for all public and private purposes; and the relief prayed was that the city be enjoined from establishing, maintaining, or operating any water works within the limits of said city until the expiration of said period of fifteen years, and from selling or negotiating any bonds, or other securities, for that purpose.

It is also alleged that if the bonds are issued the plaintiff will be compelled to pay taxes on its property for the interest on said bonds and to provide a sinking fund for the principal thereof, but the amount of the tax which will be thereby cast upon the plaintiff's property is not disclosed.

Messrs. **Walter D. Davidge** and **Leigh Clark** for appellee, in favor of motion.

Messrs. **William M. Thompson** and **Maurice McKeag** for appellant, in opposition.

Mr. Justice **Brewer** delivered the opinion of the court:

Probably the circuit court sustained the demurrer on the ground that under the constitution of the state of Texas, adopted in 1876, the attempt to grant exclusive rights in these matters was beyond the power of the city, and that, among other matters, is discussed at length by counsel in their respective briefs. That constitution (art. 1, § 26) provides that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." In the case of *Brenham* v. *Brenham Water Co.* 67 Tex. 542, the supreme court of the state, 159] construing this provision, held *that a contract similar to that made with the plaintiff was inhibited by the constitution, and that neither the city council nor the state legislature had power to make or authorize such a contract.

We do not deem it necessary to consider the important constitutional question thus presented, for it does not appear from the record that there is over $5000 in controversy, as is necessary to give this court jurisdiction. The bill is filed by the plaintiff to protect its individual interests, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.

With regard to the claim of exclusive rights, there is no allegation in the bills of the time at which the city will, unless restrained, commence the operation of its contemplated system of water works, and thus interfere with the actual performance of its contract with the plaintiff so far as respects the supply of water. Every averment would be satisfied by proof that the city intended to begin the use of its proposed water works on the day before the expiration of the fifteen years. And the only distinct disclosure of damage in the bills, or by the affidavits filed in this court, is that resulting from an actual supply of water by the city and a failure to pay the plaintiff for the use of its hydrants. So far as the mere construction of water works is concerned, that of itself is no violation of the terms of this contract. The time for which the exclusive right, as claimed, was given, was fifteen years, and the city would be guilty of no breach of any obligations if, during the life of the contract, it proceeded to sink artesian wells, to establish water works, and put itself in condition to, in the future and after the termination of the fifteen years, supply water for all public and private purposes. Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking *artesian wells and establishing a sys- [160 tem of water works, and had continued its labors in that direction during the entire life of the contract; that would have been no breach of its obligations to the plaintiff. It might have affected pecuniarily the value of the plaintiff's plant in that it carried a strong intimation that the moment the fifteen years expired the city would itself engage in the work of supplying water, and thus take from the plaintiff its business. So, preparations made by the city, at the time stated in the bills, to wit, 1889 and 1890, for the establishment of water works, may, and doubtless did, have some effect upon the value of the plaintiff's property, but the extent of the diminution of value thus caused is not alleged, and cannot be inferred. The bills do not allege that the city in terms denies the validity of its agreements to pay rent for hydrants or otherwise, and the acts which they charge that the city is about to do are acts which the city may do consistently with the continuance of the contract, and as a mere matter of preparation for the discharge of a public duty after the termination of that contract. Under these circumstances, we are of the opinion that it is not affirmatively disclosed by the record that the amount in controversy is a sum in excess of $5000, and, therefore, for want of jurisdiction in this court, the appeal must be dismissed.

THE MONTANA COMPANY (Limited) and RAWLINSON T. BAYLISS, General Manager, *Plffs. in Error.*,

v.

THE ST. LOUIS MINING & MILLING COMPANY

(See S. C. Reporter's ed. 160-172.)

Inspection of mining claim.

Section 376 of the Code of Civil Procedure of Montana, authorizing a court or judge to order an inspection, examination or survey of a lode or mining claim, is not repugnant to the 14th Amendment of the U. S. Constitution, prohibiting the deprivation of property without due process of law.

[No. 167.]

Submitted Dec. 13, 1893. Decided March 5, 1894.

IN ERROR to the Supreme Court of the state of Montana, to review a judgment of that court, affirming an order of the district court of the county of Lewis and Clarke, in the then territory of Montana, for an inspection of certain mines in the possession of the Montana Company, Limited, and appointing the inspectors, etc. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

161] *The facts in this case are as follows: On November 6, 1889, the defendant in error filed in the district court of the county of Lewis and Clarke, in the then territory of Montana, its petition praying an order for the inspection of certain mines alleged to be the property and in possession of the Montana Company (Limited). Notice was given, the defendant appeared and answered, a hearing was had, and on the 7th of December, 1889, an order for an inspection was made by the judge of said court. This order recited the giving of the notice, the hearing of the application, the production of evidence, and the arguments of counsel; finds that an inspection is necessary for the ascertainment, enforcement, and protection of the rights and interests of the petitioner in the mining claim owned by it; appoints the inspectors, and directs that they make an inspection, examination and survey. It limits the survey to the vertical planes of the end lines of the petitioners' claim, forbids the removal of any ore or minerals, or entrance to the mine unless accompanied by three representatives of the defendant, and in general makes suitable provisions to prevent any unnecessary interference with the defendant's working of the mine. By subsequent proceedings in the way of contempt, Rawlinson T. Bayliss, the general manager of the Montana Company (Limited), became a party to this litigation, and upon an adverse termination thereof in the district court a review was sought in the supreme court of the state, the territory having been admitted into the Union intermediate the filing of the application and the final disposition of the case in the district court. By that court the proceedings were sustained, and on February 4, 1890, it entered a judgment of affirmance. To review this judgment the defendants sued out a writ of error from this court. The statute under which the proceedings were had is section 376 of the Code of Civil Procedure (Comp. Stat. p. 162) and is in these words:

*"Whenever any person shall have [**162** any right to or interest in any lead, lode, or mining claim which is in the possession of another person, and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such mine, lode, or mining claim should be had or made; or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lead, lode, or mining claim and the person in possession of the same shall refuse for a period of three days, after demand therefor in writing, to allow such inspection, examination, or survey to be had or made the party so desiring the same may present to the district court or a judge thereof of the county wherein the mine, lead, lode, or mining claim is situated a petition under oath setting out his interest in the premises, describing the same; that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do. The court or judge shall thereupon appoint a time and place for hearing such petition and shall order notice thereof to be served upon the adverse party, which notice shall be served at least one day before the day of hearing. On the hearing, either party may read affidavits, and if the court or judge is satisfied that the facts stated in the petition are true he shall make an order for an inspection, examination, or survey of the lode or mining claim in question in such manner, at such time, and by such persons as are mentioned in the order. Such persons shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such persons while acting under such order shall be contempt of court. If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner."

Messrs. **W. E. Cullen, A. H. Garland** and **H. J. May** for plaintiff in error.

Messrs. **E. W. Toole** and **John B. Clayberg** for defendant in error.

Mr. Justice* **Brewer delivered the [**165** opinion of the court:

The decision of the supreme court of the state ends all inquiry as to a conflict between the statute or the proceedings had thereunder and the state constitution. The only question we may consider is whether there is any viola-

NOTE.—*As to what is due "process of law,"* see note to Pearson v. Yewdall, 24: 436.

As to constitutionality of ex post facto laws, see note to Calder v. Bull, 1: 648, and to Sturges v. Crowninshield, 4: 529.

As to ownership of mines; United States statute as to right of support of surface, see note to United States v. Castillero, 17: 448.

tion of the provisions of the Federal Constitution.

In the petition filed for the writ of error the plaintiffs in error alleged as the basis thereof that "the validity of said statute is drawn in question on the ground of its being repugnant to that provision of the 14th Amendment to the Constitution of the United States, which prohibits any state from depriving any person of life, liberty, or property, without due process of law."

In the brief it is said that the chief justice of the supreme court of the state, in his opinion, summarized exactly what they insist upon, as follows:

"It is contended that this statute is unconstitutional, and authorizes the inspection, examination and survey of the mining property of the Montana Company (Limited) upon the petition of the St. Louis Mining & Milling Company of Montana, and before the commencement of any action by the parties. The obnoxious features are pointed out in the brief, and may be summarized under the following heads: This law may be made an instrument of oppression and injustice; the quality of the interest of the petitioner is not defined; no bond is required to be given to secure the payment of the damages which may result to the owner of the property which is invaded; no appeal is allowed from the order of the court or judge in granting the prayer of the petitioner; the power of the court or judge is vast, and can practically confiscate any mine in the state; the innocent owners of mining property are injured without 'due process of law.'"

Inspection orders like this have been fre-[166]quently made, sometimes *under the authority of special statutes and sometimes by virtue only of the general powers of a court of equity. See the following cases, most of which are collected in the opinion of the supreme court of the state: *Lonsdale* v. *Curwen*, 3 Bligh, 168; *Walker* v. *Fletcher*, 3 Bligh, 172; *Blakesley* v. *Whieldon*, 1 Hare, 176; *Lewis* v. *Marsh*, 8 Hare, 97; *Bennett* v. *Whitehouse*, 28 Beav. 119, *Bennett* v. *Griffiths*, 30 L. J. Q. B. 98; *Whaley* v. *Braucker*, 10 L. T. N. S. 155; *Thornburgh* v. *Savage Min. Co.* 1 Pac. L. Mag. 267, 7 Morrison, Min. Rep. 667; *Stockbridge Iron Co.* v. *Cone Iron Works*, 102 Mass. 80; *Thomas Iron Co.* v. *Allentown Min. Co.* 28 N. J. Eq. 77.

It was said in *Lewis* v. *Marsh*, *supra*, by the Vice Chancellor: "I think the case is one in which there is a necessity that the party should be allowed what he asks, in order to prove his case. That is the meaning of necessity. A party cannot get his rights without proving what his rights are; and it is inherent in the case that the plaintiffs should have an opportunity of ascertaining that the defendants do not work more coal than they are entitled to do."

And in *Bennett* v. *Griffiths*, where leave was asked not merely for an inspection, but for making a driftway through a wall for the purpose of determining what workings had been done behind it, the court, by Cockburn, *Ch. J.*, said: "We are of opinion that the judge had jurisdiction to make the order in question. The power to order an inspection of real or personal property has long existed in the courts of equity, and we find that as ancillary to that power the courts of equity have ordered the removal, where necessary, of obstructions to the inspection."

In *Thornburg* v. *Savage Min. Co.* a case heard and determined in the Circuit Court of the United States for the District of Nevada by the district judge, Alexander W. Baldwin, we find the matter thus discussed:

"Ought a court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the *parties, and admittance thereto by means [167] of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.

"That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts? And can it refuse to learn the facts?"

See also *Kynaston* v. *East India Co.*, 3 Swanst. 249, in which an inspection of buildings was ordered to enable the inspectors to testify as to the value; *State* v. *Seymour*, 35 N. J. L. 47, 53, and *Winslow* v. *Gifford*, 6 Cush. 327.

In the latter case it appeared that certain commissioners, under authority of a statute, entered upon the lands of the plaintiff and made certain surveys with a view of ascertaining the boundaries of a tract of land devoted to public purposes, no compensation being provided for such apparent trespass. Plaintiff brought suit to recover damages therefor. It was held that the act authorizing such entry without compensation was not unconstitutional. Other instances of like temporary occupancy were referred to by the court in its opinion, such as the act of the sheriff with criminal process against an individual going to arrest him on the land of a third party; entering upon the lands of an individual for the purpose of surveying *for a highway, when, as [168] a result of such survey, the purpose of establishing the highway is abandoned. It was conceded that such entry and occupancy created a slight trespass upon the absolute right of the owner to an undisturbed and exclusive use of his real estate, but it was held that if the occupancy was reasonably necessary for some public purpose, was temporary, and with no unnecessary damage, it carried no right to

compensation. Other instances will readily suggest themselves in which there is some temporary interference with a man's absolute control of his own property, as when a party is compelled to produce his books and papers for examination by the adverse party, or when, through a receiver, possession of property is taken pending a dispute as to the title or liens upon it. All these cases involve some invasion of the rights of the owner to the possession and use of his property, yet the necessities of justice seem to compel it.

It is true that most of the reported cases of order for inspection are of recent date, but the question whether a certain proceeding is due process of law is not determined by the matter of age. In *Hurtado* v. *California*, 110 U. S. 516 [28: 232], the question was presented whether the prosecution of criminal offenses by information rather than by indictment, if authorized by the constitution and laws of a state, was in conflict with the clause of the 14th Amendment to the Constitution of the United States requiring due process of law, and it was held that it was not, and that such mode of proceeding, though of recent origin, was nevertheless due process of law. The court, by *Mr. Justice* Matthews, after referring to the fact that there are certain fundamental rights which cannot be disregarded, said: "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

On the other hand, while not decisive of the question, the frequency with which these orders of inspection have of late years been made, and the fact that the right to make them **169**] has *never been denied by the courts, is suggestive that there is no inherent vice in them. And if the courts of equity, by virtue of their general powers, may rightfully order such an inspection in a case pending before them, surely it is within the power of a state by statute to provide the manner and conditions of such an inspection in advance of the suit. To "establish justice" is one of the objects of all social organizations, as well as one of the declared purposes of the Federal Constitution, and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice; and any measures or proceedings which, having the sanction of law, provide for such temporary invasion with the least injury and inconvenience, should not be obnoxious to the charge of not being due process of law.

Passing from these general suggestions to some of a more special character, it must be remembered that inspection does not deprive the owner of the title to any portion of his property, nor does it deprive him permanently of the use. The property, therefore, is not taken in the sense that he no longer remains the owner, nor in the sense that the permanent use of the property has been appropriated. In *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 [20: 557], it was held that if a party is deprived of the entire use of his property it is a taking within the scope of the 5th Amendment, although the mere title is not disturbed. But by an inspection neither the title nor the general use is taken, and all that can be said is that there is a temporary and limited interruption of the exclusive use. And it is in that light that the question of the validity of this statute is be determined.

Counsel for plaintiffs in error contend that there is possibility of grievous wrong being done in carrying into effect the provisions of this statute, and say that the question of validity is to be determined not by the amount of wrong done in the present case, but by what may be done in other cases, quoting the language of Earl, *J.*, in *Stuart* v. *Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289: *"The constitu- [**170**] tional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done." This test is accurate, provided, of course, it is limited to what may rightfully be done, and does not extend to that which is wrongfully, though under pretence of the statute, done. Thus, that the power of a court of equity to grant injunctions is not inhibited by the constitutional provision requiring due process of law, is clear, although in a particular case a court may disregard the rules of equity and justice in granting the injunction.

It is objected that the statute does not define the quality of "right to or interest in" the mining claim which entitles to an inspection. But does the amount of a party's interest determine the question of the constitutionality of a statute passed to enable an accurate determination thereof? Suppose it be true that a petitioner has but a limited interest in a mine, has not that petitioner a legal right to the protection of that interest equal to that of the other owners? Has he not the same constitutional right to any means of ascertaining and enforcing that interest that belongs to any other party interested in the mine? Indeed, it may be said to be generally true that the weaker a party and the smaller his interest the greater the need of the strong hand of the court to ascertain and protect his rights. It is true, the quality of the right or interest is not defined, but it must, in order to come within the statute, be a "right to or interest in" the mining claim. The language is general and comprehensive, because the intent is to include within its purview every actual right, every real interest. While it is possible that in any particular case a court may err in determining the existence of a right or interest, the same possibility attaches to all litigation. If it be the duty of the state to protect the rights of its citizens, it certainly cannot be a violation of that duty to provide a uniform rule for the admeasurement of all rights of a similiar character, large or small.

The failure to require a bond, or in terms to allow an appeal, is not fatal to the constitutionality of the act. It is familiar knowledge that the circuit courts of the *United [**171** States are not compelled in granting preliminary injunctions to take from the plaintiff a bond

of indemnity to the defendant, and, frequently, they do not take any. As in such cases the matter of a bond is within the discretion of the judge, so, whether a bond shall be required as preliminary to an inspection, is a matter within the discretion of the state. The right to an inspection does not depend upon a bond, and the order for an inspection does not cease to be due process of law because a bond is not required. No inspection is ordered by the court or judge, until there has been a hearing and an adjudication of the petitioner's right; and while further testimony in the future litigation between the parties may show that such adjudication was erroneous, and that there is, in fact, no right on the part of the petitioner, yet that is a result common to all litigation, and does not gainsay the statement that the inspection is based upon a right established by judicial determination. Nor can the withholding, if it be withheld, of an appeal affect the question of due process. An appeal simply means a second hearing; and if one hearing is not due process of law, doubling it cannot make it so.

No more significant is the want of a trial by jury upon the existence of the right or interest prior to the order for the inspection. A jury trial is not in all cases essential to due process of law. *Den* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272 [15: 372]; *Palmer* v. *McMahon*, 133 U. S. 660 [33: 772]. Equity proceeds to final determination of the most important rights without a jury, and nothing is more common than a new proceeding established by statute to be carried on without the aid of a jury, as, for instance, proceedings by the state under its right of eminent domain; *Livingston* v. *New York*, 8 Wend. 85, 22 Am. Dec. 622. To determine the right to office under an election: *Whallon* v. *Bancroft*, 4 Minn. 109. To compel delivery of the possession of the seal, records, and papers of an office: *State* v. *Sherwood*, 15 Minn. 221, 2 Am. Rep. 116. To appoint guardians of insane persons: *Gaston* v. *Babcock*, 6 Wis. 503. To assess the value of improvements under the occupying claimants' law; *Ross* v. *Irving*, 14 Ill. 171. To enforce statutory liens upon vessels for labor 172] and material: **Sheppard* v. *Steele*, 43 N. Y. 52, 3 Am. Rep. 660. To determine the settlement of paupers: *Shirley* v. *Lunenburg*, 11 Mass. 379. For the assessment and collection of taxes: *Crandall* v. *James*, 6 R. I. 144. But it is needless to multiply instances.

In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, or of requiring the production of books and papers; that this power on the part of such courts has never been denied, and if it exists, *a fortiori*, the state has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, a hearing and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law. It follows, therefore, that there is no conflict between this statute and the 14th Amendment of the Constitution of the United States, and the judgment of the supreme court of Montana is affirmed.

MARY P. MILLER, Devisee of JASON G. MILLER, deceased, *Plff. in Err.*,

v.

DOMINIC G. COURTNAY, *Deft. in Err.*

(See S. C. Reporter's ed. 172-177.)

Legal title in ejectment—subsequent decree.

1. In an action of ejectment in a Federal court the legal title prevails.
2. Where a judgment was regularly obtained against the owner of lands, and execution was issued, and the lands regularly sold by the sheriff and he executed a deed to the purchaser, the legal title thereby passed to the latter, which was not divested by a subsequent decree giving the right to redeem, but which also provided that if no redemption was made the title of the purchaser at the execution sale should be quieted in him, where the conditions of redemption prescribed in the decree were never performed, and where the decree was subsequently, by consent of the parties, modified, and the conditional right to redeem denied.

[No. 157.]

Submitted Dec. 11, 1893. Decided Mar. 5, 1894.

IN ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment for defendant, in an action of ejectment, commenced by Jason G. Miller, plaintiff, against Dominic G. Courtnay, defendant, to recover certain real estate in an addition to the city of Lincoln, in Nebraska. Since the filing of the record, Jason G. Miller has died, and the action has been revived in the name of Mary P. Miller, his devisee. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

*This was an action of ejectment com- [173 menced by Jason G. Miller in the Circuit Court of the United States for the district of Nebraska, on February 21, 1887, to recover of the defendant the possession of certain real estate situate in an addition to the city of Lincoln in that state. After answer and reply, the case, on November 15, 1887, came on for trial before a jury,

NOTE.—*As to when a judgment at law in ejectment will be enjoined by a bill in equity*, see note to Davis v. Tileston, 12: 366.

That court will not restore possession on payment of the rent, see note to Smith v. Trabue, 9: 30.

As to mesne profits, when recoverable, see note to Green v. Biddle, 5: 547.

As to requisites of adverse possession, see note to Ricard v. Williams, 5: 398, and to Ewing v. Burnet, 9: 624.

which returned a special verdict finding the facts. Upon such special verdict judgment was, on motion, entered in favor of the defendant. The plaintiff thereupon sued out a writ of error from this court. Since the filing of the record Jason G. Miller has died, and the action has been revived in the name of Mary P. Miller, his devisee.

The testimony given on the trial was not preserved by any bill of exceptions, and the questions which arise are upon the sufficiency of the facts found to sustain the judgment. It appears from these findings that on August 21, 1867, the title to the land passed to Luke Lavender, the common source of title of plaintiff and defendant. On November 4, 1873, Henry Atkins obtained a judgment against Luke Lavender in the district court of Lancaster county, the county in which the land is situated. Executions were issued from time to time on this judgment and levied on the property in controversy. Finally, on March 22, 1879, the sheriff sold the property to Martha I. Courtnay, wife of the defendant. This sale was confirmed by the court and the sheriff's deed duly executed. Lavender was personally served with process, and the proceedings from the commencement of the action to the execution of the sheriff's deed were regular in form. The title thus acquired she subsequently conveyed to the defendant, though not till after the commencement of the present action. On April 17, 1884, Lavender filed his petition in the same court against Henry Atkins, Martha I. Courtnay and D. G. Courtnay, this defendant, in which he alleged his ownership, in 1873, of the property in controversy, as well as other real estate, the rendition of several judgments against him during the years 1873 and 1874, among others that in favor of Atkins; that the property then belonging to him was worth $75,000 over and above any homestead exemp-[174]tion; that all the judgments *against him amounted in the aggregate to less than $10,000; that, notwithstanding this, through the wrongful conduct of said Atkins, John S. Gregory, the defendant in this case (who was a son-in-law of said Atkins) and James E. Philpott, who was acting as his (Lavender's) attorney, his entire property was sold on executions issued on these judgments, and still leaving a balance unsatisfied. The various steps by which this result was accomplished, such as having irresponsible parties present at the sales and bidding on the property offered far above its real value, and thus preventing sales to bona fide bidders, circulating reports as to incumbrances upon the property, inducing the plaintiff Lavender to file a voluntary petition in bankruptcy in the United States district court, and then to abandon it, are all stated at length in the petition. The prayer was that the sales made on the judgments owned or controlled by Atkins, Courtnay, or Gregory be set aside; that an account be stated of the amounts due under such judgments, and that plaintiff be allowed time in which to pay such amounts, or in lieu thereof that new executions and sales be ordered.

The defendants appeared and answered, and on November 5, 1885, a decree was entered finding the issues as to this land in favor of the plaintiff, the language of the finding and decree being as follows:

"That the plaintiff is entitled to redeem the same and to be restored to the possession thereof upon the payment within six months next ensuing of the sum of two hundred and thirty-four dollars, with interest thereon at the rate of seven per centum per annum from March 22, 1879, until the same is paid into court for said defendants; to which defendants except. It is therefore ordered, adjudged and decreed that upon the payment by the plaintiff of said sum into court for the defendants within the time aforesaid, the sheriff's sale of March 22, 1879, and deed to said lands, to wit, the southwest quarter of the northwest quarter of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, be set aside, annulled, and held for naught, and the title to said lands be quieted in the plaintiff as against all claims or title that said defendants or either *of [175 them and all persons holding or claiming to hold under them or either of them may have or claim to have, under and by virtue of said sale and deed and that the defendants and each of them convey to plaintiff all right, title, and interest by them or either of them held or claimed in and to said lands by virtue of said sale and deed and that plaintiff have possession of said lands and execution therefor, and that in default of the plaintiff making such payment within the time aforesaid it is ordered, adjudged and decreed that the title in and to the said lands, to wit, the southwest quarter (¼) of the northwest quarter of the northeast quarter of section twenty-five, township ten, range six east, in Lancaster county, Nebraska, be quieted in the defendant, Martha I. Courtnay; to which defendants except. This decree, however, is not to affect any judgment or execution lien or liens which said defendants or either of them may have or hold on said lands; and plaintiff excepts thereto and prays an appeal therefrom, which is allowed; and the court further finds as to the rest and residue of said lands in the petition described the issues joined in favor of the defendants and against the plaintiff; and it is further ordered and decreed that the title in and to all the rest and residue of said lands in the petition described be quieted in the defendants."

Subsequently this stipulation was filed:

"This cause is settled and the judgment and decree rendered in the district court of Lancaster county is in all things affirmed, and all errors are waived by the plaintiff, and the said plaintiff waives that part of the decree in this case which gives said plaintiff the right to redeem certain parts of said premises mentioned in said decree, and the said Luke Lavender and wife deed all of said premises mentioned in the said decree to D. G. Courtnay, and defendants herein agree to pay all the costs, and judgment is rendered for the same in favor of the plaintiff.

"D. G. Courtnay,
"Att'y for Def'ts.
"Luke Lavender.
"This 18th day of December, 1885."

*And on the 28th of December, 1885, [176

the decree was modified in accordance therewith. On the day of the signing of this stipulation Lavender and wife executed and delivered to the defendant a warranty deed which included, with other real estate, the premises in controversy. Further findings were as follows:

"That the consideration received by the said Luke Lavender and paid and given by the said Dominic G. Courtnay for the settlement of the said suit under the said stipulation and the delivery of the said deed of conveyance to him by the said Luke Lavender and Julia A. Lavender, his wife, as above found, was the sum of five hundred dollars, cash paid to Lavender by said Courtnay, and the discharge and release by said Courtnay and Martha I. Courtnay and Henry Atkins of all the judgments held by them or any of them against the said Luke Lavender, amounting in the aggregate to about the sum of fourteen thousand dollars."

"And we further find and say that Luke Lavender did not pay within six months next accruing of the said decree the sum of $234, with interest thereon, at the rate of 7 % per annum, from March 22, 1879, neither did any person pay or offer to pay the same, and no sum of money whatever has ever been paid as required by the terms of said decree."

It also appears that, on February 21, 1883, Lavender and his wife by two deeds quit-claimed the premises to the plaintiff, the granting clause in each reading as follows:

"Have remised, released, and quit-claimed, and by these presents, do for themselves, their heirs, executors, and administrators remise, release, and forever quit-claim and convey unto the said party of the second part and to his heirs and assigns forever, all their right, title, interest, estate, claim, and demand, both at law and in equity, etc."

Messrs. **Walter H. Lamb, Henry H. Wilson** and *A. C. Ricketts* for plaintiff in error.

Mr. **Dominic G. Courtnay,** in proper person, for himself, defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

177] *This was an action of ejectment, and in such an action in a Federal court the legal title prevails. As the proceedings in the action in the Lancaster county district court, from the service of the summons upon Luke Lavender to the confirmation of the sale to Martha I. Courtnay, and the execution of the sheriff's deed, were confessedly regular in form, the legal title passed thereby to her. If it be true, as claimed by plaintiff's counsel, that the quit-claim deeds to Miller in 1883 conveyed "every equitable and legal right held by Lavender, in this land at the time," it is difficult to perceive how Lavender, in 1884, could maintain any suit to set aside such sale and deed. But, beyond this, there was nothing in the proceedings, including the decree in the case of Lavender against Atkins, Martha I. Courtnay, and this defendant, which ever, even for a single moment, operated to transfer the legal title back from Mrs. Courtnay to Lavender. The petition in that case admitted the regularity of the proceedings in the prior action as to matter of form, did not question the fact that the legal title had thereby passed to her, and only insisted on the equitable right to redeem by virtue of the alleged misconduct. The decree gave a right to redeem, but provided that if no redemption was made, the title of Mrs. Courtnay should be quieted. The conditions of redemption prescribed in the decree were never performed, and under an agreement involving other matters and upon a consideration paid by a party other than the then owner, Mrs. Courtnay, the decree was, by consent of the parties, modified, and even the conditional right to redeem denied. Surely it needs no argument to show that the legal title, once vested in Mrs. Courtnay, is not shifted backwards and forwards by the changing terms of a decree which gave and then denied a right to redeem.

It is unnecessary to go into any further consideration of this case. The legal title which passed to Mrs. Courtnay by the said sale and sheriff's deed was not divested by the subsequent decree, or any action taken thereunder, and the plaintiff never acquired the legal title by his quit-claim deeds.

The judgment is affirmed.

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*UNITED STATES, *Appts.*, [178
v.
DANIEL SHEA.

(See S. C. Reporter's ed. 178-191.)

Contract for hiring of vessel—amount of rent payable.

1. Where plaintiff by contract with the Quartermaster General was to provide and furnish a vessel for service for the U. S. Army, and that vessel so furnished by him was accepted, and was while in service and under the exclusive possession, management and control of the quartermaster's department, damaged by a collision and laid up for repairs, and after being repaired, resumed work, the contract is one of hiring, and not for service, and the government, during such possession of the vessel, was a special owner, and bound to pay rent for the vessel until returned to plaintiff.
2. There are two kinds of affreightment contracts, the one in which there is a demise of the vessel, a parting with all possession and control, and the other in which the owner, retaining the possession and control, contracts simply for service—it may be the entire service of the vessel; if the contract is one of the former kind, then rent is

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NOTE.—*As to collision, measure of damages for,* see note to Smith v. Condry, 11: 35, and to Williamson v. Barrett, 14: 68.

As to collision; rights of steam and sailing vessels with reference to each other and in passing and meeting; instances, see note to St. John v. Paine, 13: 537.

As to collision; vessel overtaking another, see note to The Abbotsford v. Johnson, 25: 168.

As to lien for freight; who has, and how waived or lost, see note to Raymond v. Tyson, 15: 47.

As to lien of the contract of affreightment on the vessel, and for damages to goods, see note to The Freeman v. Buckingham, 15: 341.

road Ties, 38 Fed. Rep. 255; *Goodwin* v. *United States*, 84 U. S. 17 Wall. 517 (21: 669); *Mitchell* v. *United States*, 96 U. S. 163 (24: 703); *Wilkinson* v. *Dalferes*, 27 La. Ann. 380.

This is not a marine cause. The James Bowen was merely acting as a ferryboat, and collided with another ferryboat in a harbor.

United States v. *The Wm. Pope*, 1 Newb. Adm. 259; *United States* v. *The James Morrison*, 1 Newb. Adm. 253.

A claim for unliquidated damages is not a subject for settlement in the executive branch of the government.

Dunbar v. *United States*, 19 Ct. Cl. 493; *Dennis* v. *United States*, 20 Ct. Cl. 120.

The departments have no cognizance of claims for unliquidated damages founded on neglect or breach of duty of public officers.

Pitman v. *United States*, 20 Ct. Cl. 255; *Brannen* v. *United States*, 20 Ct. Cl. 223; *McClure* v. *United States*, 19 Ct. Cl. 180; *Pope* v. *United States*, 21 Ct. Cl. 50; *Gibbons* v. *United States*, 75 U. S. 8 Wall. 274 (19: 454); *Morgan* v. *United States*, 81 U. S. 14 Wall. 534 (20: 739); *Pope* v. *United States*, 14 Ct. Cl. 446; 19 Ct. Cl. 693.

Messrs. **Franklin H. Mackey** and **John W. Butterfield**, for appellee:

The agreement between Hodges and Shea was a charter party pure and simple.

Clarkson v. *Edes*, 4 Cow. 470; *Marcardier* v. *Chesapeake Ins. Co.* 12 U. S. 8 Cranch, 49 (3: 483); *Spring* v. *Gray*, 31 U. S. 6 Pet. 151 (8: 352); 1 Parsons, Maritime Law, 237.

If the owner retain possession, command, and navigation, and lets merely the capacity or burden of the vessel, it is not a true charter party, but a mere contract of affreightment.

Donahue v. *Kettell*, 1 Cliff. 135; *Leary* v. *United States*, 81 U. S. 14 Wall. 607 (20: 756); *The Erie*, 3 Ware, 225.

Such a charterer is liable for the time consumed in repairs if the vessel is injured while in his control.

Hardcock v. *Geddes*, 10 East, 555; *Ripley* v. *Scaife*, 5 Barn. & C. 167; Abbott, Shipping, 43, 218; 1 Parsons, Maritime Law, 259; Flanders, Shipping, §§ 531, 552.

The "James Bowen," until discharged by the proper officer, must be considered to all intents and purposes as in the government's employ.

Terry v. *United States*, 9 Ct. Cl. 233; *Fogg* v. *United States*, 5 Ct. Cl. 264; *Smith* v. *United States*, 9 Ct. Cl. 237.

In order to know what the contract means, we must look to the intention of the parties in making it and their understanding of it.

Scott v. *United States*, 79 U. S. 12 Wall. 444 (20: 438); *Southwestern Mut. L. Ins. Co.* v. *Gridley*, 100 U. S. 616 (25: 747); *Wolsey* v. *Chapman*, 101 U. S. 755 (25: 915); *Oates* v. *First Nat. Bank of Montgomery*, 100 U. S. 239 (25: 580); *Jones* v. *New York Guaranty & I. Co.* 101 U. S. 626 (25: 1034); *Read* v. *Merchants Mut. Ins. Co.* 95 U. S. 30 (24:349);

186] **Mr. Justice* **Brewer** delivered the opinion of the court:

This case turns upon the construction to be given to the contract of May 28, 1886, taken in connection with the action of the parties thereunder. Was this a contract of hiring or for service? In *Reed* v. *United States*, 78 U. S. 11 Wall. 591, 600 [20: 220], it was said by *Mr. Justice* Clifford, speaking for the court:

"Affreightment contracts are of two kinds, and they differ from each other very widely in their nature as well as in their terms and legal effect.

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. . . . Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer, but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and if need be he may appoint the master and ship the mariners, and he becomes responsible for their acts."

And subsequently, in *Leary* v. *United States*, 81 U. S. 14 Wall. 607, 610 [20: 756], *Mr. Justice* Field thus discussed the question:

"If the charter party let the entire vessel to the charterer with a transfer to him of its command and possession and *subsequent [**187** control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel. . . . All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer."

See also *Hooe* v. *Groverman*, 5 U. S. 1 Cranch, 214 [2: 86], in which these words in the charter party, "doth grant and to freight let . . . the whole tonnage of the vessel," were held the operative words, and indicating in connection with other language a contract for service rather than a demise of the vessel. *Marcardier* v. *Chesapeake Ins. Co.* 12 U. S. 8 Cranch, 39

[3: 481], in which *Mr. Justice* Story, speaking for the court, said: "A person may be owner for the voyage, who, by a contract, with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. Such is understood to have been the case of *Vallejo* v. *Wheeler*, Cowp 143. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." *Gracie* v. *Palmer*, 21 U. S. 8 Wheat. 605 [5: 696]; *McIntyre* v. *Bowne*, 1 Johns. 229; *Hallet* v. *Columbian Ins. Co.* 8 Johns. 272; *Clarkson* v. *Edes*, 4 Cow. 470; 1 Parsons, Maritime Law, chap. 8, p. 232, § 2.

These authorities, although not all touching 188] the question of *rent, bring out clearly the essential differences between the two kinds of affreightment contracts—the one in which there is a demise of the vessel, a parting with all possession and control, and the other in which the owner, retaining the possession and control, contracts simply for service—it may be the entire service of the vessel.

If the contract is one of the former kind, then rent is payable until the end of the stipulated term and the return of the vessel. In *Havelock* v. *Geddes*, 10 East, 555, there was a demise of a vessel for a term of twelve months, and longer if the defendant should think fit to keep the same. There was a stipulation that the plaintiff, the owner of the vessel, should keep it tight, staunch, etc., and a reduction was sought of rent for the time occupied by defendants in making repairs during the term of the demise. Lord Ellenborough held that no such reduction could be allowed, saying: "The question then is, whether, because the plaintiff has undertaken to keep the vessel tight, etc., the defendants have a right to deduct anything out of the freight they are to pay, in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired? And we are of opinion they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage; and when the defendants were making their bargain they should have stipulated to deduct for the time which might be exhausted in making those repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charter party is, that whilst those repairs are going on, the ship is to be considered as in the defendants' service, and the defendants liable to continue their payments."

To like effect is the case of *Ripley* v. *Scaife*, 5 Barn. & C. 167, in which Abbott, *Ch. J.*, said:

"There is in the charter party an express stipulation for the payment of freight from a certain day, for six months certain; and so much longer as the vessel should be employed by the plaintiffs. There not being any other 189] stipulation for *the case of repairs, I think that the ship was in the employ of the plaintiffs whilst those repairs were going on, and that they were liable to pay freight during that period."

See also *Spafford* v. *Dodge*, 14 Mass. 66, in which a vessel was hired to make a certain voyage "at the rate of three dollars a ton per month, and so in proportion for a less time as the said brig should be continued in the service of the defendants." While making that voyage she was captured as a prize and detained for several months, but was finally restored, and arrived at her port of destination. It was held that the owner was entitled to rent for the full term of her absence without deduction for the time of the detention in consequence of the capture. And this is but an application of the same rule which controls in other cases of demise. If premises are rented for a term of years at a stipulated rent per year, and no provision for reduction in case of the destruction or injury of the buildings by fire be inserted in the lease, the rent is payable for the entire term and until the premises are returned, and this though the buildings may be injured, or even destroyed by fire. In short, a demise is not ended until the property is returned to the owner, and so long as that demise continues rent is payable at the stipulated price unless there be some provision for a reduction.

No technical words are necessary to create a demise. It is enough that the language used shows an intent to transfer the possession, command, and control. Now by this contract it was stipulated that the petitioner should "provide and furnish to" the government, whenever called up during a specified year, "such vessels of the descriptions hereinafter given as may be required to take the place of the vessels now performing service, etc.," and that in case of his failure so to do the government should have the "power to hire vessels elsewhere in open market" at his "sole expense and charge." These are operative words. The contract is for vessels, and not for any use of them. The vessels are to be furnished to the government; they are to take the place of other vessels presumably belonging to the government, engaged in a certain service, and if petitioner fails to furnish the needed vessels the *government may go elsewhere and hire[190 them. There is no stipulation which in terms, or by implication, casts upon the petitioner the management or control of any vessel accepted by the government. That the time for which the vessels were to be employed might be limited by the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year, and may terminable at the will of the lessor. The pay, by the 4th article, was to be "for each vessel employed."

Not only this, but the conduct of the parties in the execution of the contract removes all obscurity as to its scope and meaning. As the findings show, the vessel, the James Bowen, was furnished by petitioner, and was accepted and used by the defendants. During the time of its use it was under the exclusive management and control of the defendants. The very condition resulted which is the purpose and effect of a demise—the transfer of the exclusive possession, management, and control. The

vessel was not, when injured, returned to the petitioner, but when the repairs were finished, "resumed work." It is insisted by the defendants that there was no demise because, as claimed, the petitioner did not contract to furnish one vessel for any length of time, and could, if he wished, change vessels. It is doubtful whether that is a correct interpretation of the instrument, and whether it was in the power of the petitioner, after a vessel had been tendered and accepted by the government, to substitute another therefor. But even if it were so, the substituted vessel would pass into the exclusive possession of the government, the same as the vessel for which it was substituted.

We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control. If it be said that the clause requiring the government to furnish fuel was unnecessary in case there was a demise, it may, also, in like manner, be said that the further clause **191**] as to *the petitioner's furnishing a crew was unnecessary if he was to retain the management and control. Any possible inference from one clause may be set off against a different inference from the other, but neither of them destroys the significance of the operative words of transfer, nor outweighs that of the action of the parties in the execution of the contract.

The claim when presented to the department was rejected on the ground that the "boat was wholly under the control of the owner and his agents and employés." But the findings of fact show that that alleged ground is a mistake; that it was wholly under the management and control of the quartermaster's department. Nothing more need be said. While the question is not free from doubt, yet in view of the fact that the petitioner was to provide and furnish a vessel; that this vessel, when tendered, was accepted, and was not only in the service, but under the exclusive management and control of the quartermaster's department at the time of the accident, we think that it must be adjudged that the case presented is one of a contract of hiring, and not for service, and that the government during this possession of the vessel, was a special owner and bound to pay rent for the vessel until returned to petitioner.

The judgment will be affirmed.

The *Chief Justice* and *Mr. Justice* **Jackson** dissented from this opinion and judgment.

HENRIETTA SNELL ET AL., Administrators of the estate of Amos J. Snell, deceased, *Plff. in Err.*,

v.

THE CITY OF CHICAGO, ET AL.

(See S. C. Reporter's ed. 191-199.)

Jurisdiction to review state judgment—Federal question.

1. To give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution; or that the judgment as rendered could not have been given without such decision.
2. Determining the extent of a legislative permission to sell the franchises of a corporation, determines no question of contract, and presents no other matter of a Federal nature.

[No. 242.]

Submitted Feb. 1, 1894. Decided March 5, 1894.

IN ERROR to the Supreme Court of the State of Illinois, affirming the judgment of the Superior Court of Cook County, in that state, sustaining a demurrer and dismissing a suit in equity, brought by Henrietta Snell, *et al.*, *admrs.*, as plaintiffs, against the city of Chicago, *et al.*, defendants, to enjoin the defendants, their officers and servants, from removing or attempting to remove a certain toll gate on Milwaukee avenue, in the city of Chicago, and from interfering with plaintiff's collection of tolls thereat. *Dismissed for want of jurisdiction.*

See same case below, 133 Ill 413.

Statement by *Mr. Justice* **Brewer:**

The case is before us on error to the supreme court of the state of Illinois. The record discloses these facts: On December 21, 1888, the plaintiffs in error, as plaintiffs, filed in the office of the clerk of the superior court of Cook county their bill of complaint, seeking to enjoin the defendants, their officers, agents, and servants, from removing, or attempting to remove, a certain tollgate on Milwaukee avenue, in the city of Chicago, and from interfering with the plaintiff's collection of tolls thereat. The bill sets forth that on February 10, 1849, the general assembly of the state of Illinois passed an act to incorporate the Chicago Southwestern Plank Road Company, certain sections of which were quoted. It is unnecessary to refer to these sections in detail; it is enough to say that they provided for the incorporation of a company to construct a plank road, and described the various powers and privileges given to such corporation. The bill then refers to an act of the general assembly, dated February 12, 1849, entitled "An Act to Construct a Plank Road," etc., the twenty-first and twenty second sections of which, quoted in the bill, purport to incorporate the Northwestern Plank Road Company, the incorporators of which, as appears from section 21, had a license from the county commissioners' court of Cook county to construct a plank road from the city of Chicago to Oak Ridge, and from thence to Wheeling and the north line of said county. It then quotes the act of the general assembly of the state of Illinois of date March 1, 1854, entitled "An Act to Incorporate the Northwestern Plank Road Company." This act commences with a preamble which, referring to the act of February 12, 1849, says that doubts exist as to

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 371.

As to jurisdiction of United States Supreme Court

whether by the twenty-first, twenty-second, 193]*and twenty-third sections of said act the Northwestern Plank Road Company was duly incorporated, and therefore in the first section in terms incorporates the Northwestern Plank Road Company, and, by the second section, grants to it the powers and privileges, rights and duties, contained in the sections quoted from the earlier act of 1849. The allegation is that by virtue of these several acts the Northwestern Plank Road Company became duly incorporated and organized as a corporation, and proceeded to and did prosecute and complete the construction of the road under the powers and franchises granted. The bill further sets forth that on February 15, 1865, another act was passed by the general assembly of the state of Illinois, which act is set forth in full, and the material sections of which are as follows:

"Sec. 3. The president, by the advice and direction of a majority of the stockholders, may sell to the county of Cook the franchise, the property, and immunities of said company, or to any other party or parties, and thus dissolve said company, and divide the avails amongst the stockholders.

"Sec. 4. And be it further enacted, that the board of supervisors of Cook county may purchase such franchise, property, and immunities, and, upon the order of said board, the clerk of said county shall proceed to purchase and receive the deed of title to the same, and should said county fail to purchase the same, any person or persons may purchase the same, and thereby make the same private property.

"Sec. 5. The deed of the president of said company to the said county of Cook, or to any other party purchasing, shall be a good and lawful title to the same; provided, always, that all the debts and liabilities of said company shall be paid; provided, further, that the purchaser or purchasers of said franchise and roads shall be bound by all the obligations said Northwestern Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company, and no more."

On August 5, 1870, the Northwestern Plank Road Company made a deed to Amos J. Snell. 194]This deed, after reciting the *incorporation under the act of March 1, 1854, quoting sections 3 and 5 of the act of February 15, 1865, and reciting a meeting of the stockholders on January 5, 1866, closes with this resolution, passed at such meeting, and this granting clause:

"*Resolved by the stockholders of this Company*, That Thomas Richmond, president, be authorized to sell the plank road, tollhouses, and other property belonging to the company, with the franchise and all its rights and privileges, and give a deed of the same to the purchaser for such sum and upon such conditions as he shall deem advisable;

"And whereas the said plank road company is entirely free from debt, now, therefore, I, Thomas Richmond, president of the Northwestern Plank Road Company, for and in consideration of the sum of twenty thousand dollars ($20,000) to me in hand paid by Amos J. Snell, of Jefferson, in the county of Cook and state of Illinois, do hereby sell, transfer, convey, and set over to the said Amos J. Snell, his heirs, executors, administrators, and assigns, 'all the property of said company, consisting of the charter and its amendments and franchises, the right of way, the grading, the planking, ditches, bridges, and drainages, the tollhouses, gates, teams, implements of work, and being the plank from the old city limits of Chicago aforesaid to the nine mile post, together with all the property, goods, and chattels of said company of whatsoever nature or description:'

"To have and to hold unto the same Amos J. Snell, his heirs, executors, administrators, and assigns, forever.

"In witness whereof the said Thomas Richmond, as president, has hereunto signed his name and affixed the seal of the said Northwestern Plank Road Company this fifth day of August, A. D. 1870.

"[Corporate seal of the Northw. P. R. R. Co.]

"Thomas Richmond,

"Pres't N. W. P. R. R. Co."

This deed was duly recorded. The bill also alleges that from that time until his death Snell continued in the ownership *of said [195 property and in the actual and exclusive possession, control, and enjoyment thereof, and the undisturbed exercise of all the franchises, rights, and powers which were conferred upon the corporation by said enactments. At this time the plank road, or so much thereof as was constructed, was outside of the corporate limits of the city of Chicago, and during such time Snell erected a tollgate and tollhouse on the southeast corner of Milwaukee avenue and Fullerton avenue, at which place the tolls were collected. It is further averred that on February 8, 1888, Snell died; that the present plaintiffs are his personal representatives and heirs; that on December 10, 1888, the defendants commenced proceedings for the purpose of removing such tollgate, the territorial limits of the city having been duly extended so as to include a part at least of the tollroad and the part on which the tollgate was situated.

To this bill a demurrer was filed, which, on February 6, 1890, was sustained, and, the plaintiffs electing to stand by the bill, a decree of dismissal was entered. On appeal to the supreme court of the state the decision of the superior court was, on the 14th day of May, 1890, sustained, and the decree of dismissal affirmed. 133 Ill. 413.

Messrs. **Frank J. Crawford** and *Sidney Smith* for plaintiffs in error.

Messrs. **Edward Roby** and *Harry Rubens* for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

By this writ of error we are called upon to review the decision of the supreme court of the state of Illinois, and it is insisted that that decision is in conflict with the clause of the first

to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679 and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

section of the 14th Amendment to the national Constitution, which declares that "no state shall deprive any person of life, liberty or property without due process of law," and of the 10th section of the first article of that Constitution, 196] *which prohibits a state from passing any law impairing the obligations of contracts.

It is the settled law of this court that to give it jurisdiction of a writ of error to a state court it must appear affirmatively not only that a Federal question was presented to that court for decision, but also that the decision of the question was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution; or that the judgment as rendered could not have been given without such decision. *Miller* v. *Anderson* ("*Miller* v. *Swann*") 150 U. S. 132 [37: 1028]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111], and cases cited therein.

Guided by the rule thus laid down and long established, we turn to the record, including therein the opinion of the supreme court of the state, to see what in fact was decided. From such inspection it is obvious that there was no decision adverse to the rights vested in the Northwestern Plank Road Company by its charter. On the contrary, the clear concession in the opinion of the supreme court was that that company had by its charter a valid and exclusive franchise in respect to the tollroad, including therein the right to take tolls, and to erect and maintain a tollgate therefor. All the contract rights which it can be claimed passed by the charter to the plank road company were conceded to have passed to it, and the matter which was determined by that court, and upon which its decision rested, was that the franchises, thus vested in the corporation, did not pass by the deed made under the authority of the Act of 1865 to Snell and his heirs in perpetuity. It was not denied that those franchises passed to Snell by the deed of August 5, 1870, but the ruling was that such conveyance did not vest in the grantee the franchises as a matter of private property, to pass by inheritance to his heirs.

In order that there may be no misunderstanding of the rulings of the supreme court we quote at length from its opinion:

"By the Act of 1854, Gray, Filkins, Richmond, and their associates became a corporate body, with the right of perpetual succession, 197] etc. This was the franchise of the *corporators. By the same Act the corporate body received the right to construct and maintain a tollroad, and to build tollhouses, and collect tolls. These were the franchises of the corporation. The former franchise, that is to say, the franchise to be a corporation, cannot be transferred without express provision of law pointing out the mode in which the transfer is to be made. *Coe* v. *Columbus, P. & I. R. Co.* 10 Ohio St. 372, 75 Am. Dec. 518; *Memphis & L. R. R. Co.* v. *Berry*, 112 U. S. 609 [28: 837]. The Act of 1865 authorizes the sale of 'the franchise the property, and immunities' of the plank road company, and specifies that such transfer is to be made by deed of the president. If the word 'franchise' as here used is broad enough to include the franchise to be a corporation, with the power of perpetual succession, even then, Snell was not thereby made a corporation under the old charter. He was merely vested with the 'right to organize as a corporation' (*Memphis & L. R. R. Co.* v. *Berry*, *supra*) but such organization never took place. Neither he nor his heirs or representatives are claiming as the corporate successors of the plank road company. The appellants are claiming as the heirs of Snell, the individual.

" 'The franchise of becoming and being a a corporation in its nature is incommunicable by the act of the parties and incapable of passing by assignment.' *Memphis & L. R. R. Co.* v. *Berry*, *supra*. If Snell in his lifetime was the owner of such franchise by express legislative grant, he could not assign it and it could not descend to his heirs. He failed to use it for the purpose of effecting any corporate organization and it died with him. Even if this were not so his failure to effect said organization within ten days after the constitution of 1870 went into effect rendered it impossible, under section 2 of article 11 of that constitution, to give any validity to an organization made after the lapse of such period of ten days.

"If the franchises designated as those which belong to the corporation as distinguished from the corporators passed to Snell by the transfer, and if he had the right to maintain the tollhouses transferred to him and to collect the tolls therefrom, did such franchises and rights pass to the appellants at his death? The second proviso of section 5 of the Act of 1865 *is [198 as follows: 'Provided further, that the purchaser or purchasers of said franchise and road shall be bound by all the obligations said Northwestern Plank Road Company is by its charter, and shall enjoy all the rights and privileges enjoyed by said company and no more.' This provision is to be strictly construed in favor of the public and against the grantee of the privileges in question. Angell, Highways, § 357; 1 Morawetz, Priv. Corp. § 323; *Stormfeltz* v. *Manor Turnp. Co.* 13 Pa. 555. The person who is to 'enjoy all the rights and privileges enjoyed by said company' is stated to be the purchaser of the franchise and road. It is not stated that the purchaser and his heirs and assigns shall enjoy such rights and privileges. If it had been the intention of the legislature that the heirs of the purchaser should succeed to the privilege of collecting tolls and maintaining tollgates, it would have been so specified.

"The dissolution of the corporation did away with the right of perpetual succession which attached to the corporate body. By neglecting to organize a corporation with such privilege of perpetual succession, if the power to do so passed to him, Snell failed to preserve the element of perpetuity; but if the right to collect tolls and maintain tollhouses descended to his heirs, and by consequence became inheritable by the heirs of such heirs, then there was a continuation of the perpetuity which has been abrogated by the dissolution of the corporation. It is true that the deed made by the president of the corporation to Snell conveys to him, 'his heirs, executors, administrators,

and assigns,' but the question is not what the language of the deed was, but what the legislature authorized to be put into the deed."

There can be no mistake as to the scope of this decision. It is that the franchises vested in the plank road corporation, though passing to Snell by the deed, passed to him and not to him and his heirs, and that he took by such deed only a life estate. But in this is presented no question of a Federal nature, but only of the extent of an authority to dispose of its franchises given by a statute to a corporation. It is assumed that the charter was a valid and binding 199] contract, and that *by it certain franchises were vested in the Northwestern Plank Road Company as its absolute property, beyond the power of the state to arbitrarily retake. After the grant of this charter, and after the full investiture of the corporation with these franchises, an act was passed giving it authority to dispose of them, and the matter which was determined by the supreme court was as to the extent of the authority thus conferred. But in this there is no matter of contract. The state never contracted with the plank road company that it should have the power to transfer its franchises; nor with these plaintiffs that their intestate and ancestor should acquire an absolute title to these franchises with an indefeasible estate of inheritance. The mere grant of franchises to a corporation carries with it no power of alienation. On the contrary, the general rule is that, in the absence of express authority, they are incapable of alienation. And many cases have arisen in which an attempted alienation by the corporation has been declared by the courts to be void, as divesting it of the power to discharge the duties imposed by the charter. *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30: 83]; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1 [32: 837]; *Central Transp. Co.* v. *Pullman Palace Car Co.* 139 U. S. 24 [25: 55]. In the original act of incorporation no power of alienation was given to the plank road company. The only authority is found in the Act of 1865, and that is a mere grant of a permission to sell. Determining the extent of that permission determines no question of contract, and presents no other matter of a Federal nature. If it be true, as decided by the supreme court, that only a life estate passed to Snell, then the plaintiffs have no interest in the franchises, and the demurrer to the bill was properly sustained. This, therefore, is a pivotal question, and having been decided adversely to the plaintiffs, and in it there being no matter of a Federal nature, it follows that this court has no jurisdiction, and the case must be dismissed.

*THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY, *Plff. in Err.*, [200

v.

THE WESTERN SIEMENS-LUNGREN COMPANY.

(See S. C. Reporter's ed. 200-211.)

Sale of goods—stipulation—damages for breach of contract—how limited—judges expression of opinion.

1. One cannot accept goods from another, and use them, and then refuse to pay for them, on the ground that he never ordered them.
2. Where the stipulation in the contract is that one company will sell exclusively to another, the burners and lamps made by the former and will not knowingly permit other parties to sell for use in the prescribed territory, any burners or lamps, the scienter is an essential term of the contract; and if the former did not know of such a sale by another within that territory, the fact that one was made, involved no breach of the contract.
3. Actual damages is all the law gives in case of a breach of contract; profits which would have been realized had the contract been performed, and which have been prevented by its breach, may be recovered where they are not uncertain or remote, or where it may be reasonably presumed that they were within the intent and mutual understanding of both parties.
4. The recovery for damages is properly limited to the damages which are claimed in the pleadings; and to such as are established by the testimony.
5. An expression of opinion by the judge as to the scope or reach of testimony is no ground of error in the Federal courts.

[No. 193.]

Argued Jan. 5, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio, to review a judgment in favor of plaintiff, The Western Siemens-Lungren Company, against the Cincinnati Siemens-Lungren Gas Illuminating Company, defendant, for goods and merchandise, sold and delivered by plaintiff to defendant. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

*On February 25, 1889, the defendant [201 in error, a corporation of the state of Illinois, commenced its action in the circuit court of the United States for the Southern District of Ohio to recover from the defendant, a corporation created under the laws of Ohio, the sum of $6922.64 for goods and merchandise. The defendant appeared and filed an answer and

NOTE.—*As to contracts, their interpretation and validity*, see note to Bell v. Bruen, 11: 89.

As to covenants in contract; when dependent and when independent, see note to Goldsborough v. Orr, 5: 600.

As to stated sum in contract: whether penalty or liquidated damages, see note to Tayloe v. Sandiford, 5: 384.

As to what contracts are void as against public policy or as illegal; illegal consideration, when a defense; agreement not to bid; lobby services; for contingent fees; to prevent competition, see note to Bartle v. Nutt, 7: 825.

cross petition. A trial was had before a jury, which, on February 10, 1890, returned a verdict for the plaintiff in the sum of $5752.34. This amount was reduced by the plaintiff, in accordance with the opinion of the court, by the sum of $127.90, and for the balance, with interest, a judgment was entered. To reverse such judgment defendant sued out a writ of error from this court.

Messrs. **J. W. Warrington** and *Edward Dienst* for plaintiff in error.

Messrs. **Lowrey Jackson** and *Kramer & Kramer* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

On November 9, 1887, the Siemens-Lungren Gas Illuminating Company of Chicago, a corporation of Illinois, which had acquired by contract from the Siemens-Lungren Company, of the state of Pennsylvania, the exclusive right and privilege of selling, placing, and operating in the state of Ohio the patented regenerative and other gas lamps, appliances, and fixtures, made, owned, or controlled by the Pennsylvania corporation, entered into a contract with certain individuals, which contract was immediately thereafter transferred by them to the defendant company, giving the like exclusive rights for the counties of Hamilton, Butler, and Montgomery, in the state of Ohio. This contract specified the terms and conditions on which the Chicago company would supply the articles for sale and use in those counties. The Chicago corporation afterwards transferred all its franchises and property, including its rights and interest in this contract, to the plaintiff. The Ohio company carried on its correspondence, and sent its orders for goods to the Gas Illuminating Com-
202] pany, *and, though notified of the transfer to the plaintiff, declined in its letters to recognize such transfer. At the same time it received the goods and did not return them; and received them knowing that they were sent by the plaintiff. Upon this the defendant invokes the rule laid down in *Arkansas Valley Smelt. Co.* v. *Belden Min. Co.* 127 U. S. 379 [32: 246], and insists that the contract was of such a nature that it could not be assigned by the Gas Illuminating Company to plaintiff without the consent of defendant, which consent was positively refused. But that doctrine has no application under the circumstances of this case. Defendant could not accept these goods from the plaintiff, and then refuse to pay for them. It is immaterial whether there was an assignment from the Gas Illuminating Company to the plaintiff or not, or whether, if there was one, it was ever assented to by the defendant or not. When the defendant ordered the goods from the Gas Illuminating Company, and the plaintiff forwarded the goods upon that order, the defendant might have returned them, and declined to have any dealings with the plaintiff; but it could not accept the goods and use them, and then say it never ordered the goods from the plaintiff, never had any contract with it, and never assented to any assignment to the plaintiff of its contract with the Illuminating Company.

Of course, if the plaintiff undertook to furnish goods on the order of the defendant—an order based upon a contract between the defendant and the Gas Illuminating Company—it furnished them subject to all the terms of that contract, and the defendant may rightfully invoke any stipulation thereof as a defense in whole or in part to the action.

Another question arises on these facts. The contract hereinbefore referred to contained this clause:

"That during the entire period covered by the licenses and patents now owned by the said Siemens-Lungren Company, or which may hereafter be acquired on improvements and reissues, the said Siemens-Lungren Gas Illuminating Company will sell exclusively to said parties of the second part for use in the counties before named all the burners, fixtures and appliances *made by said Siemens-Lungren [203
Company and will not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned, or controlled by said Siemens-Lungren Company but will, upon the contrary, to the best of their ability, prevent the sale of any such articles for use within the territory named to any other than the parties of the second part, their successors or assigns."

There was testimony showing that after the execution of this contract the Middletown Gas Company purchased nine lamps from the plaintiff, and one hundred and twenty-two lamps from the Pennsylvania corporation. Middletown, where this gas company was located, is in Butler county, Ohio, and within the limits of the territory sold to the Cincinnati parties. There was no testimony tending to show that the original Chicago corporation, or this plaintiff, knew of the sale by the Pennsylvania corporation to the Middletown Gas Company. On the contrary, the testimony of plaintiff's two principal officers was that such sale was wholly unknown. Upon this failure to show any knowledge of the sales made by the Pennsylvania corporation the court struck out all the testimony as to such sales. In reference to the sale of the nine lamps by the plaintiff, the court ruled that it was a technical breach of the contract, and charged the jury to allow to the defendant as damages the profits received by the plaintiff from such sales. There was no direct testimony that the plaintiff was aware at the time of the sales of these nine lamps that Middletown was within the territory which had been sold to the Cincinnati parties, and the letters of the secretary and president of the plaintiff company state that the sales were made inadvertently and in ignorance of that fact, yet the sales were held by the court to be in direct violation of the terms of the contract, and, therefore, giving a right to the defendant to damages. The contention now is that the court erred in restricting the damages to the profits made by the plaintiff, and it is insisted that the defendant was entitled to recover what it would have made had it sold and placed the lamps in Middletown at the prices at which it was so selling *and placing them, if not to a [204
larger sum which the jury might estimate were the damages resulting from this interference with its monopoly in the purchased territory.

We cannot concur in these views, and are

of opinion that the rulings of the trial court were correct. With reference to the sale by the Pennsylvania corporation, the stipulation in the contract is that the Chicago company "will not knowingly sell, or permit other parties to sell, for use in said territory, any burners, lamps, etc." The scienter is an essential term in this covenant. There is no presumption and no evidence that the original Chicago corporation or the plaintiff knew what the Pennsylvania company was doing, and if they did not know of such a sale the fact that one was made involved no breach of the contract.

Neither was the defendant entitled to any other damages by reason of the sale by the plaintiff than the profits which the latter received. There is no presumption that the Cincinnati company would have been able to sell or place any lamps in Middletown at the prices it demanded. On the contrary, the testimony of the president of the defendant company is that the Middletown company refused to deal with it, and it is against all the rules in respect to damages for a breach of contract to give to the defendant the profits of a sale which it did not make, and which there is no reason to believe it ever would have made. There is no pretence of any wanton and willful breach by the plaintiff; nothing that suggests punitive damages, or that shows wherein the defendant was damified other than by the loss of the profits which the plaintiff received. Pass beyond that and there is only a domain of speculation —a mere guess as to what might have happened. The case of *Seymour* v. *McCormick*, 57 U. S. 16 How. 480 [14: 1024], is in point. In that case the trial court, among other things, charged the jury as follows:

"The general rule is, that the plaintiff, if he has made out his right to recover, is entitled to the actual damages he has sustained by reason of the infringement, and those damages may be determined by ascertaining the profits which, in judgment of law, he would have made, provided the defendants had not interfered with his rights.

205] *"That view proceeds upon the principle, that if the defendants had not interfered with the patentee, all persons who bought the defendant's machines, would necessarily have been obliged to go to the patentee and purchase his machine. That is the principle on which the profits that the patentee might have made out of the machines thus unlawfully constructed, present a ground that may aid the jury in arriving at the damages which the patentee has sustained."

But this court was of a different opinion, saying:

"Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee 'would have made, if the infringer had not interfered with his rights,' is a question of fact and not 'a judgment of law.' The question is not what speculatively he may have lost, but what actually he did lose."

It is true that that was an action for an infringement, and this for a breach of a contract, but still the rule of damages is the same. Actual damages is what the law gave in case of an infringement (*Birdsall* v. *Coolidge*, 93 U. S. 64 [23: 802]) actual damages is all the law gives in case of a breach of contract. Indeed, the real difference between that case and this is not so great as would be suggested by a description of the respective causes of action. For here, under the contract made by the plaintiff's assignor with the Cincinnati parties, the defendant became vested with a monopoly of sales within the prescribed territory of like nature to the monopoly given by the government for the whole territory of the United States whenever it issues a patent; and the act of the plaintiff in making a sale within that territory was an infringement similar to that of a sale of a patented article made within the limits of the United States in defiance of the rights of the patentee. Nevertheless it must be be conceded that in the case at bar there is technically a claim for a breach of a contract, and it is undeniable that in some cases the profits that would have been made are proper elements of damage in such an action. This matter has been recently considered by this court in *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 199 [35: 147], from the *careful [206 opinion of *Mr. Justice* Lamar in which case we quote as follows:

"The grounds upon which the general rule of excluding profits, in estimating damages, rests are (1) that in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote and not, as a matter of course, the direct and immediate result of the non-fulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. 1 Sedgw. Damages (7th ed.) 108; *The Lively*, 1 Gall. 315, 325, per *Mr. Justice* Story; *The Anna Maria*, 15 U. S. 2 Wheat. 327 [4: 252]; *The Amiable Nancy*, 16 U. S. 3 Wheat. 546 [4: 456]; *La Amistad de Rues*, 18 U. S. 5 Wheat. 385 [5: 115]; *Smith* v. *Condry*, 42 U. S. 1 How. 28 [11: 35]; *Parish* v. *United States*, 100 U. S. 500, 507 [25: 763,766]; *Bulkley* v. *United States*, 86 U. S. 19 Wall. 37 [22: 62]. But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied term of the contract itself, or the special circumstances under which it was made, it may be reasonably persumed that they were within the intent and mutual understanding of both parties at the time it was entered into. *United States* v. *Behan*, 110 U. S. 338, 345, 346, 347 [28: 168, 170, 171]; *Western U. Teleg. Co.* v. *Hall*, 124 U. S. 444, 454, 456 [31:479,483]; *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 307 [14: 157]."

Tested by the rules here laid down, it is obvious that the defendant is not entitled to recover as damages the profits which it would have received if it had made a sale of the nine lamps at its price to the Middletown Gas Com-

pany, for it is wholly uncertain that it would have been able to make such a sale. Indeed, the testimony of its own president is flatly to the contrary. It does not follow because a party 207] makes a purchase *at a lower price that he would have bought the same article at a higher price. The price is the one thing which oftentimes determines the question of purchase or no purchase. It is true there may be cases in which a necessity compels the purchaser to have the article, and then if he cannot buy it at one price he must at another. But no such necessity appears here, and although the gas company did purchase the nine lamps at a particular price it does not follow therefrom that it would have purchased them at any higher figures. On the contrary, it is reasonably certain that it would not.

Nor can it be assumed that profits, such as are claimed, were "within the intent and mutual understanding of both parties." It can hardly be presumed that the parties intended that the defendant should receive as damages for breach of the contract the profits of a sale which it could not make, rather than the profits of a sale that was made. There must indeed be some special circumstances before it can be inferred that parties intend that profits based upon a sale, which it is apparent could not have been made, should be the measure of damages. Actual damage will generally be assumed to be the intended measure of compensation, and all defendant has shown in this case is that the gas company did buy at a given price. The profits at that price it lost by reason of the plaintiff's sale, and that is the only actual damage which appears from the transaction. We see no error in the rulings of the court in this respect.

A third question arises upon the following stipulation in the contract:

"That the said Siemens-Lungren Gas Illuminating Company guarantees the life service of any lamps furnished to be five (5) years, exclusive of any globes broken or other damage done through careless handling, and that it will defray the expenses of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named. And that upon the expiration of said period of five years they will, if the parties of the second part so desire, guarantee that the said lamps will be guaranteed for an additional period of five years upon being paid 208] the *additional sum of three (3) dollars for each lamp thus guaranteed."

There was testimony tending to show what repairs had been made by the defendant and their cost, and the court charged the jury that they should deduct from the plaintiff's claim whatever amount the testimony disclosed to be the proper cost of such repairs. Of this no complaint is made, but in addition the defendant asked an instruction that the jury should take into consideration the probable repairs to said lamps for the balance of the period of five years, as guaranteed by said contract, which instruction the court declined to give. It also during the trial sustained an objection to the following question put to the president of the defendant company:

"Q. I will ask you to state whether or not, as the lamp grows older and remains in service longer, there is an increase in the cost and in the repairs?"

Of these rulings the defendant now complains, and insists that where damages are recoverable under a contract, such as this, "to keep the patented articles in repair for a specified time, the recovery should be allowed for the whole time specified, and not merely up to the date of the trial."

A sufficient answer to this contention is that in the count in the cross petition, in which damages are sought to be recovered for a breach of this covenant, the only allegation of damage is in these words: "Defendant alleges that it has paid out for such repairs to lamps so purchased by it, including those stated in the account attached to petition, to date, the sum of sixteen hundred ($1600) dollars, no part of which has been repaid to it." The only claim, therefore, which the defendant made was for the sums which it had already paid out, and the inquiry was, therefore, properly limited to that which it claimed. The suggestion that at the close of the cross petition there was a general prayer for judgment against the plaintiff in the sum of $23,850 will not avail the defendant in this respect, because that prayer commences with the word "wherefore," thus referring to the prior allegations, and the sum thus claimed is merely the aggregate of the separate *amounts of damage [209 alleged in the six different counts of the cross petition. It is unnecessary, therefore, to determine what testimony the defendant might have offered as to future repairs, if the claim in its cross petition had included them, or whether, if any such testimony had been received, the cost of such repairs could have been set off against the already due demand of the plaintiff.

Again, the fourth count in the cross petition, after referring to the agreement of the Chicago company to furnish defendant with the patented lamps of the Pennsylvania company, alleges that "it did furnish to this defendant a large number of lamps purporting to be said patented lamps furnished by said Philadelphia company, but which were in fact an infringement thereof, and of such poor quality as to be unfit for use. Upon trial of the lamps and the subsequent discovery of the infringements thereof, defendant was compelled to retire from use ninety-two lamps thereof which were in use, and they and those having remained unused became useless and worthless property. Defendant paid said Siemens-Lungren Illuminating Company of Chicago the sum of two thousand ($2000) dollars for said lamps, no part of which has since been paid, and that by reason of its being compelled to remove the said lamps and the consequent loss of business, it has been damaged in the further sum of one thousand dollars."

It appears that in January or February, 1888, the plaintiff forwarded to defendant one hundred lamps, and it is in respect to these lamps that the claim of damages set forth in this count arises. The testimony was conflicting as to whether these lamps were manufactured by the Pennsylvania corporation or in Chicago, and also to what extent, if any, their construction was defective, or a parture from the form of the patented lamp.

It does appear, however, from the testimony of the defendant's president, given at the trial in February, 1890, two years after the purchase, that ten or a dozen of these lamps had been sold for $35 each, and were still in use, having been used by the purchasers for a year and a half or more; and the defendant's employé, who handled these lamps, stated that the trouble was only with the burner, and that oth-
210 erwise *the lamps were all right. There was no direct testimony as to their value. There was no pretense that the defendant had ever tendered them back to plaintiff, or even that it made any complaint of them for many months after their receipt.

In respect to this matter the court charged that "the rule of damages in such a case is measured by the difference between the contract price and the actual value of the thing delivered." It is true that the court intimated that, according to its recollection, the testimony was silent as to the actual value, and said to the jury that, if that were the fact, the defendant, having kept the lamps, could recover only nominal damages, but an expression of opinion by the judge as to the scope or reach of testimony is, as is well known, no ground of error in the Federal courts. There was no arbitrary direction as to the amount which the jury should, or ought to, award, and the rule, as stated above, was more than once repeated. We see nothing in this of which the defendant can complain, and this, whether the cross petition in this respect be regarded as alleging a delivery of goods of a kind different from those contracted for, or of goods coming within the terms of the contract, but defective in quality. Counsel insists that these lamps were absolutely worthless, and that under those circumstances there was no necessity of a return, or of an offer to return. We see nothing to justify any such contention, and an instruction based upon the hypothesis that these goods were absolutely worthless would have been in manifest disregard of that which is shown by even the defendant's testimony.

The final matter is this: In the latter part of July, 1888, plaintiff furnished defendant two hundred and fifty lamps. These lamps were fitted with solid metal burners instead of tube burners used in those theretofore delivered. The contract provided that the plaintiff should furnish the most approved form of lamps made by the Pennsylvania company, and the claim was, on the part of the defendant, that the tube burner was the only burner that could be used successfully in those lamps, that the solid burn-
211 er was a failure, and that it *would cost $3 each to make the exchange. On the other hand it was insisted by the plaintiff that the tube burner was the one first used; and that the solid burner was a later invention, and supposed to be an improvement, and so furnished in good faith. It does not appear that the burners had ever been exchanged, or that the defendant had paid any money for the purpose of making an exchange, nor was there any testimony showing how much less in value a lamp with the solid burner was than one with the tube burner. If the defendant never made an exchange of burners, and so never expended any money therefor, and sold the lamp with the solid burner for the same price as one with a tube burner, it is difficult to see how it was damaged, even it be conceded that the tube burner is a better appliance than the solid burner. That is practically the state of the case, as shown by the testimony and the charge of the court. The defendant never changed burners; never paid the $3, and there was no testimony showing the value of the lamp with the solid burner, or how much less it was worth than one with a tube burner. It does not appear that the defendants ever sold a lamp for less price on account of the solid burner. In addition to this a letter from the Pennsylvania corporation (while not entirely clear in its language) seems to carry the idea that, as soon as its bill for the two hundred and fifty lamps is paid, it will exchange burners free of cost.

These are all the questions of importance presented in the trial of this case.

We see no error in the rulings of the trial court, and, therefore, the judgment is affirmed.

ANTON CAHA, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 211-222.)

Jurisdiction of district court—crimes and offenses—U. S. Rev. Stat. § 5392—false swearing in land contest—indictment, when sufficient—judicial notice—rules of department.

1. The United States District Court of Kansas had jurisdiction over a prosecution for the crime of perjury committed January 3, 1890, in Oklahoma, in violation of the provisions of U. S. Rev. Stat. § 5392, although the indictment was not found until September, 1892; such jurisdiction was not affected by the Act of May 2, 1890, creating the territory of Oklahoma.
2. The United States district courts have jurisdiction generally of "all crimes and offenses cognizable under the authority of the United States committed within their respective districts."
3. Under U. S. Rev. Stat. § 5392 the local land officers in hearing and deciding upon a contest with respect to a homestead entry constitute a competent tribunal, and such contest so pending before them is a case in which the laws of the United States authorize an oath to be administered.
4. False swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of U. S. Rev. Stat. § 5392.
5. An indictment is not insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.
6. Courts of the United States take judicial notice of the rules and regulations prescribed by the interior department in respect to contests before the land office.

NOTE.—*That the oath must be lawfully administered by competent authority to convict of perjury*, see note to United States v. Curtis, 27: 534.

As to sufficient evidence to convict of perjury, see note to United States v. Wood, 10: 527.

As to jurisdiction of United States district courts, see note to Glass v. The Betsey, 1: 485.

7. The courts take judicial notice of the rules and regulations of the executive departments of the government prescribed by authority of law.

[No. 1001.]

Argued Jan. 15, 16, 1894. Decided March 5, 1894.

IN ERROR to the District Court of the United States for the District of Kansas, to review a judgment of conviction of Anton Caha, of the crime of perjury and his sentence to the penitentiary in Kansas and to pay a fine, for false testimony given by him in a contest over a homestead entry in the land office. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Fred. Beal, L. T. Michener,** *W. W. Dudley, Henry E. Asp, John W. Shartel* and *George Gardner* for plaintiff in error.

Mr. **Edward B. Whitney,** *Asst. Atty. Gen.*, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

This case comes on error from the District Court of the United States for the District of Kansas. On March 31, 1893, plaintiff in error, having been found guilty of the crime of perjury by the verdict of a jury, was sentenced to confinement in the Kansas state penitentiary for a term of two years, and to pay a fine of ten dollars.

The questions are these: The indictment was returned September 22, 1892. It in two counts charged the defendant with the crime of perjury committed on January 3, 1890, in the land office at Kingfisher, Oklahoma, in falsely [213] testifying *that he was on a sand bar in the South Canadian river at 12 o'clock noon on the 22d of April, 1889; that this false testimony was given in a contest then pending in the land office, in which one Thomas Burch contested defendant's homestead entry on the ground that he had violated the Act of Congress of March 2, 1889, and the President's proclamation, by entering upon and occupying the lands opened to settlement under such proclamation prior to 12 o'clock noon of the day named therein, to wit, April 22, 1889.

The two counts are similar, the only material difference being that in the first count the oath is charged to have been administered by J. V. Admire, the receiver of the land office, and in the second by J. C. Roberts, the register of the land office, each being, as averred, authorized to administer the oath by the laws of the United States and the regulations of the land office. To this indictment a demurrer was presented, which, after argument, was overruled, and the first matter for consideration is this ruling. The grounds of the demurrer still insisted upon are, first, that the court had no jurisdiction over the alleged offense; and, secondly, that the indictment stated no public offense.

As to the first of these grounds; it is not disputed that the district court of Kansas had, at the time of the commission of the alleged offense jurisdiction generally of offenses against the criminal laws of the United States committed in the country known as Oklahoma, the place where this offense is charged to have been committed; but on the 2d of May, 1890, Congress passed an Act creating the territory of Oklahoma. 26 Stat. at L. 81. In section 9 *is found this* provision:

"Each of the said district courts shall have, and exercise, exclusive of any courts heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. . . . All acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside of the limits of the territory of Oklahoma as herein defined, as to *all causes of action or offenses in [214] said territory, and in that portion of the Cherokee Outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the supreme and district courts in said territory; but all actions commenced in such courts, and crimes committed in said territory and in the Cherokee Outlet, prior to the passage of this Act, shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now having jurisdiction thereof, as if this Act had not been passed."

The contention is that by this section jurisdiction was given to the district courts of Oklahoma, the indictment not having been found until September, 1892, and the reservation of jurisdiction to the Kansas court being limited to the cases in which prosecutions had already been commenced. We do not so understand the provision. The general grant of jurisdiction to the Oklahoma courts is prospective in its operation. Such is the ordinary rule of construction, and the repeal of the Act vesting jurisdiction in the Kansas court is limited by a proviso which includes not only "actions commenced," but "crimes committed." Counsel lay stress upon the words "having jurisdiction thereof," and argue that courts have no jurisdiction of crimes, but only of actions for the punishment of crimes. But this is placing too much stress upon a subordinate part of the sentence. If the scope of the sentence be as thus contended for, the words "crimes committed" are superfluous, and it would have been sufficient to have said "all actions commenced in such courts prior to the passage of this Act," etc. For the word "actions" may include both civil and criminal proceedings. But Congress went further, and provided not only that all "actions commenced in such courts," but also that all "crimes committed in said territory" prior to the passage of the Act should be "tried, prosecuted, and proceeded with until finally disposed of." Grammatically, "crimes committed in said territory" is an independent nominative, and refers to matters different from those embraced within the term "actions commenced in such courts." It is fair, under such cases, in order to determine the meaning, to omit the one nominative and read the sentence as though the other only *were present. [215] and so it will read "all crimes committed in said territory prior to the passage of this Act shall be tried, prosecuted, and proceeded with until finally disposed of in the courts now having jurisdiction thereof, as if this Act had not been passed." So reading, the meaning cannot be doubtful. Whatever of jurisdiction the district court of Kansas had at the time of the alleged offense remained unaffected by the Act of May 2, 1890.

Neither can it be doubted that the district

court of Kansas had jurisdiction over a prosecution for the crime of perjury committed at the place named in violation of the provisions of section 5392. That section, and under it this indictment was found, reads as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury."

This statute is one of universal application within the territorial limits of the United States, and is not limited to those portions which are within the exclusive jurisdiction of the national government, such as the District of Columbia. Generally speaking, within any state of this Union the preservation of the peace and the protection of person and property are the functions of the state government, and are no part of the primary duty, at least, of the nation. The laws of Congress in respect to those matters do not extend into the territorial limits of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government. It was in reference to such body of laws that section 2145, Rev. Stat. was enacted, and the argument which is sought to be drawn by the counsel therefrom against the jurisdiction of the district court of Kansas has no foundation. It is enough that section 5392 has uniform application throughout the territorial limits of the [216] *United States; that by section 563 the district courts are given jurisdiction generally "of all crimes and offenses cognizable under the authority of the United States committed within their respective districts;" and that by 22 Stat. at L. 400, chap. 13, § 2, the territory in question was annexed to and made a part of the United States judicial district of Kansas.

Neither is it necessary to consider whether section 5 of chap. 116 (11 Stat. at L. 250) remained in force after the revision of 1873. The first three sections of that chapter were re-enacted in the Revised Statutes; the 5th was omitted, and there is some discussion in the briefs as to whether, under sections 5595 and 5596 Rev. Stat., said section 5 still remains in force. But, as we said, it is unnecessary to enter into such a discussion. The indictment was returned under section 5392, and its sufficiency is to be determined by the provisions of that section.

Do the facts stated in this indictment constitute an offense under that section? It will be remembered that the perjury is charged to have been committed in a contest in the land office in respect to the validity of a homestead entry, the oath having been administered by one or other of the land officers before whom the contest was carried on. And the contention is that the statute makes no provision for such a contest before those officers; that, as the statute does not authorize any such contest, it cannot be said that the oath was taken in a "case in which a law of the United States authorizes an oath to be administered." If such a contest before the local land officers is not in terms provided for, it is certainly recognized in the statutes. Section 2273, Revised Statutes, is as follows:

"When two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provision of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district *officers, in cases of contest for [217] the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom shall be taken to the Secretary of the Interior."

Obviously, here is expressly authorized a contest before the local land officers in respect to pre emption entries. And while the same provision is not found in reference to homestead entries, the rightfulness of such a contest before such a tribunal is recognized in the Act of May 14, 1880 (21 Stat. 141, chap. 89, § 2) as follows:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, etc."

Re-enacted substantially in 1892. 27 Stat. at L. 270; see also 26 Stat. at L. 1099, § 7, and the recent Act of January 11, 1894, § 1. It is evident from these references that, even if there be no statute in terms authorizing a contest before the local land office in respect to homestead entries, the validity of such contest has been again and again expressly recognized by Congress.

Further, we find in the Revised Statutes these sections:

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . Second. The public lands, including mines.

"Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all *agents* [grants] of land under the authority of the government.

"Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

*"Sec. 2246. The register or receiver [218] is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands."

General rules of practice have been adopted

and promulgated by the Interior Department, which rules of long standing were codified by Commissioner Sparks and approved by Secretary Lamar, August 13, 1885, and, as so codified, are still the regulations in force. By these rules of practice express provision is made for a contest before the local land officers in respect to homestead as well as preemption entries, and for the taking of testimony before such officers, and a regular, formal trial, with the right of appeal to the Commissioner of the General Land Office, and therefrom to the Secretary of the Interior.

We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the dispositon of the public land; a specific Act of Congress authorizing contests before the local land offices in cases of pre-emption; rules and regulations prescribed by the Land Department for contests in all cases of the disposition of public lands, including both pre emption and homestead entries; and the frequent recognition by acts of Congress of such contests in respect to homestead entries. Clearly then, within the scope of § 5392, the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.

This is not a case in which the violation of a mere regulation of a department is adjudged a crime. *United States* v. *Bailey*, 34 U. S. 9 Pet. 238 [9: 113], is in point. There was an Act of Congress making false testimony in support of a claim against the United States perjury, and the defendant in that case was indicted for making a false affidavit before a justice of the peace of the commonwealth of Kentucky in support of a claim against the United States. It was contended that the justice of the peace, an officer of the state, had no authority under the acts of Con-[219] gress *to administer oaths, and that, therefore, perjury could not be laid in respect to a false affidavit before such officer. It appeared, however, that the Secretary of the Treasury had established, as a regulation for the government of his department and its officers in their action upon claims, that affidavits taken before any justice of the peace of any of the states should be received and considered in support of such claims. And upon this the conviction of perjury was sustained, *Mr. Justice* McLean alone dissenting. It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States. Much stronger is the case at bar, for the tribunal was composed of officers of the government of the United States; it was created by the Land Department in pursuance of express authority from the acts of Congress. This perjury was not merely a wrong against that tribunal or a violation of its rules or requirements; the tribunal and the contest only furnished the opportunity and the occasion for the crime, which was a crime defined in and denounced by the statute.

Nor is there anything in the case of *United States* v. *Eaton*, 144 U. S. 677, [36: 591] conflicting with the views herein expressed. In that case the wrong was in the violation of a duty imposed only by a regulation of the Treasury Department. There was an Act entitled "An Act Defining Butter; also Imposing a Tax upon and Regulating the Manufacture, Sale, Importation, and Exportation of Oleomargarine," which contained several sections forbidding particular acts, and imposing penalties, for violation thereof. And in addition there was a general provision in section 18 that "if a party shall knowingly, or wilfully, omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this Act prohibited, . . . be shall pay a penalty," etc. There was authority given to the Commissioner of Internal Revenue to make all needful regulations for carrying into effect the Act. In pursuance of that authority the Commissioner required the *keeping of a book in a [220] certain form, and the making of a monthly return—matters which were in no way referred to in the various sections of the statute prescribing the duties resting upon the manufacturer or dealer in oleomargarine, although subsequently to this statute, and subsequently to the offense complained of, and on October 1, 1890, Congress passed an Act, by section 41 of which wholesale dealers in oleomargarine were required to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue should require. It was held by this court that the regulation prescribed by the Commissioner of Internal Revenue, under that general grant of authority, was not sufficient to subject one violating it to punishment under section 18. It was said by *Mr. Justice* Blatchford, speaking for the court:

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the Act of October 1, 1890.

"Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense."

This, it will be observed, is very different from the case at bar, where no violation is charged of any regulation made by the department. All that can be said is that a place and an occasion and an opportunity were provided by the regulations of the department, at which

the defendant committed the crime of perjury in 221] violation of section 5392. We have *no doubt that false swearing in a land contest before the local land office in respect to a homestead entry is perjury within the scope of said section.

Some objection is made by counsel to the form of the indictment, in that in its caption there is nothing to show the organization of the court, or who composed it or who were present as constituent parties thereof when the indictment was returned; and nowhere any express recital that it was found by the concurrence of at least twelve jurors; and further, that it was signed by the assistant United States district attorney instead of by the district attorney himself. The record shows that at a term of the district court the grand jurors of the United States in and for said district came into open court, and, through their foreman, presented the bill of indictment, and that the bill was endorsed "a true bill," with the signature of the foreman immediately thereunder. With reference to all these objections it is enough to refer to section 1025 of the Revised Statutes, as follows:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Clearly, there was nothing in any of these matters which tended to the prejudice of the defendant, or rendered it doubtful by what body he was charged with the crime, in what court he was to be tried, or the exact nature of the offense with which he was charged.

Another matter is this: The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred 222]nature have been frequently *presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. Without attempting to notice all the cases bearing upon the general question of judicial notice, we may refer to the following: *United States* v. *Teschmaker*, 68 U. S. 22 How. 392, 405 [16:353,357]; *Romero* v. *United States*, 68 U. S. 1 Wall. 721 [17:627]; *Armstrong* v. *United States*, 80 U. S. 13 Wall. 154 [20:614]; *Jones* v. *United States*, 137 U. S. 202 [34:691]; *Knight* v. *United Land Asso.* 142 U. S. 161, 169 [35:974,978]; *Jenkins* v. *Collard*, 145 U. S. 546 [36:812].

These are all the matters which we deem of importance, and in them appearing no error, the judgment is affirmed.

SILAS F. KING, *Appt., and Plff. in Err.*,
v.
THE AMY & SILVERSMITH CONSOLIDATED MINING COMPANY.

(See S. C. Reporter's ed. 222-229.)

Mining claim—location—side lines—end lines—lateral rights—surface lines—effect of location—the Amy claim.

1. The location of a mining claim can only rest upon an actual discovery of the vein or lode; it cannot be made simply upon a conjectural or imaginary existence of a vein or lode.
2. The surface side lines of a mining claim extended down vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and then the outside portions must lie between vertical planes drawn downward through the end lines.
3. Side lines, properly drawn, of a mining claim run on each side of the course of the vein or lode, distant not more than three hundred feet from the middle of such vein; lines marked as side lines, but which cross the course of the strike of the vein, and do not run parallel with it, constitute end lines.
4. Where the court finds, as in this case, that what are called side lines are in fact end lines, the court in determining the lateral rights of the miner, will treat such side lines as end lines and such end lines as side lines.
5. The location of a running claim as made and defined, must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights.
6. The locator of a mining claim must stand upon his own location, and can take only what it will give him under the law; the court cannot relocate his claim and make new side lines or end lines.
7. The vein in controversy, in this action, the apex of which was within the surface lines of the Amy claims, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines.

APPEAL from and in error to the Supreme Court of the state of Montana, to review a judgment of that court, modifying the judgment of the District Court of the Second Judicial District in and for the county of Silver Bow, Montana, in an action brought by Silas F. King, plaintiff, against the Amy & Silversmith Consolidated Mining Company, defendant, for a partition of the mining claim known as the Non-Consolidated, and for an account-

NOTE.—*As to ownership of mines; United States statutes as to; right of support of surface*, see note to United States v. Castillero, 17: 448.

As to title to water by appropriation; common law rule; rule of mining states, see note to Atchison v. Peterson, 22: 414.

ing, and for a judgment for the balance found due, and for a discovery. *Reversed, and decree ordered for partition of the claim, if one can be made; if not, then for a sale and division of the proceeds, and for an accounting, etc.*

The facts are stated in the opinion.

Messrs. **C. W. Holcomb** and *Walter H. Smith* for appellant and plaintiff in error.

Mr. **W. W. Dixon** for appellee and defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff and the defendant are owners, as tenants in common, of certain mining property in Silver Bow county, state of Montana, known as the Non-Consolidated Lode mining claim. The plaintiff owns three fourths of the claim and the defendant one fourth. The defendant is, besides, the sole owner of the mining claim situated in the same county and state, known as the Amy Lode mining claim. Both claims are located and patented under the mining laws of the United States contained in sections 2320 and 2322 of the Revised Statutes. The Amy claim was first located and has the earlier patent.

The relative positions of these two claims are seen on the diagram in the record, which shows the course of the vein in the Amy claim upon which its location was made and the boundaries of the two claims, with the length and direction of each. The description of the two claims can be understood only by reference to the diagram, as each line is given. A copy of the diagram is here produced, as without it the description will be unintelligible to the reader.

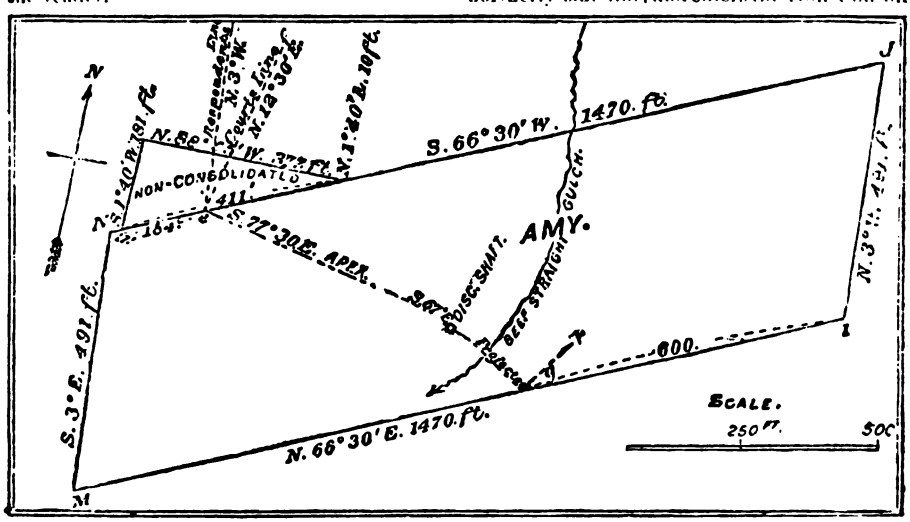
Amy claim, and, commencing seventeen (17) feet from the northwest corner of the latter, extends easterly *four hundred and eleven (411) [224 feet in length. Its northerly side line, commencing (on the northerly line of the Amy) at the point where the first line terminates, runs in a northwesterly direction three hundred and seventy-two (372) feet to the point where it meets the westerly line of the lode, and extends southwesterly from this point one hundred and eighty-one (181) feet to the place of beginning.

The vein of the Amy claim, on its course or strike, passes *through its northerly side [225 line, as marked on the diagram, into the Non-Consolidated ground; its apex crosses that line 184 feet easterly from the west side line of that claim, and does not again enter the Amy claim. The apex of the vein enters the south side of the Amy claim at a point within 600 feet westerly from the southeast corner of the Amy, and the dip of the vein is to the north.

We have in this description of the claims in controversy followed in a large degree that given in the brief of the defendant's counsel, for the subject does not admit of greater clearness of statement.

The plaintiff has brought this action for a partition of the Non-Consolidated claim with the defendant, according to the respective rights of the parties, if that be possible; but if the property cannot be thus partitioned advantageously, then for a sale of the premises and a division of the proceeds among the owners, in conformity with such rights.

As stated above, the vein of the Amy, of which the apex lies within the surface lines of the claim, in its course passes through the northerly side line, and enters the Non-Consoli



The Amy claim has a surface length of 1470 feet, and its side lines are parallel. The end lines are each 491 feet, and they are also parallel. The surface location forms a parallelogram of 1470 feet running easterly and westerly, by 491 feet running northerly and southerly.

The Non-Consolidated claim lies adjoining the northwest corner of the Amy claim. Its surface shape is that of a triangle, the longest side of which joins the northerly side of the dated claim; and it is alleged that the vein has been there worked by the owners of that claim and valuable ore taken therefrom. The plaintiff, therefore, prays, in addition to a partition or sale of the Non-Consolidated claim, for an accounting for his share, as tenant in common of an undivided three fourths of that claim, of the ores taken from the underground workings of the vein of the Amy after it had passed into that claim, if any there were.

The defendant admits his cotenancy in the Non-Consolidated claim with the plaintiff, but denies the taking of any ore from the vein of the Amy after it had passed into its ground.

The first question for determination is whether the Amy retained any right to the vein, the apex of which was within its surface lines after it had passed through its northerly side line, or rather through the vertical plane running down that line. If the Amy retained its right to that vein after it had entered the ground of the Non-Consolidated claim, it belonged to the defendant as sole owner of the Amy, and as 226] such *owner he could not be called on to account to the plaintiff for any portion of the ores taken from it. If on the other hand, the Amy did not retain its right to that portion of the vein after it had passed into the Non-Consolidated claim, it became a part of that claim, and the proceeds of the ore there taken from it would, with other proceeds of the Non Consolidated claim, be the subject of an accounting between the plaintiff and the defendant, the owners, as tenants in common of that claim. The answer to the question must be found in the construction given to section 2322 of the Revised Statutes, which took effect December 1, 1873. That section is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with the state, territorial, and local regulations not in conflict with the laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surfaces included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The preceding section 2320 prescribes the extent to which mining claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, or other valuable deposits on lands of the United States, may be taken up after May 10, 1872. It allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location shall be 227] *made until the discovery of the vein or lode within the limits of the claim located; which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.

The section also declares that no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at its surface, except as prevented by adverse rights existing on the 10th day of May, 1872, and that the end lines of each claim shall be parallel to each other. A claim located in conformity with the provisions of this section would take the form of a parallelogram, if the course or strike of the vein or lode should run in a straight line; but such veins and lodes are often found upon explorations to run in a course deviating at different points from such line. And from this circumstance much difficulty often arises in determining the lateral rights of the locators.

Section 2324 of the Revised Statutes recognizes the powers of miners in each mining district to make regulations not in conflict with the laws of the United States, or of the laws of the state or territory in which the district is situated, governing the location, manner of locating, and amount of work necessary to hold possession of a mining claim, subject to the requirement that the location must be distinctly marked on the ground so that its boundaries may be readily traced.

It is evident from the provisions cited that the location as made and defined must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights.

Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location; and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such *surface[228 lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines extended downward vertically, therefore determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines.

The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim, the lines marked as *side* lines, cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But, as was said by this court in *Iron Silver Min. Co.* v. *Elgin Min. & S. Co.* 118 U. S. 196, 207 [30:98, 102]: "If the first locator will not or cannot make

the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly he must bear the consequences." The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights, as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called *side* lines are in fact *end* lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law.

229] *Acting upon this principle there is no lateral right to the holder of the Amy claim by which he can follow its vein into the Consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. . . . "Even then," the court added, "with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein, but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims."

Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines.

The judgment of the supreme court of Montana should therefore be reversed, and judgment entered in favor of the plaintiff, for a decree of partition of the Non-Consolidated claim between the parties to the suit, who are owners as tenants in common, provided such partition can be made with due regard to the respective rights of the owners, and if it cannot be thus advantageously made, that the premises be sold and the proceeds divided according to their respective rights; and further, that the respective parties render an account of the proceeds received by them, respectively, from the Non-Consolidated claim, and that such proceeds be divided between them according to their respective rights. And it is so ordered.

*THE LOUISVILLE, EVANSVILLE & ST. LOUIS RAILROAD COMPANY, *Plff. in Err.*, [230

v.

GEORGE CLARKE, Executor of Augustine Clarke, deceased.

(See S. C. Reporter's ed. 230-244.)

Damages for death—Indiana statute—proof of income—elements of damages—instruction to jury.

1. Under the Indiana statute as to action for damages for death, the action must be commenced within two years from the death of the person injured, not from the time he received the injuries from which death resulted.
2. Under the statute of Indiana giving damages for death, the personal representative has a right of action, although a year and a day has passed after the injury before death occurs.
3. In an action for damages for death, it is not error that the court below permitted the plaintiff, against the objection of the defendant, to testify as to the income of the deceased previous to his death.
4. The age of the deceased, his probable expectancy of life, his occupation, his ability to labor, his accustomed earnings are all proper elements of the inquiry as to the compensation proper to be awarded on account of his death.
5. Where the jury were distinctly informed that they were to follow the rule of damages announced by the state court in an action for death, the statement to the jury that the court below had, on a former occasion, acted on a different interpretation of the statute, is not ground of error.

[No. 191.]

Argued Jan. 4, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the District of Indiana, to review a judgment in favor of the plaintiff, George Clarke, executor, etc., in an action brought against the Louisville, Evansville & St. Louis Railroad Company, defendants, for damages for the death of the plaintiff's testator, caused by the wrongful act and omission of the defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Alex. Pope Humphrey,** *John E. Iglehart, Butler, Snow & Butler,* and *Edwin Taylor,* for plaintiff in error.

Messrs. **W. H. H. Miller,** *Ferd. Winter* and *John B. Elam,* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought April 28, 1888, by

NOTE.—*As to contracts limiting the time within which action must be brought; waiver of; estoppel as to,* see note to Southern Exp. Co. v. Caldwell, 22: 556.

That neither time nor statute of limitations runs against the state, see note to Gibson v. Chouteau, 20: 534.

As to limitations of time in equity cases, see note to Pratt v. Carroll, 3: 627, and to Thomas v. Brockenbrough, 6: 287.

As to equity of redemption barred by time, see note to Thomas v. Brockenbrough, 6: 287.

As to length of time no bar to a trust, see note to Prevost v. Gratz, 5: 311, and to Thomas v. Brockenbrough, 6: 287.

the executor of Augustine Clarke, whose death, the plaintiff alleged, was caused by the wrongful act and omission of the defendant, the Louisville, Evansville & St. Louis Railroad 235] Company, *a carrier of passengers for hire. The gist of the action is the negligence of the company, its agents and servants, in consequence of which the decedent, on the 25th day of November, 1886, while traveling on the defendant's cars, in the state of Indiana, received injuries in his person from which death ensued. The plaintiff's testator died February 23, 1888.

The action was founded on section 284 of the Revised Statutes of Indiana, providing:

"When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for the injury, for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

It appeared from the complaint that plaintiff's testator lived more than a year and a day after being injured. And the question was presented upon a demurrer interposed by the defendant whether, within the meaning of the statute, it could properly be said that death was *caused* by the wrongful act or omission of another if it did not occur until after the expiration of a year and a day from such act or omission. The argument in support of this limitation upon the right of action given by the statute is based upon certain rules at common law in prosecutions for murder, appeals of death, and inquisitions against deodands. Before examining this question it will be well to ascertain the object of the statute as declared by the supreme court of Indiana.

In *Lofton* v. *Vogles*, 17 Ind. 105, 107, which was an action under this statute, it was contended that the plaintiff could not maintain his suit without showing that he had criminally prosecuted the defendant to conviction; that such prosecution was a condition precedent to a civil action. It was held that this rule did 236] not prevail in the United *States, as we do not in this country depend upon the injured party, or his representative, to institute criminal prosecutions.

In *Jeffersonville R. Co.* v. *Swayne*, 26 Ind. 477, 484-486, the court, observing that it was a maxim of the common law, too familiar and long established to require the citation of authority to support it, that a cause of action for an injury to the person dies with the party injured, and does not survive to his personal representative, said: "The statute does not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such the legal effect, but it creates a new cause of action unknown to the common law. The action given by the statute is for causing the death, by a wrongful act or omission, in a case where the deceased might have maintained an action had he lived, for an injury by the same act or omission. The right of compensation for the bodily injury of the deceased, which dies with him, remains extinct. The right of action created by the statute, is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the widow and children, or next of kin of the deceased, for the damages must inure to their exclusive benefit."

"The provision that the personal representative may maintain an action, if the deceased could have maintained one, if the injury had caused death," the court said in *Pittsburg, Ft. W. & C. R. Co.* v. *Vining*, 27 Ind. 513, "has been heretofore ruled to be applicable to the cause of action, and not to the person bringing it. In other words, an action may be maintained when the deceased, had he lived, would not have been prevented from recovering by reason of his want of care."

In *Mayhew* v. *Burns*, 103 Ind. 328, the court said that the statute "gives to the widow or next of kin, through the personal representative, a right to recover for any injury which they may have sustained by reason of the death of an adult, or one emancipated from parental service, and in whose life they may have had a pecuniary interest."

In *Hanna* v. *Jeffersonville R. Co.* 82 Ind. 113, *the court, discussing the question wheth- 237 er the two years' limitation prescribed by the statute ran from the death of the person injured, or from the qualification of his administrator, said: "The statute was intended mainly to be operative against carriers of passengers and in a very large measure against corporations, whose duties are exclusively performed by hired servants, who are being constantly changed, and in whose knowledge the facts in such cases would generally rest, or who are to be depended upon for such information as would lead to a discovery of the facts and witnesses to establish them. The reasons for requiring a suit to be brought within some short period after the occurrence were therefore very forcible and must have been perceived. While a proper regard for the security of human life required that a right of action should be given which did not exist by previous law, the consideration already noted required that the remedy should be promptly sought, else a door would be open wide for injustice and wrong." It was, therefore, held that the time limited for suit began to run from the death.

In *Burns* v. *Grand Rapids & I. R. Co.* 113 Ind. 169, the court, construing the statute, said that "the recovery is not a penalty inflicted by way of punishment for the wrong, but is merely compensatory of the damages sustained by the heirs or next of kin, who had, or are supposed to have had, a pecuniary interest in the life of the intestate."

And in *Hecht* v. *Ohio & M. R. Co.* 132 Ind. 507, 514: "The wording of Lord Campbell's Act and the statute of this state differ somewhat, but are in effect the same. The purpose of each was to give to the personal representative of the deceased a right of action if the deceased at the instant of his death would have had a right of action for the same act or omission had he survived." It was, consequently, held that the personal representative could not

maintain an action under the statute, if the party injured, in his lifetime, sued and recovered full compensation for the injuries inflicted, and had thereby, if he had lived, precluded himself from maintaining any further action on account of such injuries. The same construction was placed upon Lord Campbell's 238] Act in *Read* v. **Great Eastern R. Co.* L. R. 3 Q. B. 555, and in *Littlewood* v. *New York*, 89 N. Y. 24, 42 Am. Rep. 271, upon a statute of New York, not differing materially from the Indiana statute.

It thus appears to be the settled construction of this statute that the right of a personal representative to bring an action for the exclusive benefit of the widow and children, or next of kin, of one whose death was caused by the wrongful act or omission of another, depends upon the existence or nonexistence of a right in the decedent, immediately before his death, to have maintained an action on account of such act or omission. Consequently, the words of the Indiana statute, "the action must be commenced within two years," means two years from the death of the person injured, not from the time he received the injuries from which death resulted.

In the light of this construction it would seem to be an unreasonable interpretation of the statute to hold that the personal representative has no right of action, in any case, where a year and a day passes after the injury before death occurs. The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the "new grievance" upon which the action is founded does not exist. To say, therefore, that where the person injured dies one year and *two* days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to 239] *this view. Was the death, in fact, caused by the wrongful act or omission of the defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death.

Ought we to allow this obvious construction of the statute to be defeated by any rule recognized at common law as controlling upon an inquiry as to the cause of death in cases of murder, appeals of death, or inquisitions against deodands?

In cases of murder the rule at common law undoubtedly was that no person should be adjudged "by any act whatever to kill another who does not die by it within a year and a day thereafter; in computation whereof the whole day on which the hurt was done shall be reckoned first." 1 Hawk. P. C. chap. 13; 2 Hawk. P. C. chap. 23, § 88; 4 Bl. Com. 197, 306. The reason assigned for that rule was that if the person alleged to have been murdered "die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or a natural death; and in case of life, a rule of law ought to be certain." 3 Coke, Inst. 53. And such is the rule in this country in prosecutions for murder, except in jurisdictions where it may be otherwise prescribed by statute. Whart. Am. Crim. L. § 1073; *State* v. *Orrell*, 12 N. C. 139.

An appeal, when spoken of as a criminal prosecution denoted, according to Blackstone, an accusation by a private subject against another, for some heinous crime—a "private process for the punishment of public crimes," having its origin in a custom, derived from the ancient Germans, of allowing a pecuniary satisfaction, called a *weregild*, to the party injured or his relations, "to expiate enormous offenses." 4 Bl. Com. 312, 313. Bacon defines it to be a "vindictive" action—"the party's private action, seeking revenge for the injury done him, and at the same time prosecuting for the Crown in respect of the offense against the public." Bac. Abr. title, *Appeal*. These appeals could be brought "previous to *an indictment, [240 and if the appellee be acquitted thereon, he could not be afterwards indicted for the same offense." 4 Bl. Com. 315; Comyn's Dig. title, *Appeal*, *G*. 11, 16. While during the continuance of the custom referred to a process was given for recovering the *weregild* by the party to whom it was due, "it seems that when these offenses by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment on the offender, though the party was allowed no pecuniary compensation for the offense." Vol. 4, p. 314. By statute of 59 Geo. III. chap. 46, appeals of murder, treason, felony, and other offenses were abolished.

During the time when appeals of death were allowed, at common law, the rule established by the statute of Gloucester, 6 Edw. I. chap. 9, was that "the appeal must be sued out within a year and a day after the completion of the felony by the death of the party." 4 Bl. Com. 315. This, the author said, seemed to be only declaratory of the common law. And Hawkins says: "It seems clear that the appeal of death must set forth the day when the hurt was given, but also the day when the party died of it; as it appears from all precedents of this kind, both in Coke and Raslat, and also from the manifest reason of the thing, that it may appear that the party died within a year and a day after the stroke, in which case only the law intends the death was occasioned by it." 2 Hawk. P. C. chap. 23, § 88. Bacon, referring to the statute of Gloucester, says that, by that statute, "an appeal shall not be abated for

default of fresh suit, if the party sue within the year and day after the deed done, the computation whereof, as the law is now settled, shall be made not from the day when the wound is given, but *from the day when the party died;* also, the year and day shall be computed from the beginning of the day, and not from the precise time when the death happened, because regularly no fraction shall be made of a day." Title, *Appeals, D.* And Comyn: "By the statute of Gloucester, 6 Edw. I. chap. 9, an appeal shall not abate by want of fresh suit, if brought in a year and a day after the fact done; which statute is, by construction, restrained to 241]an *appeal for the death of a man. And, therefore, an appeal upon the death of a man may be within the year and day, though there be not any fresh suit; within a year and day *after the death,* though the blow was given before." 2 Coke, Inst. 320, title, *Appeals, D.*

The rule of a year and a day was also applied at common law to inquisitions of deodands, brought to forfeit to the king, "to be applied to pious uses and distributed in alms by his high almoner," personal chattels that were the immediate occasion of the death of any reasonable creature. 1 Bl. Com. 300. The rule in those cases was that the law does not look upon such a wound as the cause of a man's death, "after which he lives so long." 1 Hawk, P.C. chap. 8, § 7.

We have made this full reference to prosecutions for murder, appeals of death, and inquisitions against deodands, because of the earnest contention of counsel that the rule applied at common law in such cases, should control the construction of the Indiana statute. In our judgment, the rule of a year and a day is inapplicable to the case before us. In prosecutions for murder the rule was one simply of criminal evidence. Appeals of death and inquisitions against deodands, although having some of the features of civil proceedings, were, in material respects, criminal in their nature. Besides, as we have seen, the statute of 6 Edward I. chap. 9, was construed as giving a year and a day from the death of the party killed, not from the time the wound was inflicted. And we do not understand that any different construction was placed upon the statute of 3 Henry VII. chap. 1, to which counsel referred.

But be that as it may, in prosecutions for murder and appeals of death, the principal object was the punishment of public offenses. In cases of murder and appeals of death, human life was involved, while in inquisitions against deodands it was sought to forfeit property that had caused the death of some one. In such cases, the rule of a year and a day might well have been applied. But actions under a statute like the one in Indiana are, in their nature and consequences, wholly of a civil 242]character. What the legislature *had in view was to make provision for the widow and children, or next of kin, of one whose death has been caused by the wrongful act or omission of another. The reasons upon which the rule of a year and a day were applied in the above-mentioned cases at common law do not apply with the same force in purely civil proceedings that involve no element of punishment, but only provide compensation to certain relatives of the decedent who have been deprived of his assistance and aid. As the statute, according to the construction placed upon it by the highest court of Indiana, allows the personal representative to sue within two years after the death of the testator or intestate, where death was caused by the wrongful act or omission of the defendant, we cannot, by mere construction, restrict that right to cases in which the death occurred within a year and a day after such act or omission. We repeat that, where death was *caused* by the wrongful act or omission of another, the right of the personal representative, suing for the benefit of the widow and children or next of kin, to recover damages on account of such death, is complete under the statute, and may be asserted by action brought at any time within two years from the death.

It is assigned for error that the court below permitted the plaintiff, against the objection of the defendant, to testify as to the income of the deceased previous to his death. It is conceded by counsel that it was competent to have shown the testator's ability and capacity for labor as well as his skill in his calling. But it is insisted that the evidence as to his income for a particular period was not competent. We are of the opinion that the evidence to which the defendant objected was properly admitted. It tended, in connection with other evidence, to show the extent of the loss sustained by the widow and children on account of the death of the husband and father. The age of the deceased, the probable expectancy of life, his occupation, his ability to labor, his accustomed earnings were all proper elements of the inquiry as to the compensation proper to be awarded on account of his death. *Wade* v. *Leroy*, 61 U. S. 20 How. 34 [15: 813], *Nebraska City* v. *Campbell*, 67 U. S. 2 Black, 590 [17:271]; *District of Columbia* v. *Woodbury*, 136 U. S. 450 [34: 472]; **Texas & P. R. Co.* v. [243 *Volk, ante*, p. 78; *Howard County Comrs* v. *Legg*, 110 Ind. 479; *Hudson* v. *Houser*, 123 Ind. 309; *Collins* v. *Davidson*, 19 Fed. Rep. 83; *Hall* v. *Galveston, H. & S. A. R. Co.* 39 Fed. Rep. 18; *Sereneeon* v. *Northern Pac. R. Co.* 45 Fed. Rep. 407.

Certain observations made by *Judge* Woods, at the close of his charge to the jury, are also assigned for error. They were as follows: "Some years ago, in a case in this court involving this question, I instructed that the jury was not restricted in its award of damage to the proof of pecuniary loss suffered by the widow or next of kin, for whose benefit the action was prosecuted, and, if left to myself, should so rule now. The statute provides that the damages awarded shall 'be distributed in the same manner as personal property of the deceased,' and this, it seems to me is inconsistent with the proposition that the damages to be allowed cannot exceed the proven pecuniary loss. Some of the next of kin might be dependent and shown to have a pecuniary interest in the life of the deceased, and others to have no such interest, and yet the damages allowed must go to those who had no such interest as well, and as much as to those on account of whose interest it was allowable; but the supreme court of the state, in a somewhat recent case, as I understand, has put an interpretation upon this statute which is binding

upon this and other courts, and in accordance with that decision, as I remember it, I instruct you, and for the purpose of this case you will accept it as the law, that you will allow only the pecuniary loss suffered by the widow and surviving children on account of this death, not exceeding the limit of ten thousand dollars fixed by the statute."

The defendant, of course, makes no objection to the principle of law announced by the court, for the charge was in exact conformity to its request for instructions upon the question of damages. But it insists that the jury were probably influenced, to its prejudice, by the statement that the court below had expressed a different view from that announced by the state court.

We are of opinion that the action of the court below, in respect of this matter, is not ground 244] of error. What the judge *said was in deference to the decision of the state court, whose interpretation of the local statute was accepted as the law of the case. The jury were distinctly informed that they were to follow the rule of damages announced by the state court, notwithstanding the court below had, on a former occasion, acted on a different interpretation of the statute. It is not to be supposed that the jury misapprehended or disregarded the explicit injunction of the court to allow, in the event of a verdict for the plaintiff, only the pecuniary loss suffered by the widow and surviving children on account of the death of the husband and father.

We perceive no error in the record, and the judgment is affirmed.

JOHN DUNLAP, ET AL., *Appts.*,
v.
BENJAMIN SCHOFIELD, JR., ET AL.

(See S. C. Reporter's ed. 244-250.)

Right to recover on patent—Act of Feb. 4, 1887.

1. By U. S. Rev. Stat. § 4900, the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article "patented" or to the particular defendants by informing them of his patent and of their infringement of it, the duty of alleging, and the burden of proving, either of these facts is upon the plaintiff.
2. Under the Act of Feb. 4, 1887, an order to charge either a manufacturer or a seller of articles to which has been applied a patented design or any colorable imitation thereof, he must have been knowing that the same "has been applied,' which is equivalent to saying "with a knowledge of the patent and of his infringement."

[No. 149.]

Submitted Dec. 5, 1893. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, in favor of the plaintiffs, Benjamin Schofield, Jr., *et al.*, in an action brought by them against John Dunlap, *et al.*, for the infringement of the letters patent, issued April 2, 1889, to Julius Stroheim, for a design in rugs. The decree being for an injunction and for damages in the sum of $250 as penalty and damages under the Act of Feb. 4, 1887, chap. 105. *Reversed and case remanded, with directions to dismiss the suit.*

See same case below, 42 Fed. Rep. 323.

Statement by *Mr. Justice* **Gray:**

This was a bill in equity, filed May 7, 1889, for the infringement of letters patent issued April 2, 1889, for the term of three and a half years, by the United States to Julius Stroheim for a design for rugs.

The bill alleged that the design was new and original; that Stroheim was the original and first inventor thereof; that it was not, at the time of his application for a patent, in public use or on sale with his consent or allowance; that before the issue of the patent he assigned the invention and the patent *to be obtained [245 therefor to the plaintiffs by an instrument in writing recorded in the Patent Office; that the invention was of great practical use and benefit to the plaintiffs, and they had applied it to large and extensive use, and had expended large sums of money in introducing it, and the public and the users of the invention had acknowledged and acquiesced in its value; that the defendants had infringed, and intended to continue to infringe the patent by making, using and vending the patented design, substantially the same in outline, detail and appearance as shown and described in the patent; and that the plaintiffs, "after the issue of the aforesaid letters patent, notified the said defendants of the issue of said letters patent, of their infringement thereof, and requested them, the said defendants, to abstain and desist from any further violation thereof in infringement of" the plaintiffs' "rights thereunder in the manufacture and sale of rugs bearing said patented design;" and prayed for a discovery, an injunction, an account of profits, damages, and further relief.

The defendants answered under oath, admitting the issue of the letters patent to Stroheim; denying all the other allegations of the bill, and, among other things, denying that "after the issue of the aforesaid letters patent these complainants notified these defendants of the issue of said letters patent, or of their infringement thereof, and requested the said defendants to abstain and desist from infringement of the complainant's alleged rights thereunder, in the manufacture and sale of rugs bearing said patented design." The plaintiffs filed a general replication.

At the hearing upon pleadings and proofs, it appeared by the testimony introduced by both parties that the plaintiffs made and sold many

NOTE.—*As to when assignee may sue for infringement; when patentee must; when they must join*, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects, see note to Grant v. Walter, 37: 553.

rugs with the patented design upon them; and there was conflicting evidence upon the question of infringement. The court held that the patent was valid, and that the defendants had infringed it by making and selling rugs bearing a design in imitation of and substantially similar to the design shown, described and claimed in the patent.

No evidence was offered by either party upon [246] the question *whether the plaintiffs' rugs were marked "patented," or upon the question whether the plaintiffs had notified the defendants that they were infringing the patent.

The defendants contended that they were not liable in damages, because the plaintiffs had failed to prove their own compliance with section 4900 of the Revised Statutes, which is as follows:

"It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patented,' together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented."

The court held that the notice alleged in the bill was not a sufficient compliance with this section, and that the burden of proof was upon the defendants to show that the plaintiffs had not complied with it. *Schofield* v. *Dunlop*, 42 Fed. Rep. 323.

The plaintiffs asked for an injunction, and for damages in the sum of $250, as penalty and damages under the Act of February 4, 1887, chap. 105 (which is copied in the mar- [247] gin*) and *waived all right to any further damages, or to an account of profits. The court, on May 13, 1890, entered a decree for the plaintiffs accordingly, and the defendants appealed to this court.

Mr. **Jos. C. Fraley** for appellants.
Mr. **Hector T. Fenton** for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

By section 4900 of the Revised Statutes, which (by virtue of section 4933 applies to patents for designs) it is made the duty of every patentee or his assigns, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that it is patented, by putting the word "patented" upon it, or upon the package inclosing it; "and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented."

The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patent, unless he has given notice of his right, either to the whole public by *marking his article "patent- [248] ed," or to the particular defendants by informing them of his patent and of their infringement of it.

One of these two things, marking the articles, or notice to the infringers, is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him. Whether his patented articles have been duly marked or not is a matter peculiarly within his own knowledge; and if they are not duly marked, the statute expressly puts upon him the burden of proving the notice to the infringers, before he can charge them in damages. By the elementary principles of pleading, therefore, the duty of alleging, and the burden of proving, either of these facts is upon the plaintiff.

In the present case, although the plaintiffs had manufactured and sold goods with the patented design upon them, they made no allegation or proof that the goods were marked as the statute required. They did allege in their bill that they notified the defendants of the patent and of their infringement; but this allegation was distinctly denied in the defendants' answer, and the plaintiffs offered no proof in support of it. They could not, therefore, recover, even if this were a suit for damages within section 4900 of the Revised Statutes.

But these plaintiffs, waiving all right to an account of profits, or to other damages, sought and were allowed to recover the fixed sum of $250, in the nature of a penalty, imposed by the Act of February 4, 1887, chap. 105, upon any person who, during the term of a patent for a design, and without the license of the owner, applies the design secured by the patent, "or any colorable imitation thereof," to any article of manufacture for the purpose of sale, or sells or exposes for sale any article of

* An Act to Amend the Law Relating to Patents, Trade-marks and Copyright.

SEC. 1. Hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall' without the license of the owner, have been applied, knowing that the same has been so applied. Any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any circuit court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement.

SEC. 2. Nothing in this Act contained shall prevent, lessen, impeach or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this Act had been passed; but such owner shall not twice recover the profit made from the infringement. 24 Stat. at L. 387.

manufacture to which "such design or colorable imitation" has been applied, "knowing that the same has been so applied." 24 Stat. at L. 387. This statute, according to its clear intent and effect, requires that, in order to charge either a manufactureer or a seller of articles to which has been applied a patented design or any 249] colorable *imitation thereof, he must have been "knowing that the same has been so applied," which is equivalent to saying "with a knowledge of the patent and of his infringement." The reasons for holding the patentee to allege and prove either such knowledge, or else a notice to the public or to the defendant, from which such knowledge must necessarily be inferred, are even stronger, in a suit for such a penalty, than in a suit to recover ordinary damages only.

In none of the cases on which plaintiffs rely, and by which the court below considered its judgment as controlled, was there any adjudication inconsistent with this conclusion.

The leading case is *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 788 [19: 566] decided at October term, 1869, which was a bill in equity for an injunction, and for an account of profits, against infringers of a patent for an invention; and the passage in the opinion of this court, which is relied on by the plaintiffs, is that in which *Mr. Justice* Swayne, after citing the provisions of the Act of March 2, 1861, chap. 88, § 13, which are re-enacted in section 4900 of the Revised Statutes, proceeded as follows: "It is said that the bill contains no averment on this subject, and that the record is equally barren of proof that any such notice was ever given to the defendants, except by the service of process, upon the filing of the bill. Hence, it is insisted that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendants is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was to late for the defendants to raise the point before the master. They were concluded by their previous silence and must be held to have waived it. It cannot be considered here." 76 U. S. 9 Wall. 801 [19: 570].

In that case, as appears in the passage just quoted from the opinion, not only was there no averment in the bill, or in the answer, on the subject of marking or of notice; but no objection to the want of proof of either fact was made by the defendants at the original hearing in the circuit court, as appears by its opinion reported in *Goodyear* v. *Providence Rubber* 250] *Co.* 2 Cliff. 351. The objection *was first taken at the subsequent hearing before a master, and was therefore held to have been waived.

In some later cases in the circuit courts of the United States it has been assumed that the defendant was bound to allege and prove that the patented articles were not marked, if he would, upon that ground, avoid liability for damages under the section in question. But in none of those cases was that point in judgment. In *Goodyear* v. *Allyn*, 6 Blatch. 33, the only question before the court was of granting an injunction, a matter not touched by this section. In *Herring* v. *Gage*, 15 Blatchf. 124, the point decided was that the statute did not apply to the marking of the articles made and used by the infringing defendants. In *New York Pharmical Asso.* v. *Tilden*, 21 Blatchf. 190, the answer alleged and the proof showed that the plaintiff's goods were not marked, and the question was as to the sufficiency of a verbal notice to charge the defendants in damages. And in *Allen* v. *Deacon*, 10 Sawy. 210, the want of marking was alleged and proved by the defendant, and he was also proved to have been duly notified of the infringement. On the other hand, in *McComb* v. *Brodie*, 1 Woods, 153, it was held that if the patentee did not prove that his articles were marked, or that he gave the defendant notice of the infringement, he could recover only nominal damages.

The patent having now expired, so that the injunction is of no further value, the decree is reversed and the case remanded to the circuit court with directions to dismiss the bill.

JOSEPH CARNE ET AL., *App'ts.*, *v.* AUGUSTUS RUSS.

(See S. C. Reporter's ed. 250-252.)

Jurisdiction as to amount.

In a suit to set aside and cancel a tax deed as a cloud upon plaintiff's title, where the paintiff's title to the land was not really contested, but the only matter in controversy was the amount of money which the plaintiff was equitably bound to pay to the defendants, and the difference between the sum which the circuit court held him to pay and the highest sum claimed by the defendants was less than $5000, the amount in controversy, is insufficient to support the appellate jurisdiction of this court.

[No. 229.]

Argued and Submitted Jan. 25, 1894. Decided March 5, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, in favor of Augustus Russ, plaintiff, in a suit in equity, against John Carne, Jr., *et al.*, defendants, cancelling a tax deed as a cloud upon plaintiff's title, to land in Chicago, and a certificate of tax sale of the land, upon paying to the defendants a certain amount. *Dismissed.*

The facts are stated in the opinion.

Mr. **George W. Smith** for appellants.

Mr. **Allan C. Story** for appellee.

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity by Russ, as the owner of land in Chicago, worth more than $40,000, against Ogden and others, to set aside and cancel, as creating a cloud upon his title, a tax deed to Ogden, and a certificate of tax

NOTE.—*As to amount necessary to give jurisdiction in circuit court; cases prior to Act of 1875; amount necessary since act of 1875; amount in dispute*, see note to Schunk v. Moline M. & S. Co. 37: 256.

sale procured by the other defendants as his agents.

The bill alleged that the taxes upon which the tax deed and certificate were issued were illegally levied and apportioned, and that the plaintiff had tendered to the defendants the full amount of the taxes paid by them.

The defendants answered, denying the plaintiff's title, the illegality of the taxes, and the tender of payment. But Ogden, in his answer, offered to waive his claim of title to the land and to reconvey it to the plaintiff, if the plaintiff would pay him the sums paid by him, with penalties accrued thereon and ten per cent interest. And the other defendants, in their answers, disclaimed all title to themselves.

At the hearing, the defendants contended that the sums which the plaintiff was in equity bound to pay them amounted to $8705.34. But the circuit court held that those sums amounted to $4291.84 only, and that the plaintiff, upon paying this amount (which he forthwith paid into court) was entitled to the relief prayed for, and entered a final decree in his favor. The defendants appealed to this court.

Upon the admissions of the answers, and upon the claims made by the defendants in the circuit court, and renewed in this court, it clearly appears that the plaintiff's title to the land was not really contested, but that the only matter in controversy was the amount of money which the plaintiff was equitably bound to pay to the defendants, and that the difference between the sum which the circuit court held him to pay and the highest sum claimed by the 252] defendants was less *than $5000. The amount in controversy, therefore, is insufficient to support the appellate jurisdiction of this court. Act of February 16, 1875, chap. 77, § 3 (18 Stat. at L. 316); *Peyton* v. *Robertson*, 22 U. S. 9 Wheat. 527 [6: 151]; *Farmers Bank of Alexandria* v. *Hooft*, 32 U. S. 7 Pet. 168 [8: 646]; *Ross* v. *Prentiss*, 44 U. S. 3 How. 771 [11: 824]; *Tintsman* v. *First Nat. Bank of Mt. Pleasant*, 100 U. S. 6 [25: 530].

Appeal dismissed.

THE JOHNSON COMPANY, *Plff. in Err.*,
v.
WILLIAM WHARTON, JR., *et al.*

(See S. C. Reporter's ed. 252-261.)

Review by appellate court—res adjudicata—judgment, when a bar—effect of a judgment not being appealable.

1. A defeated suitor in a court of general jurisdiction is not at liberty, in a subsequent suit between himself and his adversary, in the same, or in any other court, to relitigate a matter directly put in issue and actually determined in the first suit, upon its appearing that the judgment in the first suit, by reason of the small amount in dispute, cannot be reviewed by a court of appellate jurisdiction.
2. The principle of *res adjudicata*, in its application to the judgments of courts of general jurisdiction, does not depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court.
3. A judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or privies upon the same matters when directly in question in another court.
4. The rule of *res adjudicata* cannot be restricted to those cases, which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction.

[No. 114.]

Argued Nov. 24, 1893. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment against the defendant, The Johnson Company, in an action brought by William Wharton, Jr., *et al.*, for the stipulated royalties or fees for guard rails sold by defendant, constructed according to letters patent granted to said William Wharton, Jr. The amount of the judgment being $6306. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

By written agreement executed November 24th, 1885, between William Wharton, Jr., & Co., a limited partnership association, and the Johnson Steel Street Rail Company, a corporation—to be hereafter referred to as the Wharton and the Johnson companies—the latter acquired the right to make and sell, upon certain conditions, guard rails constructed according to the specifications attached to letters patent granted to William Wharton, Junior, for an improved guard rail.

The present action was brought upon this agreement of license to recover the stipulated royalties or fees for guard rails sold and delivered by the Johnson Company between January 10, 1888, and June 4, 1889.

In its statement of demand the Wharton Company averred that the Johnson Company commenced and continued the sale of guard rails, and voluntarily rendered statements and paid *the stipulated fees down to January 1, 1887, but refused to pay those due between [253 January 1, 1887, and January 10, 1888, on the ground that the rails made and sold by it were not covered by the Wharton patent; that in a suit brought by the present plaintiff against the Johnson Company in the Circuit Court of

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NOTE.—*As to estoppel by judgment*, see note to Aspden v. Nixon, 11: 1059.

As to estoppel in pais, see note to Stowe v. United States, 22: 144.

As to estoppel by recital in deed, or will, or other instrument, see note to Carver v. Astor, 7: 761.

As to estoppel by recitals in negotiable bonds or securities, see note to Mercer County v. Hackett, 17: 547.

As to estoppel as to contracts limiting the time within which action must be brought, see note to Southern Exp. Co. v. Caldwell, 22: 556.

Judgment, when conclusive, res judicata.

A judgment by default is conclusive upon the facts involved, as between the same parties in a subsequent action. Ferris v. Fisher, 67 Hun, 134.

An erroneous ruling of the court will not prevent the matter from being *res judicata*. Rogers v. Rogers, 37 W. Va. 407.

the United States for the Eastern District of Pennsylvania, it was adjudged that the rails sold by the defendant were covered by the Wharton patent, and judgment was entered for the amount of royalties to January 10, 1888; that from and after the latter date, down to the expiration of the patent, June 4, 1889, the defendant continued to sell, under the agreement, rails of the same character as those that had been adjudged to be covered by the above patent.

The Johnson Company, admitting the manufacture and sale by it between January 10, 1888, and June 4, 1889, of certain girder guard rails of steel, averred that those manufactured by it were not such rails as were covered by the Wharton patent. It also admitted that the suit mentioned in the plaintiff's statement

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A final decree purporting to be a full settlement of the rights of the parties may be pleaded as an estoppel in a subsequent suit or proceeding, although the opinion of the reviewing court on appeal therefrom indicates that important questions involved in the pleadings were overlooked, and that if they had been considered they might have changed the adjudication. Northwestern Bank v. Hays, 37 W. Va. 475.

A judgment not fraudulently procured, rendered by a court of competent jurisdiction in an action involving the same subject-matter, between the same parties or their privies, is, as a plea, a bar, or as evidence, conclusive as to the matters actually determined, or which might have been litigated and decided as incident to or essentially connected with the subject-matter of the litigation, and other matters coming within the legitimate purview of the original action, both in respect to matters of claim and of defense. De Chambrun v. Campbell, 54 Fed. Rep. 231.

A judgment is not deprived of its conclusive effect upon subsequent proceedings between the same parties, by the fact that both parties have appealed from it and that an undertaking to stay proceedings has been given on appeal by the one sought to be enjoined. Stevens v. Stevens, 69 Hun, 332.

An adjudication upon a demurrer is conclusive upon the merits of the subject-matter, in a subsequent action. La Porte v. Organ, 5 Ind. App. 369.

A decision sustaining a demurrer to counts of an answer in replevin, showing that there was no wrongful detention of the property of defendant even if he had no lawful title to it, when unreversed, and when plaintiff has failed to avail himself of the permission granted of replying to such counts, is a final decision in the case as to the question decided, that such counts were sufficient as a defense to the action, and is binding upon the referee in the action. Sherman v. Jenkins, 70 Hun, 593.

An order striking out part of an answer is conclusive upon the defendant's right to set up the same matter in an answer to a supplemental complaint, where no ground or question not existing at the time of the former application is presented. Peaslee v. Peaslee, 51 N. Y. S. R. 597.

The dismissal of a bill in equity, upon the merits is a bar to further proceedings in the same court, for the same purpose, between the same parties, although the court may not have gone into the evidence. Rogers v. Rogers, 37 W. Va. 407.

A decree on final hearing dismissing for failure of proof a bill to remove a cloud on title, is a bar to a subsequent suit between the same parties to establish complainant's title to the lands. Chiles v. Champenois, 69 Miss. 603.

The dismissal without prejudice, by reason of formal defects, of a petition for the summary setting aside of a judgment under Mass. Pub. Stat. chap. 187, §§ 17-19, is not a bar to a subsequent petition. Soper v. Manning, 158 Mass. 381.

A judgment after trial upon the merits, upon a verdict directed for defendant because the evidence was insufficient to support a verdict in favor of plaintiff, is a bar to a subsequent action between *the same* parties upon the same cause of action. *Morgan v. Chicago, M. & St. P. R. Co.* 68 Wis. 348.

A final judgment is conclusive between the parties and their privies, upon all matters litigated or necessarily involved in the action in which it was rendered. Sanford v. Oberlin College, 50 Kan. 342.

A judgment of a state court is conclusive in a Federal court, of matters which a party had the opportunity to set up and of which he had knowledge at the time. Harper v. Harper, 3 U. S. App. 328, 53 Fed. Rep. 35.

In a suit upon a different cause of action, the judgment in a former case cannot operate as determining what might have been, but was not, brought in issue and passed upon. Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 278 (36: 972), 53 Am. & Eng. R. Cas. 687.

A judgment does not preclude a subsequent action upon a claim which might have been set up as a counterclaim in the suit in which the judgment was rendered. Seventh Day Adventist Pub. Asso. v. Fisher, 95 Mich. 274.

A general verdict and judgment for the defendant in an action in which several defenses are set up, either of which, if sustained, would justify a verdict in his favor, upon all of which evidence is heard, is *prima facie* evidence that all the issues were found in his favor, in a subsequent action in which such judgment would amount to estoppel. Rhoads v. Metropolis, 144 Ill. 580.

An adjudication that an executrix had power to sell and made a valid sale of one lot of land is not conclusive of the question whether her sale of another lot was valid. Reeves v. Brayton, 36 S. C. 384.

A judgment of a court of equity declining to enforce a parol partition, but leaving the parties to their remedy at law, is not conclusive of the facts there presented, in a subsequent action of ejectment. Lewis v. Baker, 151 Pa. 529.

A judgment is conclusive upon all the parties to the suit in which it was rendered, in a subsequent action involving substantially the same facts and issues, and will control as authority in the latter action in determining similar rights of one upon whom it is not binding as an adjudication. Tauziede v. Jumel, 133 N. Y. 614.

A judicial determination of a question is not sufficient to make it *res judicata*, unless it was rendered upon the merits, upon a material point, and upon substantially the same facts, presented in a subsequent suit. Shaw v. Broadbent, 129 N. Y. 114.

A former judgment is not a defense where there was clearly no jurisdiction to render it, on account of the want of service or appearance. Reed v. Chilson, 40 N. Y. S. R. 960.

The fact that after answer had been interposed in a suit, judgment was recovered in another jurisdiction, if not pleaded by supplemental answer, is not available as a defense. Reed v. Chilson, *supra*.

A prior judgment will not be held to create an estoppel, where the record is not before the court and there is no finding disclosing its contents. Reddick v. Keesling, 129 Ind. 128.

The effect of a judgment as a bar to future actions is not affected by the fact that it is erroneous. People v. Holladay, 93 Cal. 241.

Where contrary judgments have been rendered in two separate suits between the same parties, involving the same subject-matter, the estoppel of one judgment neutralizes that of the other, and

was brought and decided as set forth, but insisted that the decision was not binding in the present case, "because the amount involved in the former suit was so small as not to entitle the defendant to a writ of error on the said judgment to the Supreme Court of the United States, whereas the amount involved in this suit is sufficient to so entitle the defendant;" and "that the right of the defendant to have the issues involved in this case adjudicated by the Supreme Court of the United States, if a decision adverse to it is rendered by this [the circuit] court, cannot be taken away from it by reason of a former trial and judgment between the same parties, where the amount involved did not entitle the defendant to a review of the same."

The court below held the affidavit of defense to be insufficient, and, the damages sustained by the defendant having been assessed at the

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the question is left to be tried over. Shaw v. Broadbent, 129 N. Y. 114.

Until a final judgment is reached there can be no estoppel by judgment or by decree. Quinn v. McMahan, 40 Ill. App. 593.

The decision of the Wisconsin supreme court upon a demurrer is conclusive in that case of all questions therein adjudicated upon: although a contrary decision has subsequently been rendered by the United States circuit court between the same parties upon the merits of another case. Ellis v. Northern Pac. R. Co. 80 Wis. 459, 144 U. S. 458 (36: 504).

A judgment overruling a demurrer for want of parties is conclusive of the same question when raised by answer, when made upon the merits. McKean v. Jones, 19 Can. S. C. 489.

It is not necessary that a judgment set up as a bar to a second suit should be final in the sense that it is not liable to be reversed on appeal, it being sufficient that it is in force, not suspended by an appeal or otherwise, and that it finally disposed of the controversy. Cook v. Rice, 91 Cal. 664.

A decision in a proceeding for leave to issue execution on a judgment, against the validity of a claim made by the debtor against the creditor, and which he sought to have applied in payment upon the judgment, is a bar to a subsequent action by him upon such claim. Moore v. Garner, 109 N. C. 157.

Judgment in a former action for the defendant on the ground of want of notice to him will not bar a subsequent recovery by the same plaintiff, where the previous action constitutes such notice. Rose v. Hawley, 133 N. Y. 315, reversing 118 N. Y. 502.

An order for the issuance of execution upon a judgment against a decedent, on the ground that he has fraudulently conveyed his property, is not conclusive upon the question whether the conveyance was fraudulent. *Re* Holmes, 131 N. Y. 80.

A judgment which determines that when rendered there is no right of action in the plaintiff is to that extend conclusive: but the right which he does not then have he may acquire unless some vital point adjudged prevents that possibility. Rose v. Hawley, 133 N. Y. 315, reversing 118 N. Y. 502.

A judgment dismissing a bill "without prejudice" is not a bar to a subsequent bill, though the latter shows no greater or more equitable right than the former. Northern Pac. R. Co. v. St. Paul, M. & M. R. Co. 47 Fed. Rep. 536, affirmed in 4 U. S. App. 149, 49 Fed. Rep. 306; Reynolds v. Hennessy, 17 R. I. 169.

A judgment dismissing a suit on plaintiff's own motion, after a general demurrer to his petition has been sustained and he has obtained leave to amend, is not a bar to a subsequent action by him upon the same cause of action. Scherff v. Missouri Pac. R. Co. 81 Tex. 471.

A judgment dismissing the bill on the ground that the court has no jurisdiction is not a bar to a second action between the same parties for the same cause, although the court in fact had jurisdiction. Weigley v. Coffman, 144 Pa. 489.

A judgment dismissing an action on the ground that plaintiff's evidence was insufficient to entitle him to relief is not a bar to a subsequent action for the same cause, although plaintiff moved for a new trial and appealed to the highest court of the state. Lindwall v. Woods, 47 Fed. Rep. 195.

A fact found and embodied in a judgment is final and conclusive between the parties and their privies, whenever and wherever the question subsequently arises. Moore v. New York Elev. R. Co. 126 N. Y. 671.

An order based on the merits, dissolving an injunction, which is the only relief sought, is such final decision as will sustain the defense of *res judicata*. Gallaher v. Moundsville, 34 W. Va. 730.

A judgment founded on an admission conclusively establishes the fact admitted, as between the parties to the record, in any subsequent action between them. Miller v. Union Switch & S. Co. 37 N. Y. S. R. 110.

No suit can be prosecuted between the same parties to reopen a question fully tried upon an issue made upon a rule or motion, while a final judgment thereon is unreversed. Burner v. Hevener, 34 W. Va. 774.

If the final decision of a motion affecting a substantial right may be reviewed on appeal, and the complaining party acquiesces, the decision is as conclusive of the matters decided as the determination of the action itself would be of the whole of the controversy. Kaufman v. Schneider, 35 Ill. App. 256.

A decision on a motion is not *res judicata* so as to be binding on the court in the entry of final judgment in the same case. Shainwald v. Lewis, 14 Sawy. 23.

A judgment dismissing a suit after a complete trial upon the merits is final unless it contains qualifying terms. Glaude v. Peat, 43 La. Ann. 161.

The dismissal of a bill to cancel an unauthorized satisfaction of a judgment for want of jurisdiction is not an adjudication against the right to enforce the judgment. Jones v. Hunter, 32 Ill. App. 445.

A judgment of nonsuit is not a bar to a subsequent action for the same cause, brought in due time. Smith v. Floyd County, 85 Ga. 420.

A judgment is not *res judicata* upon a question which the court expressly refused to consider and pass upon. Landon v. Townshend, 38 N. Y. S. R. 714.

An independent cause of action possessed by defendant and existing previous to a judgment obtained by plaintiff is not barred thereby, even if defendant might have pleaded it in set-off, unless it has been in fact so pleaded and made the subject of adjudication. Fiske v. Steele, 152 Mass. 200.

A judgment is not a bar to a subsequent action between different parties upon different allegations, although the questions in the latter action might have been litigated in the earlier. Nanny v. Fancher, 39 N. Y. S. R. 890.

A party desiring to avail himself of a judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention. Lewis v. Ocean Nav. & P. Co. 125 N. Y. 341.

If the language used in a decree makes it broader than the point for decision permits the effect is limited to that point; and it is not *res judicata* as to any other recitals therein. East Tennessee, V. & G. R. Co. v. Mahoney, 89 Tenn. 311.

sum of $6306, judgment was rendered for that sum.

Messrs. **Wayne MacVeagh,** *George Harding* and *George J. Harding*, for plaintiff in error:

Where, under the Federal statutes, no right to a writ of error or appeal exists in a particular case, the plain intent of the law constituting this court a court of review of the merits of cases within its jurisdiction, denies to the conclusion of a lower Federal court the force of an estoppel in a subsequent case within the limits of this court's jurisdiction, where the question is distinctly raised in the court below. The strictness with which this court maintains the limits of its jurisdiction based upon the amount in controversy is well illustrated by those cases which hold that nothing collateral to the judgment or decree can be used to establish jurisdiction where the judgment or decree itself is below the statutory limit.

Troy v. *Evans*, 97 U. S. 1 (24: 941); *Elgin* v. *Marshall*, 106 U. S. 578, 581 (27: 249, 250); *Opelika City* v. *Daniel*, 109 U. S. 108 (27: 873); *New Jersey Zinc Co.* v. *Trotter*, 108 U. S. 564 (27: 828); *Bruce* v. *Manchester & K. R. Co.* 117 U. S. 514 (29: 990); *New England Mortg. Secur. Co.* v. *Gay*, 145 U. S. 123 (36: 646).

But the same strictness of interpretation clearly requires, on the other hand, that, jurisdiction being established, if it be made effective to bring within the cognizance of the court all questions of fact and law properly raised in the court below, independent of technical rules of estoppel, the operation of which, however general in extent cannot be made to deprive litigants of substantive rights.

Messrs. **Frank P. Prichard** and *John G. Johnson*, for defendants in error:

A judgment of a court of competent jurisdiction is conclusive between the parties as to the issue decided.

Black, Judgm., § 500; Freem. Judgm., § 247; Herman, Estoppel & Res Judicata, § 48.

The fact that the amount in controversy is so small that the defeated party has no right of appeal does not make the judgment any the less conclusive when the same question arises in a subsequent litigation, though the amount there involved is sufficiently large to support an appeal.

Griffin v. *Long Island R. Co.* 102 N. Y. 449; *Elgin* v. *Marshall*, 106 U. S. 578 (27: 249); *Opelika City* v. *Daniel*, 109 U. S. 108 (27: 873); *Gibson* v. *Shufeldt*, 122 U. S. 27 (30: 1083); *New England Mortg. Secur. Co.* v. *Gay*, 145 U. S. 123 (36: 646); *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227 (36: 951); *United States* v. *Wanamaker*, 147 U. S. 149 (37: 118); *Scotland County* v. *Hill*, 112 U. S. 183 (28: 692).

Mr. Justice **Harlan** delivered the opinion of the court:

The question, upon the merits, which the defendant's affidavit of defense presented, was whether the girder guard rails manufactured and sold by it were covered by the Wharton patent and by the license granted by the agreement of November 24, 1885. But that precise question, it is admitted, was presented and determined in the former suit between the same parties. And we are to inquire, on this writ of error, whether the court below erred in holding that the judgment in the former suit concluded that question between the parties. The learned counsel for the defendant insists that it did not, and bases his contention solely upon the ground that the former judgment was not, by reason of the limited amount involved, subject to review by this court.

Is it true that a defeated suitor in a court of general jurisdiction is at liberty, in a subsequent suit between himself and his adversary, in the same, or in any other court, to relitigate a matter directly put in issue and actually determined in the first suit, upon its appearing that the judgment in the first suit, by reason of the small amount in dispute, could not be reviewed by a court of appellate jurisdiction? Does the principle of *res judicata*, in its application to the judgments of courts of general jurisdiction, depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court? Upon principle and authority these [257 questions must be answered in the negative. We have not been referred to, nor are we aware of, any adjudged case that would justify a different conclusion.

The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter, shall not be retried between the same parties in any subsequent suit in any court. The exceptions to this rule that are recognized in cases of judgments obtained by fraud or collusion have no application to the present suit.

In *Hopkins* v. *Lee*, 19 U. S. 6 Wheat. 109, 113 [5: 218, 219] it was held that a fact directly presented and determined by a court of competent jurisdiction cannot be contested again between the same parties in the same or any other court. "In this," the court said, "there is and ought to be no difference between a verdict and judgment in a court of common law and a decree of a court of equity. They both stand on the same footing and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. . . On a reference to the proceedings at law, and in chancery, in the case now before us, the court is satisfied that the question which arose on the trial of the action of covenant was precisely the same, if not exclusively so (although that was not necessary) as the one which had already been directly decided by the court of chancery." And in *Smith* v. *Kernochen*, 48 U. S. 7 How. 198, 217 [12: 666, 674]: "The case, therefore, falls within the general rule,

that a judgment of a court of concurrent jurisdiction directly upon the point is a plea, as a bar, or as evidence between the same parties or 258] privies upon the same matters when *directly in question in another court." To the same effect are *Pennington* v. *Gibson*, 57 U. S. 16 How. 65, 77 [14: 847, 852]; *Stockton* v. *Ford*, 59 U. S. 18 How. 418 [15: 395]; and *Doe* v. *Ferris*, 67 U. S. 2 Black, 606, 609 [17: 317, 319].

The whole subject was carefully considered in *Cromwell* v. *Sac County*, 94 U. S. 351, 352 [24: 195,197], where it was said: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered on a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

The doctrines of the latter case were applied in *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639 [25: 1074], which case is like this in some respects. That was an action for the recovery of the last installments of money due on a contract for the purchase of timber lands, the plaintiff having in a previous action against the same defendant obtained a judgment for the first installment. In the first action the sole defense was that the defendant had been induced to make the contract of guaranty by false and fraudulent representations. The same defense was made in the second action, and an additional one was interposed to the effect that the representations made as to the quantity of timber, and which induced the ex- 259] ecution of *the contract, amounted to a warranty upon which defendant could sue for damages. Both grounds of defense relied on in the second action, were held to be concluded by the judgment in the prior action. In respect to the second ground it was said: "The finding of the referee, upon which the judgment [in the first action] was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of a case—shows that no representation as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding, having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication."

In *Stout* v. *Lye*, 103 U. S. 66, 71, [26: 428, 430] in which one of the questions was as to the conclusiveness of a judgment in a state court upon the same parties to a suit in the Federal court—the two suits involving the same subject-matter, and the suit in the state court having been first commenced—this court, observing that the parties instituting the suit in the Federal court, being represented in the state suit, could not deprive the latter court of the jurisdiction it had acquired, said: "The two suits related to the same subject-matter, and were in fact pending at the same time in two courts of concurrent jurisdiction. The parties also were, in legal effect, the same, because in the state court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose. By electing to bring a separate suit the Stouts voluntarily took the risk of getting a decision in the circuit court before the state court settled the rights of the parties by a judgment in the suit which was pending there. Failing in this, they must submit to the same judgment that has already been rendered against their representative in the state court. That was a judgment on the merits of the identical matter now in question, and it concluded the 'parties and those in privity with them, not only as to every matter which was offered and *received [260 to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *Sac County*, 94 U. S. 351, 352 [24: 195, 197]. It is true the mortgagor did not set up as a defence that the bank had no right to take the mortgage, or that he was entitled to certain credits because of payments of usurious interest, but he was at liberty to do so. Not having done so, he is now concluded as to all such defenses, and so are his privies."

In all of these cases, it will be observed, the question considered was as to the effect to be given by the court of original jurisdiction to the judgment in a previous case between the same parties or their representatives, and involving the same matters brought up in a subsequent suit. In no one of them is there a suggestion that the determination of that question by the court to which it was presented should be controlled by the inquiry whether the judgment in the first action could be reviewed upon appeal or writ of error.

The counsel for the plaintiff in error in support of his position, referred to the clause of the Constitution declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish, and to the clause providing that the judicial power of the United States shall extend to *all* cases in law or equity mentioned in that instrument. But, except in the cases specially enumerated in the Constitution and of which this court may take cognizance, without an enabling Act of Congress, the distribution of the judicial power of

the United States among the courts of the United States is a matter entirely within the control of the legislative branch of the government. And it has never been supposed that Congress, when making this distribution, intended to change or modify the general rule, having its foundation in a wise public policy, and deeply imbedded in the jurisprudence of all civilized countries, that the final judgment of a court—at least, one of superior jurisdiction—competent under the law of its creation to deal with the parties and the subject matter, and having acquired jurisdiction of the par-
261] ties, *concludes those parties and their privies, in respect to every matter put in issue by the pleadings and determined by such court. This rule, so essential to an orderly and effective administration of justice, would lose much of its value if it were held to be inapplicable to those judgments in the circuit court of the United States which, by reason of the limited amount involved, could not be reviewed by this court.

The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment—whatever the nature of the question decided, or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings and actually determined in the former suit. The existence of non-existence of a right, in either party, to have the judgment, in the prior suit re examined, upon appeal or writ of error, cannot, in case, control this inquiry. Nor can the possibility that a party may legitimately or properly divide his causes of action, so as to have the matter in dispute between him and his adversary adjudged in a suit that cannot, after judgment, and by reason of the limited amount involved, be carried to a higher court, affect the application of the general rule. Whatever mischiefs or injustice may result from such a condition of things, must be remedied by legislation regulating the jurisdiction of the courts, and prescribing the rules of evidence applicable to judgments. Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases, which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction.

We are of opinion that the question whether the rails manufactured by the Johnson Company were covered by the Wharton patent, having been made and determined in the prior action between the same parties—which judgment remains in full force—could not be relitigated in this subsequent action.

There is no error in the judgment, and it is affirmed.

*THE UNION PACIFIC RAILWAY COMPANY, *Plf. in Err.*, [262
v.
DAVID GEORGE McDONALD, ET AL.

(See S. C. Reporter's ed. 262-284.)

Railroad company, when liable for leaving a slack pit unfenced—trespasser—liability to strangers—injury to infant—degree of care—sudden emergencies—evidence of negligence—when court may direct verdict.

1. Where a railroad company also operated a coal mine within a few hundred feet of its depot, and deposited close by its track a large quantity of coal slack which kept continually burning under its surface, and the fire was concealed by a covering of ashes, and the company was required by statute to fence their slack piles as against cattle and horses, but omitted to do so, and the plaintiff, a lad about 12 years of age, becoming frightened at the threats of other boys ran along a narrow path bordering on and skirting the slack pit, and in attempting to pass some persons near the edge of the slack pit slipped and fell into the burning slack, breaking through the covering of ashes, from which he was rescued, severely burned and injured, having no previous knowledge of the burning slack, the railroad company was guilty of negligence in leaving unguarded the slack pit and the plaintiff can recover of the company for such injuries.
2. Where a railroad company left its slack pit without a fence around it, or anything to give warning of its really dangerous condition, and knew or had reason to believe that it was in a place where it would attract the interest or curiosity of passers-by, the plaintiff, a boy of tender years, cannot be regarded as a mere trespasser, for whose safety and protection while on the premises in question, the railroad company was under no duty or obligation whatever to make provision.
3. While a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to them for injuries arising from its negligence or from its tortious acts.
4. A railroad company is liable for an injury received by an infant while upon its premises, from idle curiosity, or for purposes of amusement, if such injury was, under the circumstances, attributable to the negligence of the company.
5. The law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition.
6. Persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases.
7. The non-performance by the railroad company of the duty imposed by statute, of putting a

NOTE.—*As to the degree of care required by infants to avoid injury*, see note to Sioux City & P. R. Co. v. Stout, 21: 745.

As to care and precaution necessary in crossing a railroad track, see note to Continental Imp. Co. v. Stead, 24: 403.

As to trespassers or persons on track of railroads; duty of railroad company towards them, see note to Mitchell v. New York, L. E. & W. R. Co. 36: 1094.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty.

3. The court may direct a verdict for the plaintiff or the defendant, as the one of the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.

[No. 224.]

Argued Jan. 23, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Colorado, to review a judgment, in favor of David George McDonald, an infant, by his next friend, plaintiff, against the Union Pacific Railway Company, defendant, for the sum of $7500, for personal injuries sustained by plaintiff, in consequence of the want of due care, upon the part of defendant, in managing and controlling certain premises belonging to it, on which plaintiff received such injuries. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. A. Hoehling, Jr., Samuel Shellabarger.** *John F. Dillon* and *Jeremiah M. Wilson*, for plaintiff in error:

The court below should have submitted to the jury the question of negligence on the part of the defendant company. Its failure to do so, and, instead thereof, to charge that the said defendant company was guilty of negligence as matter of law for which it was liable to the plaintiff, was serious error, for which the judgment below should be reversed.

Cordell v. *New York Cent. & H. R. R. Co.* 64 N. Y. 535; *Harty* v. *Central R. Co. of N. J.* 42 N. Y. 468; *Hanlon* v. *South Boston Horse R. Co.* 129 Mass. 310; *Billings* v. *Breinig*, 45 Mich. 65; *Clark* v. *Boston & M. R. Co.* 64 N. H. 323; *Davis* v. *Guarnieri*, 45 Ohio St. 485; *Hayes* v. *Michigan Cent. R. Co.* 111 U. S. 228 (28: 410); Buswell, Personal Injuries, §§ 141, 142.

Whether there has been contributory negligence on the part of the plaintiff is a question for the jury, under the same circumstances, and subject to the same limitations as the question whether there has been negligence on the part of the defendant.

Jalie v. *Cardinal*, 35 Wis. 118, 129; *Seigel* v. *Eisen*, 41 Cal. 109; *Park* v. *O'Brien*, 23 Conn. 339; *Kansas Pac. R. Co.* v. *Brady*, 17 Kan. 380; *Brown* v. *European & N. A. R. Co.* 58 Me. 384; *New Jersey Exp. Co.* v. *Nichols*, 32 N. J. L. 165.

In the great majority of cases, the question of negligence on any given state of facts must be one of fact.

Sioux City & P. R. Co. v. *Stout*, 84 U. S. 17 Wall. 657 (21 :745); *Mangam* v. *Brooklyn R. Co.* 38 N. Y. 455, 98 Am. Dec. 66; *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99.

Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, the case should properly be left to the jury.

Fernandez v. *Sacramento R. Co.* 4 Cent. L. J. 82; *State* v. *Manchester & L. R. Co.* 52 N. H. 529; *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *McGrath* v. *Hudson River R. Co.* 32 Barb. 144; *Bridges* v. *North London R. Co.* L. R. 7 H. L. 213; *Beers* v. *Housatonic R. Co.* 19 Conn. 566; *Vinton* v. *Schwab*, 32 Vt. 612; *Pennsylvania Canal Co.* v. *Bently*, 66 Pa. 30; *Wyatt* v. *Citizens R. Co.* 55 Mo. 485; *Norton* v. *Ittner*, 56 Mo. 351; *Stoddard* v. *St. Louis, K. C. & N. R. Co.* 65 Mo. 514; *Jenkins* v. *Little Miami R. Co.* 2 Disney, 49.

The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, idlers, bare licensees, or others who come upon them, not by any invitation, express or implied, but for their pleasure, or to gratify their curiosity.

Hargreaves v. *Deacon*, 25 Mich. 1; *Gautret* v. *Edgerton*, L. R. 2 C. P. 371, 36 L. J. C. P. 191, 15 Week Rep. 638, 16 L. T. N. S. 17; *Stone* v. *Jackson*, 16 C. B. 199, 32 Eng. L. & Eq. 349; *Roulston* v. *Clark*, 3 E. D. Smith, 366; *Zoebisch* v. *Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Frost* v. *Grand Trunk R. Co.* 10 Allen, 387, 87 Am. Dec. 668; *Hounsell* v. *Smith*, 7 C. B. N. S. 731, 6 Jur. N. S. 897, 29 L. J. C. P. 303, 8 Week. Rep. 227; *Balch* v. *Smith*, 7 Hurlst. & N. 736, 8 Jur. N. S. 197, 31 L. J. Exch. 201; *Kohn* v. *Lovett*, 44 Ga. 251.

One unlawfully upon the land of another cannot recover for injuries there received by him, unless such injuries were wanton or malicious on the part of the owner of the land, or the result of negligence so extreme on the part of the owner that wanton or malicious intent is to be inferred therefrom.

A trespasser upon the premises of another assumes all risks of danger arising out of the condition of the premises.

Beck v. *Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Early* v. *Lake Shore & M. S. R. Co.* 66 Mich. 349; *Stafford* v. *Ingersol*, 3 Hill, 38; *Wells* v. *Howell*, 19 Johns. 385; *Trask* v. *Shotwell*, 41 Minn. 66; *Marble* v. *Ross*, 124 Mass. 44, 48, 49; *Hounsell* v. *Smith, supra;* 1 Thomp. Neg. 303.

Mr. **J. Warner Mills,** for defendant in error:

The facts are absolutely undisputed and are of such conclusive character as that rational minds could reasonably draw but one conclusion from them.

This concealed fire was not fenced as required by statute, nor was any warning given the public.

The court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, will be compelled to set aside a verdict returned in opposition to it.

Delaware, L. & W. R. Co. v. *Converse*, 139 U. S. 469 (35: 213); *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 417 (26: 485, 489).

The plaintiff had a right to assume that there was no hidden furnace in the slack pit, and that defendant would conform its conduct to the express requirements of the law, and not bring injury upon him by its violation.

Jetter v. *New York & H. R. Co.* 2 Abb. App. Dec. 458; *Hayes* v. *Michigan Cent. R. Co.* 111

U. S. 228 (28:410); *State* v. *Boston & M. R.* 58 N. H. 408, 410.

Under the doctrine of this court in the case of *Hayes* v. *Michigan Cent. R. Co.*, 111 U. S. 228 (28:410) and under all of the adjudged cases of other courts, the failure of defendant to comply with the statute was at least evidence of negligence.

The failure to fence, in this instance, was the proximate cause of the injury.

Hydraulic Works Co. v. *Orr*, 83 Pa. 335; *Crogan* v. *Schicle*, 53 Conn. 186, 55 Am. Rep. 88.

Slight facts will constitute an implied invitation to come upon one's premises.

Sioux City & P. R. Co. v. *Stout*, 84 U. S. 17 Wall. 657 (21:745); *Birge* v. *Gardner*, 19 Conn. 507, 50 Am. Dec. 261; *Haughey* v. *Hart*, 62 Iowa, 98, 49 Am. Rep. 138; *Young* v. *Harvey*, 16 Ind. 314.

It is culpable negligence to leave a pit or other excavation in such an unguarded state.

Sioux City & P. R. Co. v. *Stout*, 84 U. S. 17 Wall. 657 (21:745), 11 Am. L. Reg. N. S. 226, 2 Dill. 294; *Atlanta Cotton Seed Oil Mills* v. *Coffey*, 80 Ga. 141; *Powers* v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Malloy* v. *Hibernia Sav. & L. Soc.* (Cal.) April 22, 1889; *Gulf C. & S. F. R. Co.* v. *Styron*, 66 Tex. 421; *Gulf C. & S. F. R. Co.* v. *Evansich*, 63 Tex. 54; *Kansas Cent. R. Co* v. *Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Nagel* v. *Missouri Pac. R. Co.* 75 Mo. 653, 42 Am. Rep. 418; *Twist* v. *Winona & St. P. R. Co.* 39 Minn. 164; 2 Thomp. Neg. 1188, § 2; *Nichols* v. *Washington, O. & W. R. Co.* 83 Va. 99, 102, 103; *Indiana, B. & W. R. Co.* v. *Barnhart*, 115 Ind. 399; *Keffe* v. *Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393.

It is negligence *per se* not to observe a duty imposed by statute.

St. Louis, A. & T. H. R. Co. v. *Huggins*, 20 Ill. App. 639; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408 (36:485); *Schilling* v. *Abernethy*, 112 Pa. 437, 56 Am. Rep. 320; Black, Proof & Pleadings in Accident Cases, p. 97, § 79; Buswell, Personal Injuries, § 77.

The charge is entitled to a reasonable interpretation.

Castle v. *Bullard*, 64 U. S. 23 How. 172 (16:424); *United States* v. *Philadelphia & R. R. Co.* 123 U. S. 113, 114 (31:138, 139).

In the courts of the United States a judge may aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination.

Vicksburg & M. R. Co. v. *Putnam*, 118 U. S. 545 (30:257); *St. Louis, I. M. & S. R. Co.* v. *Vickers*, 122 U. S. 360 (30:1161).

Even conceding the plaintiff was a trespasser the company owed him at least the duty that at that place, and under the circumstances even the common law would impose, and that the statute did impose upon it, to build a fence around the slack pit.

Mr. Justice **Harlan** delivered the opinion of the court:

The Union Pacific Railroad Company seeks the reversal of the judgment below for the sum of $7500, the amount assessed against it, by the verdict of a jury, as compensation to the de-
263] fendant *in error for personal injuries alleged to have been sustained by him in consequence of the want of due care upon the part of the company in managing and controlling certain premises belonging to it, on which the plaintiff received such injuries.

The evidence on behalf of the plaintiff, tended to establish the following facts: At the time and before the injuries in question were received the defendant owned and operated a railroad, immediately on the line of which was the village of Eric, Colorado, containing about six hundred inhabitants. Within a few hundred feet of its depot at that village the company operated a coal mine. Between the shaft house of the mine and the depot building were the tracks of the railroad. A narrow, rough, uneven foot path to the coal mine extended from the depot building, over the railroad tracks, and close to a slack pit or trench. In working the mine, the company's agents and employés had deposited along and close by the track, between the shaft house of the coal mine and the depot building, a very large quantity of coal slack, which extended up and down the track. The slack was piled up so as to generate heat and cause it to take fire underneath by spontaneous combustion, and was not spread out in thin layers upon the surface of the ground. It was in a long trench formed on the east side of the railroad in excavating and throwing up dirt for the track, and the top of which was on a level with the ground around it. The path, above referred to, was described by a witness as "a little bit above the fire, sort of rim running around the fire, about eighteen inches wide."

For a long time prior to the injuries complained of this slack burned continuously under its surface. A few inches below the surface was a bed of burning coals, extending nearly the whole length of the pit. The surface was a mere covering of ashes, sufficient in depth to conceal from view the fire underneath. Except when there was rain, snow, or wind, no smoke would be emitted from the slack pit, nor would there be any visible indications of the existence of the burning coals under the ashes covering the slack.

*The burning portion of the slack thus[**264** concealed and covered by what appeared to be dead ashes, was within two or three hundred yards of the most populous part of the town, and came within a few feet of the platform of the depot building. In 1884 the fire burned within twenty feet of the depot building.

For some time, perhaps as long as two years, before the day on which the plaintiff was injured, the company's agents and officers had knowledge of the existence of this slack pit, and of its dangerous condition as above stated. Cattle had been known to stray into it and get burnt. This fact was known to the company's agents.

The children of the miners were accustomed to go to the mine just as it suited them. They were allowed to pick up coal and carry it to their homes. A witness, who was a coal miner and had worked on this mine, testified that "he had frequently, nearly every day, seen children play around there and they were allowed to go around the machinery where the shaft was; and this was allowed during all the years this mine was operated. During the

time he worked there, he never heard of any objections to children coming on the premises, or of their being driven off." Another witness who had worked in the mine in 1884, and had been acquainted with it before and after that time, and who was asked to state what he knew about strangers, men and women, being allowed to go about the mine, said: "Well, in general, strangers coming to the town, about the first look they take is over to the mine and engine; they are so near the town, and for curiosity they often walk over; never heard of anybody, children or others, being driven away from the works; the slack pile was covered with ashes and the fire could not be seen; the path was about 18 inches wide and near the level of the trench; it was rough and slanting down toward the fire." On cross-examination this witness stated that "the pile had been burning in that way for about two or three years, and the path above it could not be easily seen; that while you would undoubtedly see it, still a person could not follow it clearly, plainly, and easily, and ladies going to the grave-[265] yard would avoid it and did not *want to travel it; when on the path the heat from the burning slack could be felt only when the wind blew; the defendants used to dump their fine slack in there from time to time and burn it, and continued to burn it in that way."

The slack pit had no fence around it, nor was it guarded in any way. There was nothing in its appearance, when the weather was clear, to indicate that there was fire beneath the surface of ashes.

On the 3d of September, 1884, the plaintiff, a lad about 12 years of age, visited Erie with his mother. Neither the mother nor the child had any knowledge of this slack pit. After dinner of that day, in the afternoon, the plaintiff obtained the consent of his mother to visit the coal mine in company with a "trapper" boy of the town, with whom he had become acquainted. While at or near the shaft house his attention was attracted to a man in the act of sending a pair of mules down the shaft. About that time, five or six boys came from the coal pit, having lamps on their hats and dirty faces. One of them yelled, "Let's grease him," another, "Let's burn him." They started towards the plaintiff, who, becoming frightened, ran away, intending to take the small path that skirted the slack-pit, the only one leading from the mouth of the coal pit or from the shaft-house to the depot building and the village. In attempting to pass some persons who happened to be on the bank or near the edge of the slack pit, he slipped and fell into the burning slack, breaking through the covering of ashes. He came very near sinking with his entire body into the bed of fire underneath the ashes, and would have perished instantly, if he had not been pulled out by a grown person near by at the time.

The person who rescued him testified that the day was a nice, calm one; that he, witness, started for his home, and hearing some one screaming, he saw the boy fall into the burning slack while running from the trappers who had scared him. "These trappers," the witness said, "were boys down in the mine for the purpose of leading the mules. The boy, George McDonald, was running in the direction of the path that led to the town. He ran into the fire, and fell on to his hands and *face. [266 He [witness] was standing about four feet off from him in the foot-path. He went in and pulled him out, and found his hands all burned, skin hanging from the hands and fingers, and was burned in his back and clothes; that he helped carry him to the hotel, the boy not being able to walk; that at the time of the accident there was nothing to indicate that there was any fire there; that a man who had never seen it would walk right in it; would not know there was any fire, nothing but brown ashes; came up within forty feet of the depot. Children used to go around there at all hours of the day; some to get coal, others to bring their father's dinner, and some would go over just to see the place, and this condition of affairs was so allowed or conducted during all the time witness was there; that the path was up and down and on a slant toward the slack pile. The Jackson, Marfell & Mitchell mines used to throw their slack out, but they used to scatter it so it would not burn." On cross-examination the same witness stated that the path was used by the miners in going to and from town to the shaft, and that there was no other path; that when the boy fell into the fire he was running toward the town.

As the result of the injuries received by him, the plaintiff's hands and arms became weakened and in part disabled, and his face badly scarred and disfigured. His general health was greatly and permanently impaired. His kidneys became seriously weakened and deceased. He suffered intense pain, and was confined to his bed for a long period of time, disabled in the use of his hands in any way.

At the time the plaintiff was injured there was in force a statute of Colorado, passed May 3, 1877, entitled "An Act to Compel Owners of Coal Mines to Fence their Slack Piles and Abandoned Pits." That statute was as follows: "§ 1. That the owner or operators of coal mines from which fine or slack coal is taken and piled upon the surface of the ground, in such quantities as to produce spontaneous combustion, shall fence said ground in such manner as to prevent loose cattle or horses from having access to such slack piles. § 2. All owners of land having abandoned coal pits or shafts on the same, of *sufficient depth to en- [267 danger the life of cattle, horses, or other stock, shall fence or fill said pits or shafts in such a manner as to afford permanent protection to all such stock endangered thereby. § 3. Every person violating sections one (1) and two (2) of this act shall be deemed guilty of a misdemeanor and shall be fined in a sum not less than twenty (20) dollars nor more than one hundred (100) dollars, to be collected as other fines are collected, and shall be further liable to any party injured thereby in the amount of the actual injury sustained." Colo. Gen. Laws, 1877, p. 126, §§ 137, 138, 139; Mills, Ann. Stat. §§ 3202, 3203, 3204.

The defendant examined two witnesses. Neither of them testified to any material facts inconsistent with those above stated. They were introduced for a purpose to which we shall presently refer.

At the close of all the testimony the defendant asked the court to instruct the jury "that

there is not sufficient evidence to warrant the jury in finding that the plaintiff has received any permanent injuries or impairment of his capacity to earn wages, and that because such serious injuries, if any, are not shown to have followed after the other is not sufficient to warrant the jury in finding that the one is the cause of the other."

The court, in its charge to the jury reviewed the evidence, and said: "It is not claimed the plaintiff had any notice or knowledge of the fact that there was any fire in the place where he received his injury, or that by the exercise of reasonable care or diligence he could have seen or discovered the fire. The law made it the duty of the defendant to fence its slack pit, and if it did not do so, and as a result of its negligence in failing to comply with its legal duty in this regard the plaintiff received the injuries complained of, the defendant is liable. Persons are entitled to the protection which would accrue from a compliance with the statute, and the plaintiff had a right to presume the space between the railroad tracks was not a burning slack pit because it was not fenced. It was the legal duty of the defendant to fence the burning slack, and its omission to [268] do so was negligence. *The defendant being guilty of negligence, your next inquiry will be whether the plaintiff was guilty of any such negligence as will prevent him from recovering, for it is a principle of law that one injured by the negligence of another cannot recover damages for such injury if by his own negligence he contributed to the injury. Upon the undisputed facts of the case it was not an act of negligence for the plaintiff to visit the defendant's coal mine as he did, and he was not a trespasser there in a sense that would excuse the defendants for the acts of negligence by which he was injured, and which I have heretofore adverted to; nor was it an act of negligence for the plaintiff under the circumstances to run away from the miners. A boy may lawfully run to avoid injury or when frightened or in play; and the fact that the plaintiff was running on the occasion of his injury does not constitute negligence on his part. He undoubtedly had a right to run toward the hotel where his mother was stopping. Nor was it negligence in him when he did run not to follow exactly a rough, irregular, and narrow path leading from one railroad track to the other. There was nothing in the surroundings to inform him or any other person having no previous knowledge of the facts that he would incur any risk or danger in not keeping in the path in crossing the space between the railroad tracks, and if you find he did not see the fire and could not, with the exercise of reasonable diligence, discover it, and did not know it was there, and that the surface of the pit apparently presented a safe footing and passage, then he was not guilty of any negligence in attempting to run across it. The disputed issue in the case is the question of damages; what damages you shall award; and first, gentlemen, you will compensate the plaintiff for the pain and suffering he endured by reason of the injuries he received on this occasion."

After instructing the jury in respect to the measure of damages, the court said: "The plaintiff's attorney has said to you, gentlemen, that he claimed, and that you ought to award, more than a compensation. He is not content with compensatory damages—that is, the damages you shall find *and award to [269] him for his pain and his suffering, for his expenses, for his loss of time, for the disability that he sustained, if any. He says those are not elements enough, and that, in addition, you should award him damages as a punishment to this defendant for not having complied with the statute. That you cannot do, gentlemen. That claim is not supported by the law. It is, moreover, in the very teeth of the statute of the state under which it is claimed, for that statute in terms says that the persons or the corporation neglecting to fence these slack pits shall be liable to any party injured thereby in the amount of the actual injury sustained, thus in terms cutting off exemplary damages."

The defendant excepted "to the refusal of the court to instruct that there was not sufficient evidence as to the question of serious or permanent injury, and leaving the question of serious impairment to them, and also to the instruction not given, and to the giving of the instruction as to all questions connected with permanent injury, and to the withdrawing the question of negligence of defendant and contributory negligence of the plaintiff from the jury."

Before examining the grounds of defendant's exceptions to the action of the court below in giving and refusing instructions, we will consider the general question presented by the case, namely, whether the owner or occupant of premises is liable, under any circumstances, and, if so, under what circumstances, for injuries received by a person, while on such premises, and by reason of their dangerous condition.

In *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 577, 580 [26: 235, 236], it was said that "the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or those who were likely to act upon such invitation." This rule, the court said, was founded in justice and necessity, and was illustrated by many cases.

*In the present case there was no ex- [270] press invitation to the plaintiff to come upon the premises of the railroad company for any purpose. But if the company left its slack pit without a fence around it, or anything to give warning of its really dangerous condition, and knew or had reason to believe that it was in a place where it would attract the interest or curiosity of passers-by, can the plaintiff, a boy of tender years, be regarded as a mere trespasser, for whose safety and protection while on the premises in question, against the unseen danger referred to, the railroad company was under no duty or obligation whatever to make provision?

A leading case upon this subject, cited and

approved by this and many other courts, is *Lynch* v. *Nurdin*, 1 Q. B. 29. The facts in that case were these: The defendant's carman went into a house, leaving his horse and cart standing in a street for about half an hour, without any person to take care of them. The plaintiff, a lad about seven years of age, with several other children, were playing with the horse around the cart. During the carman's absence he got upon the cart. Another boy led the horse on while the plaintiff was attempting to get off the shaft. The plaintiff fell and was run over by the wheel, and his leg broken. The court was asked to direct the jury that there was no evidence in support of the plaintiff's case, his own negligence having brought the mischief upon him. This request was refused, and it was left to the jury to say, first, whether it was negligence in the defendant's servant to leave the horse and cart for half an hour in the manner disclosed; and, secondly, whether that negligence occasioned the accident. The case came before the Queen's Bench upon a rule *nisi* for a new trial on the grounds of misdirection, and because the verdict was against the evidence. Lord Denman, *Chief Justice*, delivering judgment, referred to the contention that the mischief was not produced by the mere negligence of the servant, but, at most, by that negligence in combination with two other active causes, namely, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the c r, and so committing [271] a trespass upon the *defendant's chattel. On the former of these causes he deemed it unnecessary to dwell at length, observing: "For if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first." He then referred to the additional fact, appearing in that case, that the plaintiff had no right to enter the cart, and that if he had abstained from doing so, would have escaped injury, and proceeded to inquire whether the plaintiff, being thus a co-operative cause of his own misfortune, was thereby deprived of his remedy. He said: "The legal proposition that one who has by his own negligence contributed to the injury of which he complains cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord Ellenborough's doctrine in *Butterfield* v. *Forrester*, 11 East, 60, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim of redress. Ordinary care must mean that degree of care which may reasonably to be expected from a person in the plaintiff's situation; and this would evidently be very small, indeed, in so young a child. But this case presents more than the want of care. We find in it the positive misconduct of the plaintiff an active instrument towards the effect." After reviewing the adjudged cases, and observing that the question of negligence must depend upon the circumstances of each case, he said that the jury "would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether, in that case, no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear, or thronged with a noisy multitude; especially whether large parties of young children might be reasonably expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established. But the question *remains, can [272] the plaintiff, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is, that supposing that fact ascertained by the jury, but to this extent, that he merely indulged in amusing himself with the empty cart, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting with prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it." Upon these grounds the action was held to be maintainable by the infant.

We have referred quite fully to the case of *Lynch* v. *Nurdin*, because it was cited in *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 660 [21: 745, 748] in connection with other cases in support of the rule, laid down in that case, that while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such injuries arising from its negligence or from its tortious acts.

In *Sioux City & P. R. Co.* v. *Stout*, the principal question was whether a railroad company was liable for an injury received by an infant, while upon its premises, from idle curiosity, or for purposes of amusement, if such injury was, under the circumstances, attributable to the negligence of the company. The facts in that case were these: The railway company owned and used for its roadbed and depot grounds a tract of uninclosed land, in the town of Blair, Nebraska, upon which the company had its depot house, a quarter of a mile from which was a turntable belonging to it. The plaintiff, a boy a little over six years of age, together with one or two other boys, went to the company's depot, about a half a mile distant, without any definite purpose in view. Upon arriving there, the boys, at the suggestion of one of them, proceeded to the *turn- [273] table, about a quarter of a mile distant, traveling along the defendant's roadbed or track. When they reached the turntable, which was not attended or guarded, nor at that time fastened or locked, revolving easily on its axis, two of the boys commenced to turn it. The plaintiff's foot, while he was attempting to get on it, was caught between the end of the rail on the turntable, as it revolved and the end

of the iron rail on the main track of the defendant's road, whereby it was badly cut and crushed, resulting in a serious and permanent injury. It appeared in evidence by one of the employés of the company that he had previously seen boys playing at the turntable, but this fact was not communicated to the officers of the company having charge of the turntable. The plaintiff had never been at the turntable before.

Judge Dillon, Circuit Judge, in his charge to the jury, after observing that negligence was the omission to do something that a reasonable, prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent or reasonable man would not do under all the circumstances of the particular transaction under judicial investigation, and that if the turntable, in the manner it was constructed and left, was not dangerous in its nature, the defendants would not be guilty of any negligence in not locking or guarding it, said: "The machine in question is part of the defendants' road and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that if they resorted there they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendants did know, or had good reason to believe, under the circumstances of the case, that the children of the place would resort to the turntable to play, and that if they did they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence,"

274] *That charge was held by this court to be an impartial and intelligent one. And after observing that the jury were at liberty to find for the plaintiff, if from the evidence it could justly be inferred that the railroad company, in the construction, location, management, or condition of the turntable, had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, *Mr. Justice* Hunt, delivering the unanimous judgment of this court, said "that the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injure him, and no greater, than existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury by his foot being caught between the fixed rail of the roadbed and the turning rail of the table they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been at play upon the turntable *upon* other occasions, and within the observa*tion and to the knowledge of* the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case. As it was, in fact, on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table, weighing some eight or ten pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have *upon their turntables a latch or bolt, or [275 some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty would have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given; that it was negligent; and that its negligence caused the injury to the plaintiff."

The principles announced in *Sioux City & P. R. Co.* v. *Stout* have been approved in many adjudged cases. In *Keffe* v. *Milwaukee & St. P. R. Co.* 21 Minn. 207, 211, 18 Am. Rep. 393, which was also the case of an injury received by a child of tender years, while playing upon an unfastened, and unguarded turntable of a railroad company, the court, overruling a motion based on the pleadings for judgment rendered in favor of defendant, said: "Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left this turn table unfastened *for the purpose* of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defense to an action by the plaintiff, who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. . . . It is true that the defendant did not leave the turntable unfastened *for the purpose* of injuring young children; and if the defendant had had no reason to believe that the unfastened turntable was likely to attract and injure young children, the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in danger. But the complaint stated that the defendant know that the turntable, when left unfastened, was easily revolved; that, when so left, it was very attractive, and, when put in motion by them, dangerous to young children; and knew also that many children were in the habit of going upon it to play. The defendant, therefore, knew that by *leaving this turntable unfastened [276 and unguarded, it was not merely inviting young children to come upon the turn-

table, but was holding out an allurement, which, acting upon the natural instincts by which such are controlled, drew them by those instincts into hidden danger." It was held that, under the circumstances, the child was not in fault in following the temptation set before it, and that the company violated its duty in not protecting him against the danger into which the child was thus led.

The Minnesota case is referred to by *Judge* Cooley in his Treatise on Torts. Alluding to the doctrine of implied invitation to visit the premises of another, he says: "In the case of young children, and other persons not fully *sui juris*, an implied license might sometimes arise when it would not on behalf of others. Thus leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it; and, perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise." Chap. 10. p. 303.

An instructive case upon the general subject is *Powers* v. *Harlow*, 53 Mich. 507, 514, 515, 51 Am. Rep. 154. That was an action by an infant to recover damages for injuries received while he was on the premises of the defendant, a small parcel of which was under lease to the boy's father. The defendant had sometimes used dynamite for removing stumps that obstructed the cultivation of his lands. This dynamite was put up in boxes, in which were smaller boxes, containing exploders. One of these boxes was placed by the defendant's servant in a temporary shed on his farm. There was no enclosure about the shed. The word "powder" was written on the box, but neither the plaintiff nor his father could read, nor had either been told that anything dangerous was stored there. The shed was distant from any public highway, but of the several parcels of land leased by the defendant, the one leased by the plaintiff's father was nearest to the shed (within ten rods or less) and to the farm road used by the defendant's lessees in reaching the parcels 277] respectively cultivated by them. *According to the facts the lessor had not restricted the lessee to any particular route in reaching the part leased by him. The tenant was within the limits of his right if he did not depart altogether from the direct line between the end of the farm road and the lot which had been leased to him. The defendant's superintendent went to the box in the shed for dynamite and exploders as he had occasion to use them. The evidence also tended to show that the handling of the exploders by persons who were ignorant of their nature, or were careless, or under circumstances rendering them liable to accidental concussion, would be extremely hazardous.

The supreme court of Michigan, speaking by *Chief Justice* Cooley, said: "Under the circumstances disclosed in this case the invitation to the tenant to come upon the land was an invitation which embraced his family also. The tenant was a laboring man, apparently of small means, and it is customary for such men to be assisted in their manual labor by the members of their families, and the defendant must have understood that the persons who rented of him these small patches of land would be likely to avail themselves of the services of their children in cultivating them." Again, in the same case: "Children, wherever they go, must be expected to act upon childish instincts and impulses, and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. . . . A man of ordinary prudence if told that so dangerous an article was so carelessly stored might well have deemed the statement incredible. We cannot under these circumstances say that the plaintiff's father was chargeable with fault in not suspecting danger and warning his children away from it, or that the child himself was blameworthy in acting upon the childish instincts and propensities which, combined with the negligence of defendant's servant, to bring the danger upon him." To the same general *effect are many other cases, some of [278 which, for convenience of reference, are given in the margin.* In nearly all of those cases that of *Lynch* v. *Nurdin*, 1 Q. B. 29, is cited with approval.

It has been sometimes said that the case of *Lynch* v. *Nurdin* was overruled by *Mangan* v. *Atherton*, L. R. 1 Exch. 239, 4 Hurlst & C. 388. But, in reference to the latter case, *Lord Chief Justice* Cockburn, with whom concurred Manisty, *J.*, said in *Clark* v. *Chambers*, L. R. 3 Q. B. Div. 327, 338 (1878:) "The defendant had there exposed in a public market place a machine for crushing oil cake without its being thown out of gear or the handle being fastened, or any person having the care of it. The plaintiff, a boy four years of age, returning from school with his brother, a boy of seven, and some other boys stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion three of his fingers were crushed. It was held by the court of exchequer that the defendant was not liable, first, because there was no negligence, on the part of the defendant, or, if there was negligence, it was too remote; and, secondly, because the injury was caused by the act of the boy who turned the handle and of the plaintiff himself, who was a trespasser. With the

* Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67; Daley v. Norwich & W. R. Co. 26 Conn. 591; Rauch v. Lloyd, 31 Pa. 358, 72 Am. Dec. 747; Gillis v. Pennsylvania R. Co. 59 Pa. 129, 142, 98 Am. Dec. 317; Hydraulic Works Co. v. Orr, 83 Pa. 332, 335; Norfolk & P. R. Co. v. Ormsby, 27 Gratt. 455, 476, Morrison v. Cornelius, 63 N. C. 346, 349; Morgan v. Cox, 22 Mo. 373, 378, 66 Am. Dec. 623; Boland v. Missouri R. Co. 36 Mo. 484, 490; Walsh v. Mississippi Valley Transp. Co. 52 Mo. 434, 439; Macon & W. R. Co. v. Davis, 18 Ga. 679, 686; Government Street R. Co. v. Hanlon, 53 Ala. 70, 79; Fraler v. Sears Union Water Co. 12 Cal. 555, 559, 73 Am. Dec. 562; Richmond v. Sacramento Valley R. Co. 18 Cal. 351, 356; Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 410; Morris v. Litchfield, 35 N. H. 271, 278; Weick v. Lander, 75 Ill. 93, 97; Central R. Co. v. Moore, 24 N. J. L. 824, 832.

latter ground of the decision we have in the present case nothing to do; otherwise we should have to consider whether it should prevail against the cases cited, with which it is 279] *obviously in conflict. If the decision as to the negligence is in conflict without judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so, because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion."

We adhere to the principles announced in *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, [21: 745]. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure, but it did not do so. On the contrary, it permitted all without regard to age, to visit its mine and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind, or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all these circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision.

In *Townsend* v. *Wathen*, 9 East. 277, 299, it was 280] held that *if a man place dangerous traps, baited with flesh, in his own ground so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, would probably be attracted by their instinct into the traps, and in consequence of such act his neighbor's dogs be so attracted and thereby injured, an action on the case would lie. "What difference," said Lord Ellenborough, *Ch. J.*, "is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?" What difference, in reason we may observe in this case, is there between an express license to the children of this village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license, resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure? Referring to the case of *Thompson* v. *Wathen*, *Judge* Thompson, in his work on the Law of Negligence, well says; "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded in his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong might thereby be killed or maimed for life." Vol. I, pp. 304, 305. Indeed, the present case is stronger than the one supposed by the writer, in that the defendant was aware of the fact that children often visited its mine.

The evidence of the two witnesses, introduced by the defendant, that a boy was warned off the coal shaft on the morning of the day when plaintiff fell into the slack pit, had no reference to the plaintiff. The boy to whom they referred was one who was at the shaft house in the forenoon. The plaintiff did not go there until the afternoon. Both of these witnesses saw the plaintiff, at the time of the trial, and were unable to identify him as the boy to whom the warning *was given. But if [281 this warning was given to the plaintiff, it had reference only to the danger of his being on the platform of the shaft house, and not to any danger of his being near that house or the vicinity of the coal mine.

Nor is there any force in the suggestion that the plaintiff was negligent in falling into the burning slack. The conduct of the persons who came out of the coal pit, with lamps upon their heads and with dirty faces, yelling "Let's grease him," "Let's burn him," frightened the lad, and caused him to run in the direction of the town where his mother was staying. He ran towards the only path that was open to him, and made such efforts as he could to escape those who threatened to harm him. His falling into the slack heap was accidental, and in no proper or just sense the result of negligence. The question of negligence upon the part of an infant must be determined with reference to his age and to the situation in which, at the time of the injury, the circumstances placed him. The authorities cited—indeed, all the adjudged cases—agree, as declared by the court of appeals of New York, that in applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must not himself be guilty of negligence that substantially contributed to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition. *Reynolds* v. *New York Cent. & H. R. R. Co.* 58 N. Y. 248, 252. And so, as declared by the same court, persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases. *Thurber* v. *Harlem Bridge M. & F. R. Co.* 60 N. Y. 326, 336. Even in the case of an employé of a railroad company, claiming to have been injured as the result of the com-

pany's negligence, this court has said that in determining whether he has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might be reasonably expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion. **282**]*Kane v. Northern Cent. R. Co. 128 U. S. 94, 95 [32:341]. Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or to secure the other, unless the circumstances, under which that effort was made, shows recklessness or rashness.

Equally without merit is the suggestion that the mother was negligent in permitting the plaintiff to visit the coal mine. There was, in fact, very little danger, under ordinary circumstances, in visiting the mine, except that which came from its contiguity to the burning slack pile. But of the existence of that concealed danger both the plaintiff and his mother were ignorant. If the negligence of a parent can be imputed to the child so as to prevent the latter from maintaining an action for personal injuries received by him from others—upon which question we express no opinion—it is sufficient to say that negligence cannot be attributed to the plaintiff's mother because of her consenting that her son might visit the coal mine in company with one of the trapper boys of the village, who was, presumably, capable of caring for him while away from the mother.

At the close of the charge by the court there was a general exception to the withdrawal from the jury of the questions of the defendant's negligence and the plaintiff's contributory negligence.

The court correctly said that there was no controversy about the leading facts of the case, and that the defendant was guilty of negligence. As the facts were undisputed, the question of liability upon the ground of negligence was one of law, and as the facts showed negligence by the railroad company, which was the primary, substantial cause of the injury complained of, it was not error in the court to so declare.

The only question that could arise upon this part of the case is whether the court should have instructed the jury—as, in effect, it did—that the failure of the company to put a fence around the slack pit, as required by the statute of Colorado, was negligence, of which the plain-**283**] tiff could *complain in this action for personal injuries sustained by him. Primarily, that statute was intended for the protection of cattle and horses. But it was not, for that reason, wholly inapplicable to the present case upon the issue as to negligence. In *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 330 [28: 410,412] which was an action by an infant for personal injuries sustained by the alleged negligence of a railroad company in not properly guarding its line within the limits of the city of Chicago, this court, speaking by *Mr. Justice* Matthews, said: "In the analogous case of fences required by the statute, as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery." The non-performance by the railroad company of the duty imposed by statute, of putting a fence around its slack pit, was a breach of its duty to the public, and, therefore, evidence of negligence, for which it was liable in this case, if the injuries in question were, in a substantial sense, the result of such violation of duty.

Nor did the court err in saying to the jury that the disputed issue was the question of damages. Looking at all the facts there was an entire absence of any just ground for imputing contributory negligence to the plaintiff. If the jury had so found, the court could properly have set aside the verdict as being against the evidence. Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury, altogether, and "direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial *discretion, [**284** would be compelled to set aside a verdict returned in opposition to it." *Delaware L. & W. R. Co. v. Converse*, 139 U. S. 469, 472 [35: 213,215] and authorities there cited; *Elliott v. Chicago M. & St. P. R. Co.* 150 U. S. 245 [37: 1068]; *Anderson County Comrs. v. Beal*, 113 U. S. 227, 241 [28: 966,971].

Judgment affirmed.

UNITED STATES, *Plff. in Err.*, *v.* THE NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 284-300.)

Land grant to Northern Pacific Railroad Company—most direct and practicable lines—joint resolution of May 31, 1870—Act of July 2, 1864—priority of a grant—exception from grant—forfeiture of lands—condition subsequent.

1. The Act of July 2d, 1864, did not contain a grant of lands in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraphic line from Portland to Puget Sound.
2. When the termini of a railroad are mentioned, for whose construction a grant is made, the ex-

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NOTE.—*As to land grants to railroads*, see note to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

As to errors in surveys and descriptions in patents for lands; how construed, see note to Watts v. Lindsey, 5: 423.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

tent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line.

3. The joint resolution of Congress of May 31st, 1870, gave to the Northern Pacific Railroad Company a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.

4. No public land disposed of after the passage of the Act of July 2d, 1864, was intended to be embraced in the grant of May 31, 1870.

5. In respect to the public lands, within, at least, common granted or primary limits, priority of grant, not priority of location, determines the question of ownership, as between parties claiming the same lands under different grants.

6. Lands granted by the Act of May 4th, 1870, to the Oregon Central Railroad Company in aid of the construction of its road, were not public lands within the meaning of the grant of May 31st, 1870, to the Northern Central Railroad Company, and were, consequently, excepted out of that grant as having been previously disposed of by the United States.

7. When Congress, by the Act of 1885, forfeited to the United States so much of the lands granted by the Act of May 4th, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminous with the uncompleted portions of the road, the United States was reinvested with the title for its own benefit exclusively, and the title did not pass to the Northern Pacific Railroad Company.

8. No one but the grantor can raise the question of a breach of a condition subsequent.

[No. 135.]

Argued Dec. 14, 1893. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the District of Oregon, to review a judgment in favor of the Northern Pacific Railroad Company, *et al.*, defendants, in an action brought by the United States, to recover the value of certain lumber manufactured from logs alleged to have been unlawfully cut and removed by the defendants in the year 1886, from public lands in the then territory of Washington. *Reversed, and cause remanded with directions to enter judgment for the United States.*

See same case below, 41 Fed. Rep. 842.

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, Jr.,** *Solicitor Gen.*, for plaintiff in error.

Messrs. **James McNaught,** *Fred M. Dudley* and *Dolph, Mallory & Simon* for defendant in error.

285] **Mr. Justice* **Harlan** delivered the opinion of the court:

This writ of error brings up for review a judgment in favor of the defendants in error in an action brought by the United States to recover the value of certain lumber manufactured from logs alleged to have been unlawfully cut and removed by them, in the year 1886, from the public lands, namely, from the northwest quarter of section seven, township eight north, range five west of the Willamette meridian, in the then territory of Washington. It was adjudged below, upon a special finding of facts, that, at the time of the alleged wrong, the title to these lands had passed from *the United States,* and that the defendant, Aaron Kinney, was then the owner of them. 41 Fed. Rep. 842. If the title had so passed, the judgment must be affirmed; otherwise, reversed.

From the special finding, based upon a written stipulation between the parties, the case is as follows:

By an Act of Congress, approved July 2, 1864, the Northern Pacific Railroad Company was incorporated, with authority to construct and to maintain a continuous railroad and telegraph line, "beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a *branch via the valley of the Columbia river, to a point at or near Portland,* in the state of Oregon, *leaving the main trunk line* at the most suitable place, not more than three hundred miles from its western terminus." The same Act granted to the company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile, on each side of its line, as the company should adopt, through the territories of the United *States, and the alternate sections per mile [286 where the road passes through any state, "and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claim or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." By the 6th section it is provided that "the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this Act." 13 Stat. at L. 365, chap. 217, §§ 1, 3, 6.

On the 6th day of March, 1865, Josiah Perham, president of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior a communication in these words: "Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map; in red ink, the general line of their railroad from a point on Lake Superior, in the state of Wisconsin, to a point on Puget Sound in Washington territory, *via* Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific

surveys; and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law."

287] *The route indicated by the map was entirely north of the 45th degree of north latitude, and within the territory of the United States, but no action was taken by the Secretary of the Interior in respect to that map or the request contained in the communication of Mr. Perham.

By a joint resolution of Congress, approved April 10, 1869, it was provided that "the Northern Pacific Railroad Company be, and hereby is, authorized *to extend* its *branch* line from a point *at or near Portland*, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its *main* line *west of the Cascade Mountains* in the territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the Act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, That said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States in respect to said *extension* of its *branch* line as aforesaid, *except such lands* as may be included *in the right of way* on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the 2d day of July, 1871, and forty miles per year thereafter, until the whole of said extension shall be completed." 16 Stat. at L. 57.

On the 4th day of May, 1870, Congress, for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and a suitable point of junction near Forest Grove to Yamhill river near McMinnville, in the state of Oregon, granted to the "Oregon Central Railroad Company, a corporation of Oregon, then engaged in constructing said road, and to their successors and assigns, a right of way, etc. . . . and, also, each alternate section of the public lands, not mineral, except coal or iron lands, designated by odd numbers, nearest to said road, to the amount of ten such alternate sections per mile on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of 288]this Act. *And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up said deficiency." That Act further provided: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of said grant, shall be disposed of only to actual settlers at double the minimum price for such lands." The company was required to file within one year after its passage, and with the Secretary of the Interior, its assent to the Act; and it was made a condition of the grant that a section of twenty or more miles of the proposed railroad and telegraph line be constructed within two years, and the entire road and telegraph line within six years from the same date. 16 Stat. at L. 94, chap. 69.

The Oregon Central Railroad Company filed with the Secretary of the Interior its acceptance of the above grant—on what day the findings of fact do not state—and on the 31st of January, 1872, filed its map of definite location of a proposed line of road from Astoria to Castor Creek, near Forest Grove. It is stated in the findings of fact that the only provision in the charter of the Oregon Central Railroad Company, at the time of the above grant to it, conferring power or right to locate and construct a railroad, was that contained in the following clause: "The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette Valley to the southern boundary of the state, under the laws of Oregon *and the law of Congress recently passed[289 granting lands in aid of such purpose."

On the 31st day of May, 1870, twenty-seven days *after* the date of the above grant to the Oregon Central Railroad Company, Congress passed a joint resolution providing: "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; . . . and also *to locate* and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its *main* road to some point on Puget Sound, *via* the valley of the Columbia river, with the right to locate and construct its *branch* from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and

sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the Act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the state of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." 16 Stat. at L. 378.

290] *The Northern Pacific Railroad Company filed with the Secretary of the Interior and the Commissioner of the General Land Office on the 13th day of August, 1870, another map, showing the general route of its main line from a point on Puget Sound, following almost identically the same route as that indicated on the map filed by it on the 6th day of March, 1865; and on the day of the filing of the last map, to wit, August 13, 1870, twenty sections of land per mile on each side of the line indicated on it were withdrawn from sale for the benefit of the company. And on the 13th day of September, 1873, the company duly filed its map of definite location of the line of its road from Kalama to Tenino, in Washington territory, a distance of sixty-five miles. No road has been constructed by that company down the Columbia river. But during the years 1871, 1872, and 1873 it constructed its line from Kalama, on the Columbia river in Washington territory, in a northerly direction to Tenino, forming a portion of a direct line of road since that time extended and completed to Puget Sound at Tacoma, the western terminus of the Northern Pacific Railroad. The road from Tacoma to Portland runs for about one half the distance up the valley of Columbia river to the last named point, the entire length of that line being 105 miles.

During the years 1872 to 1880 a line of road was constructed by the Oregon Central Railroad from Portland southward through the Willamette Valley towards the southern boundary of the state to Corvallis in that valley, a distance of about ninety-seven miles, which road, so constructed, passed through McMinnville and near Forest Grove. But no line was ever constructed by that company from a point of junction near Forest Grove to the Yamhill river or elsewhere.

The land from which the logs in question were cut lies north of the 45th degree of latitude within twenty miles of the line indicated upon the map filed, January 31, 1872, by the Oregon Central Railroad Company with the Secretary of the Interior; is within forty miles of the line selected by the Northern Pacific Railroad 291] Company for the main line of its *road from Lake Superior to Puget Sound by way of the valley of the Columbia river, as indicated upon the map forwarded to the Secretary of the Interior by that company on the 6th of March, 1865, as well as of the line selected by it, after the passage of the joint resolution of May 31, 1870, as the main line of its road down the Columbia river to Puget Sound, as indicated upon the map filed with the Secretary of *the* Interior on the 13th day of August, 1870; and is within the same distance of the line of road as constructed from Kalama to Tenino.

Congress, by an Act approved January 31, 1885, forfeited to the United States, and restored to the public domain, so much of the lands granted to the Oregon Central Railroad Company by the Act of March 4, 1870, as were adjacent to and coterminous with the uncompleted portions of that company's road and not embraced within the limits of the grant to that company for the completed portions. 23 Stat. at L. 296, chap. 46, § 1.

The lands in question (and other tracts) were listed by the Northern Pacific Railroad Company on March 31, 1885, but the General Land Office, November 9, 1885, rejected the listing. Upon appeal to the Department of the Interior that action was confirmed October 29, 1887. 6 U. S. Land Dec. 292.

After the withdrawal of the above lands in the interest of the Northern Pacific Railroad Company, in August, 1870, and up to November 9, 1885, the Land Office and the Department of the Interior refused all applications for settlement upon lands north of the Columbia river within the limits of the grant to that company.

The Northern Pacific Railroad had located, constructed, and was operating its road from Portland to Tacoma at the time it executed a deed for this land to J. B. Montgomery, the "grantee" of the defendant Aaron Kinney.

The general conclusion of law from the above facts was declared by the circuit court to be that upon the filing its map of general location, and the subsequent completion by the Northern Pacific Railroad Company of its road, the title to the land in question vested indefeasibly in that corporation, *and [292 by subsequent conveyances passed to the defendant Kinney.

The first and principal question is, whether the Act of July 2, 1864, contained a grant of lands in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraphic line *from Portland* to Puget Sound?

Although that Act allowed the company to adopt the most eligible route, within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point "at or near Portland," and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than three hundred miles from its western terminus, and extending "*via* the valley of the Columbia river to a point at or near Portland." If the main line, as originally indicated by the Act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended *via* the valley of Columbia river to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country, north of

the forty-fifth degree of latitude. On the contrary, as said in *St. Paul & P. R. Co.* v. *Northern Pac. R. Co.*, 139 U. S. 1, 13 [35: 77, 82], "when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant." It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason **293]** *why that map was not accepted by the Interior Department. Besides, it is not found as a fact in this case that the most eligible railroad route for the main line, between Lake Superior and Puget Sound, looking at the purpose of Congress in making the grant of 1864, was down the Columbia river and *via* some point at or near Portland. It is clear that the purpose of Congress, by the Act of 1864, was not to connect Portland with Puget Sound, by a road established upon the most direct or eligible route between those places; but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia river, that would strike the main trunk line connecting Puget Sound and Lake Superior. There was no purpose, *by that Act*, to make a grant of lands for a road to be located and constructed from a point "at or near Portland" to Puget Sound.

This interpretation of the Act of 1864 is supported by the joint resolution of April 10, 1869, authorizing the Northern Pacific Rail road *to extend* "its *branch* line from a point *at or near Portland, Oregon, to some suitable point on Puget Sound*," and "also to connect the same with its main line *west of the Cascade Mountains, in the territory of Washington*." By the same resolution it was expressly declared that the company should not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to that extension of its branch line, except such lands as might be included *in the right of way* on the line of such extension. It is said that the company did not take action under this resolution, and did not accept it in any form. Be this as it may—upon this point the finding of facts being silent—the resolution of 1869 shows that Congress, at that time, to the knowledge, it must be presumed, of the railroad company, interpreted the Act of 1864 as not containing a grant of lands to aid in the construction of a road from Portland to Puget Sound.

Coming next to the joint resolution of May 31, 1870, which was accepted and acted upon by the company, we find, in connection with authority to issue bonds in aid of the construction and equipment of its road, to be secured by **294]** *mortgage, that express authority was given, for the first time, to the Northern Pacific Railroad Company "to locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its *main* road to some point on Puget sound, *via* the Valley of the Columbia river, with the right to locate its *branch* from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." Again, in the same resolution: "And that twenty-five miles of said main line between its western terminus and the city of Portland, in the state of Oregon, shall be completed by January 1, 1872, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." Undoubtedly, this resolution gave authority to locate and construct a main road *via* the Columbia river valley to Puget Sound. A road so located and constructed would, or might, have passed the city of Portland. But if, as the company now insists, the Act of 1864 gave ample authority to locate and construct a road extending from Lake Superior to Puget Sound, along the valley of the Columbia river, *and by the way of Portland or its vicinity*, the resolution of 1870 was entirely unnecessary in so far as it gave authority to the company to locate and construct its road through the Columbia river valley to some point on Puget Sound. We cannot agree that this resolution is to be held, in this respect, as simply a recognition by Congress of an existing right, in the company, to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the Act of 1864. On the contrary, it should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound.

This view is supported by the action of the Interior Department in the case of the *Northern Pacific Railroad Co.* v. *McRae*, 6 U. S. Land Dec. 400. The question there was, whether the company had a grant of lands for its road *from Portland* to Puget Sound. The Commissioner of the Land Office held that the company had no grant for that portion of its *road **[295]** from or near Portland to Puget Sound. Upon appeal by the company to the Secretary of the Interior, that ruling was reversed. *Mr. Justice* Lamar, then Secretary of the Interior, after referring to the Act of 1864, and to the joint resolution of May 31, 1870, well said: "By this resolution the designation of the lines of the road were changed; that which by the granting Act was known as the branch line (*via* the valley of the Columbia river to a point at or near Portland in the state of Oregon) was changed to main road, or main line, and that which had been designated as main line (across the Cascade Mountains to Puget Sound) was changed to branch line. So, by the joint resolution of 1870 the company was authorized to locate and construct its main line *via* the valley of the Columbia river, through some point at or near Portland, Oregon, to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in its Act of incorporation. Now, the grant provided for in its Act of incorporation is every alternate section of public land not mineral, (except coal and iron) designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad whenever it passes through any state. I am clearly of opinion that by the joint resolutions of May 31, 1870, Congress

intended that the grant of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line *via* the valley of the Columbia river through Portland to Puget Sound. This conclusion, based alone upon the language of the joint resolution, would be confirmed, if confirmation was necessary, by the debates in Congress upon said resolution while it was pending, and make clear the manifest purpose of said resolution."

It cannot be inferred from the opinion of *Mr. Justice* Lamar* that the company, in the 296] case before him, contended *that it had a grant of land for any line, whether main or branch, between Portland and Puget Sound, except that made by the joint resolution of May 31, 1870.

But does the grant contained in the resolution of 1870 embrace the particular land in dispute? The Act of 1864 granted to the Northern Pacific Railroad Company only public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time its lind of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office. And by the resolution of 1870 it was de- 297] clared that if at the time of the final *location of the company's main line or branch there were not enough lands per mile within the prescribed limits, the deficiency could be supplied from lands, within ten miles beyond those limits, other than mineral and other lands, as excepted in the charter of the company, "to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the Act of July 2d, 1864." It is, therefore, clear that no public land disposed of after the passage of the Act of July 2, 1864, was intended to be embraced in the grant of May 31, 1870.

The lands here in question were disposed of by the United States after the passage of the Act of 1864, and before the *passage of the [298 joint resolution of May 31, 1870; for they are within twenty miles of the line of the Oregon Central Railroad Company, as shown on its map of definite location, filed January 31, 1872, and based upon the grant to it of May 4, 1870. It is true that the Northern Pacific Railroad Company, on the 13th day of August, 1870, acting under the joint resolution of May 31, 1870, filed a map of the general route of its main line from a point on Puget Sound; that, on the same day, twenty sections per mile on each side of the line indicated on it were withdrawn from sale for the benefit of the company; and that this was followed by a map, filed September 13th, 1873, of the definite location of its line from Kalama to Tenino. But it is well settled that, in respect to the public lands, within, at least, common granted or primary limits, priority of grant, not priority of location, determines the question of owner-

*The part of the opinion of *Mr. Justice* Lamar which refers, in detail, to the debates in Congress on the resolution of May 31st 1870, is as follows:

"In the course of the debate Senator Howard said: 'It asks no more at the hands of Congress, as I said before, than what is promised to them in their original charter of 1864—not a single acre, I repeat, waith the exception of the *new* donations upon the line *from Portland to Puget Sound*, which is authorized by this resolution. That line from Portland to Puget Sound *was not embraced in the original charter*. It was authorized and the right of way given to this company at the last session of Congress (joint resolution of April 10, 1869) but simply the right of way and no lands to enable the company to build it. On that line, and on that alone, are lands required additional to those contemplated in the original charter.' *Cong. Globe*, 41st Cong. (2d Sess.) p. 2546. As reported from the committee, the resolution contained this language: 'Under the provisions and with the privileges and duties provided for in its Act of incorporation and amendment thereto. During the debate in the Senate, Mr. Howard said: 'I now move to strike out in the fifteenth line the words 'and the amendments thereto,' so as to make it sure that this *new* line, which is to pass *from Portland to Puget Sound*, will be entitled to the subsidy in lands; otherwise it might leave it very uncertain.' The amendment was agreed to, p. 2583. Subsequently, Senator Howard moved to amend the sentence, 'under the provisions and with the privileges and duties provided for in its Act of incorporation,' by inserting after the word 'privileges' the word 'grants,' saying 'so to remove any ambiguity that might arise.'

"In the House, in reply to the question, How much additional land will be granted should this bill become a law? Mr. Wheeler said: 'That depends upon the fact whether the lines will be longer than the orignal ones. This can only be determined by actual survey. If more land is taken it will be only for the additional distance and for the quantity per mile granted by the charter. p. 3263. Mr. Wilson said: 'This is no increase of land over that which has already been given to this road. It only gives them additional land for an additional piece of road which they now propose to construct from Portland up to Puget Sound. The old grant is not increased one acre." p. 3266. "I am clearly of the opinion that the Northern Pacific Railroad Company has a grant of lands from Portland to Puget Sound (Tacoma) and your decision is, therefore, reversed."

In addition to what appears in the opinion of *Mr. Justice* Lamar, it may also be stated that Senator Stewart of Nevada, in supporting the resolution, said: "There is no grant additional to that contained in the original law, *except in the extension of the road on the western end from Portland to Puget Sound*." 41st Cong. (2d Sess.) pt. 3, p. 2543. Senator Sherman: "The first part of this bill gives the company authority to make a mortgage, . . and it also provides for a *new* land grant *from Portland to Puget Sound*." In answer to inquiries by Senator Thurman, Senator Howard, having the resolution in charge, stated that its passage was earnestly desired by the Northern Pacific Railroad Company. Senator Thurman inquired whether, if the proposed resolution passed, "the main line must diverge down the Columbia river at the same point at which the branch would diverge under the original charter?" To this Senator Howard replied: "I think that would be the construction to be given to the two acts together, the charter and the present resolution." He then said: "I now move to strike out, in the fifteenth line, the words *and amendments thereto*, so as to make it sure that this *new* line, which is to pass *from Portland to Puget Sound, will be entitled to the subsidy in lands*." This motion was adopted. 41st Cong. (2d Sess.) pt. 3, p. 2546. In the House of Representatives, Mr. Wheeler, Chairman of the Committee on Railroads, from which the resolution was reported, said, in explanation of its provisions: "Second. The company wants to change the route of the main line and branch as defined by the original Act of incorporation. It wants *now* to build its *main line by the way of the valley of the Columbia river instead of over the Cascade Mountains, as intended at the outset*. . . The route by the valley of the Columbia river is far the more feasible, and can be built in much shorter time and with the means which this bill will enable the company to command. This change takes the road direct to Portland, thus giving it business when it is completed to that point, and enabling it to use the river for the transportation of materials during the progress of construction." 41st Cong. (1st Sess.) pt. 4, p. 3263.

ship, as between parties claiming the same lands under different grants. *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491 [24: 1095]; *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 358, 369 [35: 766,769]; *United States* v. *Southern Pac. R. Co.* 146 U. S. 570, 598, 606 [36: 1091, 1098, 1101].

So that the rights of the Oregon Central Railroad Company, whose grant preceded that to the Northern Central Railroad Company of May 31, 1870, by nearly one month, attached, as of the date of its grant, although the latter company filed a map of general route before the former filed a map of definite location. The lands in question had been disposed of by the United States prior to the passage of the joint resolution of May 31, 1870, namely, by the Act of May 4, 1870, granting lands to the Oregon Central Railroad Company in aid of the construction of its road. And as they were embraced by the latter grant, and were not included in any other grant then existing, they were not public lands within the meaning of the grant of May 31, 1870, to the Northern Central Railroad Company, and were, consequently, excepted out of that grant as having been previously disposed of by the United States.

When, therefore, Congress by the Act of 1885, forfeited to the United States and restored to the **299**] public domain so much *of the lands granted by the Act of May 4, 1870, for the benefit of the Oregon Central Railroad Company, as were adjacent to and coterminious with the uncompleted portions of the road, the United States was reinvested with the title for its own benefit exclusively. And the title did not pass to the Northern Pacific Railroad Company by reason of the failure of the Oregon Central Railroad Company to construct its road, or because of the subsequent forfeiture of the latter's rights by the Act of 1885. The restoration to the public domain of the lands so forfeited took from the Northern Pacific Railroad Company no lands granted to it by the Act of 1870. In *United States* v. *Southern Pac. R. Co.* 146 U. S. 570, 606 [36: 1091, 1101] in which one of the questions was as to the right of the Southern Pacific Railroad Company to appropriate lands that had been previously granted to the Atlantic & Pacific Railroad Company, but which lands were forfeited by Congress, after the date of the grant to, and the filing of the map of definite location by, the former company, this court said: "So when intent is to be considered, the question is whether Congress intended, the title having once vested in the Atlantic & Pacific, that the Southern Pacific Company should stand waiting to take the lands at some future time, however distant, when the Atlantic & Pacific Company's title should fail. Again, there can be no question, under the authorities heretofore cited, that if the Act of forfeiture had not been passed by Congress the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the Act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the Act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic & Pacific was guilty of a breach of a *con- [**300** dition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit."

One other point pressed by the defendant deserves notice. It is that the Oregon Central Railroad Company was without power under its charter to construct a railroad from Portland to Astoria, and, therefore, could not obtain the benefit of the grant made by Congress of the lands in dispute. That corporation is not here seeking the aid of the court to invest it with title to real estate it could not legally acquire for the purposes of its charter. If it were, it might be the duty of this court to inquire as to its right, under the laws that created it, to take and hold such title. *Case* v. *Kelly*, 133 U. S. 23 [33: 515]. The question is whether Congress embraced these lands in its grant to that company of May 4, 1870. If it did, then the title passed to it from the United States, subject to be defeated by breach of condition subsequent and subject, it may be, to any proceeding the state of Oregon might institute to compel a corporation created by its laws to keep within the limits of the powers granted to it. Whether the Oregon Central Railroad Company could, under its charter, take title to those lands was and is a matter that concerned only that corporation and the state of Oregon. It is sufficient, for this case, to say that the lands here in dispute were not included in the grant of 1864 or in that of May 31, 1870, to the Northern Pacific Railroad Company. If, as we hold, Congress did not intend to include them in the latter grant, and even if we should also hold that the Oregon Central Railroad Company was incompetent, under its charter, to take title to them, the lands, never having been granted prior to May 4, 1870, to any corporation, would not, contrary to the intention of Congress, have fallen under the grant of May 31, 1870, to the Northern Pacific Railroad Company, but would have remained part of the public domain.

It results that the court below erred, and that judgment should have been rendered for the United States.

The decree is reversed, and the cause remanded with directions to enter judgment for the United States, upon the special finding of facts. Reversed.

301] *THE KEOKUK & WESTERN RAILROAD COMPANY, *Plf. in Err.*, v. STATE OF MISSOURI.

(See S. C. Reporter's ed. 301-317.)

Exemption from taxation—Constitution of Missouri—taxing power of state—consolidation of two corporations—judgments against mortgagor—suit for taxes—estoppel by judgment.

1. The Keokuk & Western Railroad Company, is not entitled to the exemption of its property from taxation contained in the original charter to the Alexandria & Bloomfield Railroad Company, of which road it is the successor in interest.
2. The Alexandria & Bloomfield Railroad Company, whose charter contained the exemption from taxation, was dissolved by the consolidation with the Iowa Southern Railway Company, and a new corporation was thereby called into being, which held its property subject to the constitution of Missouri of 1865, which denies the power of the general assembly to exempt property from taxation.
3. The taxing power of the state should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms.
4. The Missouri legislature had no power in 1869, to extend to a new corporation created by the consolidation of two other corporations an exemption from taxation contained in an act passed in 1857, before the constitution was adopted; the constitutional provision that no property shall be exempted from taxation, applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869.
5. A mortgagee is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made party to the litigation.
6. A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action.
7. Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.

[No. 182.]

Argued Dec. 21, 22, 1893. Decided March 12, 1894.

IN ERROR to the Supreme Court of the State of Missouri, to review a judgment of that court, affirming the judgment of the circuit court of Missouri, for the county of Scotland, in favor of the state of Missouri, plaintiff, against the Keokuk & Western Railroad Company, for state and county taxes, levied on the property of the Missouri, Iowa, & Nebraska Railway Company, for the year 1886. *Affirmed.*

See same case below, 99 Mo. 30.

Statement by *Mr. Justice* **Brown:**

This was an action at law brought in the circuit court of Missouri for the county of Scotland, by the state, suing for the use of the collector of revenue for Scotland county, against the Keokuk & Western Railroad Company to charge the property then in its hands as owner with an alleged lien for state and county taxes levied on the property of the Missouri, Iowa & Nebraska Railway Company for the year 1886. The Keokuk & Western Railroad Company, defendant, became the purchaser of the property of the corporation against which the tax was levied, in December, 1886, through a sale thereof under a supplemental decree of foreclosure rendered July 8, *1886, and by other deeds of conveyance [302 made by the Missouri, Iowa & Nebraska Railway Company, and by the Central Trust Company of New York.

The answer set forth the following facts in defense.

1. That the Alexandria & Bloomfield Railroad Company was chartered by special act of February 9, 1857, to build a railroad from Alexandria, Missouri, in the direction of Bloomfield in the state of Iowa, to the northern boundary of the state of Missouri. The act further provided that the construction of the road should be commenced within ten years after the passage of the act, and completed within ten years thereafter, and that "the stock of said company shall be exempt from taxation for a period of twenty years after its completion." By a subsequent act of February 19, 1866, the corporate name of such railroad company was changed to the Alexandria & Nebraska City Railroad Company. It appeared upon the trial that the road was completed to the state line in December, 1872.

2. March 2, 1869, the legislature passed a general law, authorizing any railroad company in Missouri to consolidate with a railroad company of any adjoining state, making one company of the two, "whose stock shall be so consolidated, under such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed." The fourth section of this act provided as follows: "Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this state, which may be thus consolidated with one in the adjacent state as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not

NOTE.—*As to exemption from taxation; whether a contract or not; not implied*, see note to Tucker v. Ferguson, 22: 805.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to Providence Bank v. Billings, 7: 939.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

taken place." Pursuant to this act, the Alexandria & Nebraska City Railroad Company, on May 3, 1870, consolidated with the Iowa Southern Railway Company, an Iowa corporation, under the name of the Missouri, Iowa & Nebraska Railway company, forming a continuous 303] *line from Alexandria, on the Mississippi, to a point in the state of Iowa near Nebraska City on the Missouri river.

3. Subsequently, and on August 19, 1886, the Missouri, Iowa & Nebraska Railway Company was sold under a decree of foreclosure entered in the Circuit Court of the United States for the Southern District of Iowa, to Morris K. Jessup and Henry C. Thatcher, who, subsequently, and in December of the same year, conveyed the same to the Keokuk & Western Railroad Company, defendant.

4. Defendant further set forth in its answer, by way of estoppel, that, in 1873, plaintiff brought suit against the Missouri, Iowa & Nebraska Company to recover the taxes for the year of 1872, upon the property described in the petition of this action; that defendant answered, claiming the exemption provided by the ninth section of the original Alexandria & Bloomfield charter; that such suit was decided in favor of the railroad company, and affirmed upon appeal to the supreme court of Missouri, and reported in 65 Mo. 123.

5. Defendant also pleaded by way of further estoppel that, in 1881, one Secor and other stockholders of the Missouri, Iowa & Nebraska Company filed a bill in a Circuit Court of the United States for the Eastern District of Missouri, praying an injunction against said company paying the taxes alleged to be due upon their property in Scotland, Clarke, and Schuyler counties and to enjoin the county court and the collectors of revenue from claiming such taxes for the year 1881, or any previous years; that a temporary injunction was granted which was made final and perpetual, and which is still in full force and effect; that in such suit complainant claimed the same exemption contained in the Alexandria & Bloomfield charter, which the court held to be valid; and that such case was reported in *Secor* v. *Singleton*, 9 Fed. Rep. 809.

It further apperred that a new constitution was adopted by the state of Missouri in 1865, which contained the following provisions:

"Art. 11, Sec. 3. All statute laws of this state now in force, not inconsistent with this consti-
304]tution, shall continue in force *until they shall expire by their own limitation, or be amended or repealed by the general assembly.

"Art. 11, Sec. 16. No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools and such as may belong to the United States to this state, to counties, or to municipal corporations within this state."

Upon the hearing of this case, the circuit court of Scotland county denied the exemption claimed by the defendant, and rendered judgment against it for the taxes in question, which judgment was affirmed on appeal, by the supreme court of the state (*State* v. *Keokuk & W. R. Co.* 6 L. R. A. 222, 99 Mo. 30) whereupon after an unsuccessful motion for a rehearing, defendant sued out this writ of error.

Messrs. **John F. Dillon, Felix T. Hughes** and *Thomas De Witt Cuyler*, for plaintiff in error:

By the consolidation the exemption from taxation of the Alexandria & Bloomfield Company continued to and vested in the Missouri, Iowa & Nebraska Railway Company.

State v. *Macon County Ct.* 41 Mo. 453; *State* v. *Cape Girardeau & S. L. R. Co.* 48 Mo. 468; *State* v. *Coffee*, 59 Mo. 59; *Atlantic & P. R. Co.* v. *St. Louis*, 66 Mo. 228.

There is not a word in the constitution of Missouri which forbids the legislature from authorizing the continuation of such rights, privileges and exemptions possessed by a corporation existing prior to the constitution to a corporation thereafter formed by the consolidation of such corporation with others.

Muller v. *Dows*, 94 U. S. 444 (24: 207).

Mere legislative authority to consolidate two or more railroads into one, continues in force all rights and privileges, including exemption from taxation, to such consolidated company.

Philadelphia & W. R. Co. v. *Maryland*, 51 U. S. 10 How. 376 (13: 461); *Tomlinson* v. *Branch*, 82 U. S. 15 Wall. 460 (21: 189); *Tennessee* v. *Whitworth*, 117 U. S. 145 (29: 835).

Under the constitution the act of March 2, 1869, authorizing the consolidation continues the tax exemption.

Scotland County v. *Missouri, I. & N. R. Co.* 65 Mo. 123; *Secor* v. *Singleton*, 9 Fed. Rep. 809; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 256 (27: 926).

The case is *res adjudicata* of every issue made in the pleadings.

Cromwell v. *Sac County*, 94 U. S. 351 (24: 195); *Garwood* v. *Garwood*, 29 Cal. 514; *Hickerson* v. *Merico*, 58 Mo. 61; *Union R. & Transp. Co.* v. *Traube*, 59 Mo. 355; *Bissell* v. *Spring Valley Twp.* 124 U. S. 225 (31 411); *Scotland County* v. *Thomas*, 94 U. S. 682 (24: 219).

The consolidation act, being but an amendment, became a part of the original incorporation act, and to accept it would not destroy the exemption from taxation.

Schuyler County v. *Thomas*, 98 U. S. 175 (25: 90); *Scotland County* v. *Hill*, 132 U. S. 107 (33: 261); *Scotland County Ct.* v. *United States*, 140 U. S. 41 (35: 351); *Livingston County* v. *First Nat. Bank of Portsmouth*, 128 U. S. 102 (32: 359).

When the exemption is once established such exemption will not be held to be repealed or taken away by implication.

State v. *Minton*, 23 N. J. L. 529; *State* v. *Bentley*, 23 N. J. L. 532; *State* v. *Jersey City*, 31 N. J. L. 575; *St. Louis* v. *Alexander*, 23 Mo. 483; *State* v. *Macon County Ct.* 41 Mo. 463; *Smith* v. *Clark County*, 54 Mo. 58.

There was established a rule of property protected by the Constitution of the United States.

Reed v. *Ownby*, 44 Mo. 206; *State* v. *Miller*, 50 Mo. 129; *State* v. *St. Louis, K. C. & N. R. Co.* 77 Mo. 202; *State* v. *Greer*, 78 Mo. 195; *Piqua Branch of Bank of Ohio* v. *Knoop*, 57 U. S. 16 How. 369 (14: 977); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206 (17: 525); *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 256 (27: 926); *St. Louis, I. M. & S. R. Co.* v. *Berry*, 113 U. S. 475 (28: 1058).

In transfers of special privileges by consolidation everything passes unless prohibited.

Green County v. *Conness*, 109 U. S. 104 (27: 872).

The tax exemption should continue to the Consolidated Company, and such intention is consistent with, and not in contravention of, any provision of the constitution of the state of Missouri.

Morawetz, Priv. Corp. §§ 735, 736; *Tennessee* v. *Whitworth*, 117 U. S. 149 (29: 836).

The exemption, which was granted by the Act of February 9, 1857, could not be taken away without the consent of the company.

Scotland County v. *Missouri, I. & N. R. Co.* 65 Mo. 123.

The existing exemption of the Alexandria & Bloomfield Railroad, under section 9 of its charter, was not impaired or affected by the constitution of 1865, and was not intended to be.

Scotland County v. *Missouri, I. & N. R. Co. supra.*

The words "franchise and privileges" will carry the tax exemption to a consolidated company.

Tennessee v. *Whitworth*, 117 U. S. 149 (29: 836).

Mr. **John C. Moore**, for defendant in error:

The charter granted to the Pacific railroad in 1849 was subject to the power of the legislature to alter, suspend, or repeal all charters thereafter granted.

Pacific R. Co. v. *Renshaw*, 18 Mo. 210; *Pacific R. Co.* v. *Hughes*, 22 Mo. 291, 64 Am. Dec. 265; *Hope Mut. F. Ins. Co.* v. *Beckman*, 47 Mo. 93; *Re Powell*, 5 Mo. App. 220.

Where the state reserves the right to alter, amend, or repeal, and the charter does not negative the reserved right, its exercise by the state is not a violation of a contract.

Louisville Water Co. v. *Clark*, 143 U. S. 1 (36: 55); *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454 (21: 204); *Maine Cent. R. Co.* v. *Maine*, 96 U. S. 499 (24: 826); *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359 (25: 185); *Hoge* v. *Richmond & D. R. Co.* 99 U. S. 348 (25: 303); *Union Pac. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700 (25: 496); *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13 (26: 961); *Close* v. *Glenwood Cemetery*, 107 U. S. 466 (27: 408); *Spring Valley Waterworks* v. *Schottler*, 100 U. S. 347 (28: 173); *Louisville Gas Co.* v. *Citizens Gas Light Co.* 115 U. S. 683 (29: 510); *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396 (32: 979); *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98 (34: 898).

If a general statute reserves the power to alter charters, a charter subsequently granted is subject to this power.

Central R. & Bkg. Co. v. *State*, 54 Ga. 401; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y. 44; *Suydam* v. *Moore*, 8 Barb. 358; *Hyatt* v. *McMahon*, 25 Barb. 457; *Iron City Bank* v. *Pittsburg*, 37 Pa. 340; *State* v. *Person*, 32 N. J. L. 134; *State* v. *Railroad Tax Comrs.* 37 N. J. L. 228; *Griffin* v. *Kentucky Ins. Co.* 3 Bush, 592; *White* v. *Syracuse & U. R. Co.* 14 Barb. 559.

If the power is reserved the legislature may repeal, alter, or modify a charter by a general statute, or it may be done by change in the constitution, and a creditor cannot object, nor is the consent of the corporation necessary.

Re Gibson's Application, 21 N. Y. 9; *Read* v. *Frankfort Bank*, 23 Me. 318; *Bangor, O. & M. R. Co.* v. *Smith*, 47 Me. 34; *Atty. Gen.* v. *Chicago & N. W. R. Co.* 35 Wis. 425; *Crease* v. *Babcock*, 23 Pick. 334, 34 Am. Dec. 61; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Hyatt* v. *Whipple*, 37 Barb. 595; *Hyatt* v. *Esmond*, 37 Barb. 601; *Perrin* v. *Oliver*, 1 Minn. 202; *Butler* v. *Walker*, 80 Ill. 345; *State* v. *Railroad Tax Comrs.* 38 N. J. L. 472; *Delaware R. Co.* v. *Tharp*, 5 Harr. (Del.) 454; *Stephen* v. *Smith*, 29 Vt. 160; *McLaren* v. *Pennington*, 1 Paige, 102; *Ferguson* v. *Miners & M. Bank*, 3 Sneed, 609; *West Wisconsin R. Co.* v. *Trempealeau County Supra.* 93 U. S. 595 (23: 814); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989).

If the constitution itself did not repeal the exemption it was done by act of 1875.

New York v. *Cook*, 148 U. S. 397 (37: 498); *Hamilton Gas Light & C. Co.* v. *Hamilton*, 146 U. S. 258 (36: 963).

The constitution forbid the legislature to grant an exemption from taxation; hence the act of March 2, 1869, did not grant it and could not grant it. But the consolidated company was a new company.

Atlantic & Gulf R. Co. v. *Georgia*, 98 U. S. 359 (25: 185); *Maine Cent. R. Co.* v. *Maine*, 96 U. S. 499 (24: 836); *Memphis & L. R. R. Co.* v. *Berry*, 112 U. S. 609 (28: 837); *St. Louis, I. M. & S. R. Co.* v. *Berry*, 113 U. S. 465 (28: 1055).

The exemption died with the old company.

Morgan v. *Louisiana*, 93 U. S. 217 (23: 860); *Wilson* v. *Gaines*, 103 U. S. 417 (26: 401); *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244 (27: 922).

Mortgagees are not bound by judgments or decrees rendered against the mortgagor and affecting the mortgaged premises in suits begun by third parties subsequent to the execution of the mortgage unless the mortgagees are themselves made parties or some one authorized to represent them, like trustees of mortgage bondholders are made parties to the litigation.

Campbell v. *Hall*, 16 N. Y. 575; *Scates* v. *King*, 110 Ill. 456; *Dooley* v. *Potter*, 140 Mass. 49; *Cutter* v. *Jones*, 52 Ill. 84; *Zoeller* v. *Riley*, 100 N. Y. 102, 53 Am. Dec. 157; *Doe* v. *Derby*, 1 Ad. & El. 783; Bigelow, Estoppel (5th ed.) 142, 143.

A mortgagee is privy in estate with a mortgagor only in respect to the estate as it existed when the mortgage was executed.

Mathes v. *Cover*, 43 Iowa, 512.

The purchaser at a sheriff's sale made on execution in tax suit acquires only the right, title, and interest of the defendants in the tax suit.

Powell v. *Greenstreet*, 95 Mo. 13; *Watt* v. *Donnell*, 80 Mo. 196; *Boatmens Sav. Bank* v. *Grewe*, 84 Mo. 478; *Evans* v. *Robberson*, 93 Mo. 192; *Graves* v. *Ewart*, 99 Mo. 13.

And persons not made defendants are not affected by the judgment.

Graves v. *Ewart, supra.*

Mr. Justice **Brown** delivered the opinion of the court.

The question in this case is whether the defendant, the Keokuk & Western Railroad Company, was entitled to the exemption of its

property from taxation contained in the original charter to the Alexandria & Bloomfield Railroad Company, of which road it is the successor in interest.

(1) It will be observed that the constitutional provision upon which the state relies for the enforcement of this tax for the year 1886 was adopted in 1865, before the consolidation of the Alexandria & Bloomfield Company, under its changed name of the Alexandria & Nebraska City Railroad Company, with the Iowa Southern Company, which took place in 1870, and before the completion of the road in 1872. That the exemption from taxation contained in the original charter to the Alexandria & Bloomfield Company would have continued the full [305] twenty years from the completion *of the road in 1872, had such consolidation not taken place, is, for the purpose of this case, conceded. Indeed, it was so held by the supreme court of the state, in *State* v. *Macon County Ct.* 41 Mo. 453. The court, construing sections 8 and 14 of article 11 of the constitution, held the provisions of section 14 to be a limitation upon the *future* power of the general assembly, and not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted. See also *State* v. *Cape Girardeau & S. L. R. Co.* 48 Mo. 468; *State* v. *Coffee*, 59 Mo. 59; *Atlantic & P. R. Co.* v. *St. Louis*, 66 Mo. 228.

The question then arises whether the Alexandria & Bloomfield Railroad Company, whose charter contained the exemption, is still in existence, or was dissolved by the consolidation, and a new corporation was thereby called into being, which held its property subject to the constitutional provisions of 1865, denying the power of the general assembly to exempt property from taxation. In the numerous cases which have arisen in this court as to the effect of a consolidation upon the existence and status of the constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place—the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. *Tomlinson* v. *Branch*, 82 U. S. 15 Wall. 460 [21:189]. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation, which one of them possessed, falls to that portion of the new corporation to which, under its former name, it had been attached. If, upon the other hand, the consolidation worked a dissolution of the prior corporations, its former privileges and franchises also ceased to exist. Thus, in the earliest of these cases, *Philadelphia & W. R. Co.* v. *Maryland*, 51 U. S. 10 How. 376 [13:461], it was held that the Baltimore & Port Deposit Railroad Company, whose charter contained no exemption from taxation, did not acquire such exemption by consolidation with the Delaware & Maryland Railroad Company, whose charter exempted the road from taxation, [306] *"except upon that portion of the permanent and fixed works which might be in the state of Maryland." A general rule was laid down in this case to which this court has steadily adhered, that the taxing power of the state should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms. This case was subsequently reaffirmed in the *Minot* v. *Philadelphia, W. & R. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21:888].

In *Tomlinson* v. *Branch*, 82 U. S. 15 Wall. 460 [21:189], it was held that when a railroad company, to which, by its charter, an exemption from taxation was granted for a limited period, was by act of the legislature "merged" in another company, which thereby became invested with all its rights, property, and privileges, the exemption applied to the property with its limitation of time, and although the company in which it was merged had been granted a perpetual exemption from taxation in its charter, this perpetual exemption would not be extended to property so acquired, without express words, or necessary intendment to that effect. In *Central R. & Bkg. Co.* v. *Georgia*, 92 U. S. 665 [23:757], the act of the legislature authorized the Central Railroad and the Macon Railroad "to unite and consolidate" their "stocks" and all their "rights, privileges, immunities, property, and franchises" under the name and charter of the Central Railroad, in such manner that each owner of shares of stock of the Macon road should be entitled to receive an equal number of shares of the consolidated companies. It was held this consolidation was not a surrender of the existing charters of the two companies, and did not work the extinction of the Central Company, nor the creation of a new company, and also that the consolidated company continued to possess all the rights and immunities which were conferred upon each company by its original charter. The Central Company having been exempted from taxation beyond a limited amount by its original charter, it was held not to be within the power of the legislature to impose an increased tax after the consolidation was effected; but as the Macon Company had no provision in its charter limiting its liability to taxation, the power of the legislature remained *unimpaired to tax its [307] franchises, property, and income after its consolidation with the Central. It was said in the opinion of the court that "if in the statute there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied." It was held that the act did not work the dissolution of the existing corporations, and at the same time the creation of a new company, the court giving among other reasons that there was no provision for the surrender of the certificates of stock of the shareholders of the Central, and none for the issue of other certificates to them. It will be observed in this case that the road whose charter contained the exemption from taxation was preserved intact by the consolidation; and it was held that its exemption continued, while the other road was undoubtedly intended to go out of existence; and as the Macon road held its property and franchise subject to taxation, the Central, succeeding to the franchises and property, held them alike subject. Other cases to the same effect, and holding that the act of consolida-

tion did not operate as a dissolution of the constituent companies, are *Chesapeake & O. R. Co.* v. *Virginia*, 94 U. S. 718 [24: 310]; *Green County* v. *Conness*, 109 U. S. 104 [27: 872], and *Tennessee* v. *Whitworth*, 117 U. S. 139 [29: 833].

Upon the other hand we have held that the consolidation acts of Ohio and Maine worked a dissolution of the constituent companies and the incorporation of a new company, and that such company was subject to intermediate acts declaring the charters of corporations subject to be altered, amended, or repealed by the legislature. *Shields* v. *Ohio*, 95 U. S. 319 [24: 357]; *Maine Cent. R. Co.* v. *Maine*, 96 U. S. 499 [24: 836]. A leading case is that of *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359 [25: 185], wherein two railroad companies, each of which enjoyed by its charter a limited exemption from taxation, were consolidated by an act of the legislature passed April 18, 1863, which authorized a consolidation of their stocks, conferred upon the consolidated companies full corporate powers, and continued to it the franchises, privileges, and immunities which [308] the *companies had held by their original charters. It was held that by the consolidation the original companies were dissolved and a new corporation created, which became subject to the provisions of a statutory code, adopted January 1, 1863, permitting the charters of private corporations to be changed, modified, or destroyed at the will of the legislature. It was further held that a subsequent legislative act taxing the property of such new corporation as other property in the state was taxed was not a law impairing the obligation of a contract. It was said that the consolidation provided for was not a merger of one company into another, and the case of *Central R. & Bkg. Co.* v. *Georgia*, 92 U. S. 665 [23: 757], was distinguished from it in this particular. "Nor was it," says *Mr. Justice* Strong, "a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company." In the *St. Louis, I. M. & S. R. Co.* v. *Berry*, 113 U. S. 465 [28: 1055], a like effect was given to the consolidation of two roads by an agreement which provided that all the property of each company should be taken and deemed to be transferred to the consolidated company "as such new corporation without further act or deed." It was held that this created a new corporation, with an existence dating from the time the consolidation took effect, and that it was subject to constitutional provisions with reference to taxation in force at that time. See also *McMahan* v. *Morrison*, 16 Ind. 172, 79 Am. Dec. 418.

Looking at the Act in question in this case, we find that, by section 1, any Missouri railroad company whose tracks should connect with the road of an adjoining state was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, making one company of the two, whose stock should be so consolidated upon such terms, conditions, and stipulations as might be *mutually agreed [309] between them; that, by section 2, "such consolidation shall not be made, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated;" that, by section 3, the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and providing that a copy of the consolidation agreement, and the name adopted for the new company, "shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company." It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies, and the formation of a new one, than by providing that the two companies shall become one; that new certificates of stock shall be issued in exchange for the stock of the constituent companies; and that the consolidation agreement shall be recorded with the secretary of state as the charter of a new company. In our opinion this was the effect of the act in question.

It is impossible to conceive of a corporation existing without stock, or certificates representing the interests of the corporators in the organization. Now, if the act provides that these certificates shall be surrendered, and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders—who their officers? If the stock in the new company is sold, what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone as much as if they had formally surrendered their charters. The new company may doubtless receive by transmission from its constituent companies their property, rights, privileges, and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of his grantor, by inheritance, succession, or *purchase. The result is not a [310] mere union or partnership of two companies, nor the merger of the franchises of one in another, but the extinguishment of one and the creation of another in its place. Speaking of a similar act of Ohio, which declared that the consolidated companies "shall be deemed and taken to be one corporation, possessing within the state all the rights, privileges, and franchises, and subject to all the restrictions, liabilities, and duties of such corporations of this state so consolidated." *Mr. Justice* Swayne observed in *Shields* v. *Ohio*, 95 U. S. 319, 323 [24: 357, 358]: "It [the consolidation] could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All —the old and the new—could not coexist. It was a condition precedent to the existence of the new corporation that the old ones should

first surrender their vitality and submit to a dissolution. This being done, *eo instanti*, the new corporation came into existence."

It follows from this that, when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing, which required (art. 11, § 16) that no property, real or personal, should be exempted from taxation, except such as was used exclusively for public purposes; in other words, that the exemption from taxation contained in section 9 of the original charter of the Alexandria & Bloomfield Railway Company did not pass to the Missouri, Iowa & Nebraska Company. As was said of an Arkansas corporation in *St. Louis, I. M. & S. R. Co.* v. *Berry*, 113 U. S. 465, 475 [28: 1055, 1058], "it came into existence as a corporation of the state of Arkansas, in pursuance of its constitution and laws, and subject in all respects to their restrictions and limitations. Among these was that one which declared that 'the property of of corporations, now existing, or hereafter created, shall forever be subject to taxation the same as property of individuals.' This rendered it impossible for the consolidated corporation to receive by transfer from the Cairo & Fulton Railroad Company, or otherwise, the **311**] exemption sought to be enforced *in this suit." See also *Memphis & L. R. Co.* v. *Berry*, 112 U. S. 609 [28: 837]; *Shields* v. *Ohio*, 95 U. S. 319 [24: 357]; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244 [27: 922].

Nor was the exemption saved by section 3 of article 11, providing that "all statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly." This referred to statutes in force at the time the constitution was adopted, the operation of which is continued, notwithstanding the constitution. In this case, however, the exemption contained in section 9 of the charter of the Alexandria & Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached.

It is further insisted however that, under section 4 of the Act of March 2, 1869, there was a further provision that the consolidated company should be "subject to all the liabilities, and bound by all the obligations of the company within this state," and "be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place." Whether, under the name "franchises and privileges" an immunity from taxation would pass to the new company may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled. In the *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176 [29: 121], it was held that an immunity from taxation enjoyed by the Covington & Ohio Railway Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that "said purchaser shall forthwith be a corporation," and "shall succeed to all such franchises, rights, and privileges . . . as would have been had . . . by the first company but for such sale and conveyance." It was held, following in this particular *Morgan* v. *Louisiana*, 93 U. S. 217 [23: 860], that the words "franchises, rights, and privileges" did not necessarily embrace a grant of an exemption or immunity. See also *Pickard* v. *East Tennessee, V. & G. R. Co.* 130 U. S. 657 [32: 1051]. Upon the other hand, it was held in *Tennessee* v. * *Whitworth*, 117 U. S. [**312** 139 [29: 833], that the right to have shares in its capital stock exempted from taxation within the state is conferred upon a railroad corporation by state statutes granting to it "all the rights, powers, and privileges" conferred upon another corporation named, if the latter corporation possesses by law such right of exemption, citing in support of this principle a number of prior cases. See also *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 297 [36: 972, 979].

But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence that, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869.

(2) The question of estoppel remains to be considered. In 1873, the county of Scotland brought suit in the circuit court of Scotland county against the Missouri, Iowa & Nebraska Railway Company to recover the taxes of 1872 upon the property in question in this case, and was defeated, the court holding it to be exempt under section 9 of the charter of the Alexandria & Bloomfield Railway Company. It was conceded in that case that the Missouri, Iowa & Nebraska Railway Company had succeeded to all the privileges and liabilities of the Alexandria & Bloomfield Company. It appeared that in the seventh section of a general act concerning corporations, which act antedated the charter of the Alexandria & Bloomfield Railway Company, it had been declared that "the charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, *and repeal, in the discretion of the [**313** legislature;" and that on March 10, 1871, long subsequent to the charter of the Alexandria & Bloomfield road, the legislature had passed an act providing for the uniform assessment and collection of taxes upon railroad companies. On appeal to the supreme court of Missouri, that court held that the object of the general corporation laws of 1845 and 1855 was to confer certain powers and privileges and impose certain duties and liabilities, in the absence of any stipulations or provisions inconsistent with

those contained in special charters subsequently granted; that, if there were any inconsistencies in the charter of 1857 with such act, it must be understood that the restrictions of this act were intended to be removed, for reasons satisfactory to the legislature—in other words, that one legislature could not bind its successors, and if the legislature of 1857 thought proper to disregard the provisions of the general act concerning corporations, there was no principle upon which such power could be questioned. It followed from this that the exemption from taxation contained in the charter of 1857 was valid, and was a grant which could not be taken away by the act of 1871, subjecting all railways to the payment of taxes. The question upon which the case now under consideration was subsequently decided, namely, that the Missouri, Iowa & Nebraska Railway Company did not succeed to the exemption from taxation provided in the original charter of the Alexandria & Bloomfield Company, was not discussed in that case, since the exemption was conceded to inure to the latter company.

To the argument that this judgment constitutes an estoppel there are two answers:

First. There were no such privity of estate between the defendant in the suit, namely, the Missouri, Iowa & Nebraska Company, and the defendant in this suit as makes the judgment in that case *res adjudicata* in this. The mortgage of the Missouri, Iowa & Nebraska Railway Company, under the foreclosure of which this defendant purchased this road, was executed June 1, 1870, and neither the trustee under that mortgage, the Farmers' Loan & Trust [314] Company, nor the *bondholders, whom this mortgage secured, were parties to that action, which was begun in 1873 to recover the taxes of 1872. While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgagor, unless he or some one authorized so represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree. A leading case on this point is *Campbell* v. *Hall*, 16 N. Y. 575, in which it was held that a second mortgagee of land was not estopped by a judgment in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but might litigate the amount due upon the first mortgage, notwithstanding the judgment. Speaking of the rule that a grantee is estopped by a judgment against his grantor, because he holds by a derivative title from his grantor, and cannot, therefore, be in a better situation than the party from whom he obtained his right, the court observed: "This being the reason for the rule, it follows that it can have no application except where the conveyance is made after the event out of which the estoppel arises. The principle in such cases is that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveys must necessarily be subject, in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer. On the other hand, nothing which the grantor can do or suffer to be done after such transfer can affect the rights previously vested in the grantee." See also *Mathes* v. *Cover*, 43 Iowa, 512; *Bryan* v. *Malloy*, 90 N. C. 508; *Scates* v. *King*, 110 Ill. 456; *Dooley* v. *Potter*, 140 Mass. 49; *Coles* v. *Allen*, 64 Ala. 98; *Todd* v. *Flournoy*, 56 Ala. 99, 28 Am. Rep. 758; *Shay* v. *McNamara*, 54 Cal. 169.

Second. A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court *upon that question might [315] raise an estoppel in another suit, upon the principle stated in *Cromwell* v. *Sac County*, 94 U. S. 351 [24: 195]. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. This was an action upon certain bonds and coupons issued by the county of Sac. Defendant pleaded a judgment rendered in favor of the county in a prior action brought by one Smith upon earlier coupons upon the same bonds, accompanied by proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the suit was prosecuted for his sole use and benefit. The court held that there was a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. It was said that "it is not believed there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions." The same principle was reaffirmed in *Nesbit* v. *Independent Dist. of Riverside*, 144 U. S. 610 [36: 562], and *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 302 [36: 972, 981]. In the case of *Davenport* v. *Chicago, R. I. & P. R. Co.* 38 Iowa, 633, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. "The cases," said the court, "are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will *conclude the parties in the second. [316] . . . Taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two promissory notes made upon two distinct and separate, though similar, transactions between the

same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision."

Nor did the judgment in that case establish a rule of property upon which the plaintiff was entitled to rely, and upon the faith of which it claims to have purchased the road, inasmuch as it appears that the point upon which this case turns, namely, the right of the Missouri, Iowa & Nebraska Railway Company to the exemption in the original charter was conceded in that case, and the only rule of property established was that the Alexandria & Bloomfield Company was entitled to such exemption, notwithstanding the general act concerning corporations enacted prior thereto, which declared that the charter of every corporation should be subject to alteration or repeal, and the act of March 10, 1871, which provided a general law for the collection of taxes from railway companies. This, if anything, was the rule of property declared in that case; and as that rule is not relied upon in this case, and the tax is defended upon a ground not put in issue there, but conceded by counsel in favor of the company, it is difficult to see how that case can be regarded as establishing any rule of property of which the defendant can avail itself in this action.

(3) What is known as the Secor decree was obtained in a suit brought by Secor and other stockholders of the Missouri, Iowa & Nebraska Railway against the company itself, and also against the county court and officers of certain counties to enjoin the collection of taxes for 1881, or any previous years. The case was decided upon the authority of the above case of *Scotland County* v. *Missouri, I. & N. R. Co.* 65 Mo. 123, and an injunction granted in pursuance of the prayer of the bill. In ad-
317 dition to the fact above stated *that a suit for taxes for one year is not an estoppel to a suit for taxes for a different year, there is the same absence of that privity of estate so indispensable to an effective estoppel, which we hold to be fatal in respect to the judgment in the state court. If the plaintiff herein, the Keokuk & Western Railroad Company, would not have been affected by an adverse decree in the Secor suit, it cannot take advantage of the same by way of estoppel. The operation of an estoppel must be mutual.

There was no error in the judgment of the supreme court of Missouri, and it is therefore affirmed.

Mr. Justice **Harlan** and *Mr. Justice* **Brewer** dissented.

THE KEOKUK & WESTERN RAILROAD COMPANY, *Appt.*,

v.

THE COUNTY COURT OF SCOTLAND COUNTY ET AL.

(See S. C. Reporter's ed. 317, 318.)

Case followed.

The case of The Keokuk & Western Railroad Company v. Missouri, *ante*, p. 450, followed.

[No. 183.]

Argued Dec. 21, 22, 1892. Decided March 12, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Missouri, dismissing a suit in equity to enjoin the County Courts and Collectors of Revenue, for the Counties of Clarke, Scotland and Schuyler, in the State of Missouri, from levying and collecting taxes on the railway property owned by the plaintiff, in these counties. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a bill to enjoin the county courts and collectors of revenue for the counties of Clarke, Scotland and Schuyler, in the state of Missouri, from levying and collecting taxes on the railway property owned by the plaintiff in these counties.

Messrs. **Felix T. Hughes, John F. Dillon** and *Thomas Dewitt Cuyler* for appellant.

Messrs. **J. C. Moore, F. L. Schofield,** *T. L. Montgomery* and *John A. Whiteside* for appellees.

Mr. Justice **Brown** delivered the opinion of the court.

*This case differs from the one just de-[**318**
cided only in the fact that this is a bill in equity, filed by the corporation whose property is sought to be taxed, to restrain the defendants from levying or collecting any taxes for the years 1883 to 1887, inclusive, upon the ground that the Circuit Court for the Eastern District of Missouri in the *Secor Case*, 9 Fed. Rep. 809, and also the supreme court of the state, had held the property of the company not to be subject to taxation.

As the questions involved in the two cases are precisely the same, the decree of the court below dismissing the bill was correct, and the same is therefore affirmed.

Mr. Justice **Harlan** and *Mr. Justice* **Brewer** dissented.

THE KEOKUK & WESTERN RAILROAD COMPANY, *Appt.*,

v.

THE COUNTY COURT OF SCOTLAND COUNTY ET AL.

(See S. C. Reporter's ed. 318-327.)

Decree, when an estoppel—purchaser under mortgage—party to suit for taxes.

1. Where in a suit brought by stockholders of a railway company a decree was made enjoining

NOTE.—*As to estoppel by judgment*, see note to Aspden v. Nixon, 11: 1059.

As to estoppel in pais, see note to Stowe v. United States, 22: 144.

As to estoppel by recital in deed, or will, or other instrument, see note to Carver v. Astor, 7: 761.

As to estoppel by recitals in negotiable bonds or securities, see note to Mercer County v. Hackett, 17: 548.

As to estoppel as to contracts limiting the time

the collection of taxes of the railway company until the expiration of the exemption limited in the charter of said company, a purchaser of the railroad deriving his title from the foreclosure of a mortgage given before such suit is not entitled to file a bill to revive that suit nor can he invoke that decree as an estoppel against other suits brought to enforce, as a lien upon such property, the taxes levied thereon for other years; neither the prior mortgagee nor his representative having been made a party to the suit in which such decree was made.

2. The purchaser under a mortgage is not entitled to the benefit of an estoppel under a decree obtained in a suit begun after the execution of the mortgage.

3. Although the lien of the state for taxes ranks all other liens whether prior or subsequent, yet in a suit to enforce such lien, the holder of an incumbrance must be made a party, if it is desired to divest him of his rights.

[No. 414.]

Argued Dec. 21, 22, 1893. Decided March 12, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Missouri, dismissing a bill of revivor, filed by the Keokuk & Western Railroad Company, against the County Court of Scotland County *et al.*, to revive a suit begun August 6, 1879, by Charles A. Secor *et al.*, stockholders of, the Missouri, Iowa & Nebraska Railway Company, against the Judges of the County Court of Scotland, Schuyler and Clarke counties, the object of which suit was to enjoin the collection of taxes upon such railway company for the year 1879, and several years prior thereto. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a bill in equity filed by the Keokuk & Western Railroad Company to revive a suit begun August 6, 1879, by Charles A. Secor and other stockholders of the Missouri, Iowa & Nebraska Railway Company against the judges of the county courts of Scotland, Schuyler and Clarke counties, the object of which suit was to enjoin the collection of taxes *upon such railway company for the [319 year 1879 and several years prior thereto.

The bill of revivor, which was filed February 17, 1890, set forth the commencement of the suit by Secor against the county courts above named, and the rendition of a decree May 10, 1882, by which the defendants were enjoined from levying or collecting taxes of the railway company "until the expiration of the exemption limited in the charter of said railway company, to wit, December 1, 1892." and that the same was in full force and effect. The bill further alleged the execution of a mortgage in 1870 by the railway company to the Farmers' Loan & Trust Company of New York, the foreclosure of the same, the purchase of the road in 1886 by Morris K. Jesup and Henry C. Thatcher, a purchasing committee of the bondholders, and the conveyance of the same to the plaintiff, the Keokuk & Western Railroad Company, in December, 1886, whereby the Missouri, Iowa & Nebraska Railroad Company became dissolved, and Secor and the other stockholders ceased to have

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within which action must be brought, see note to Southern Exp. Co. v. Caldwell, 22: 556.

As to when vendee is estopped from disputing the title of his vendor, see note to Watkins v. Holman, 10: 878.

As to estoppel; stranger not bound by, and cannot take advantage of; who are not privies; infants; husband and wife, see note to Deery v. Cray, 18: 653.

Estoppel by declarations or conduct; by agreement; by representations; as to corporate existence or acts.

One who has procured the enactment of a special law intended for his benefit cannot question its constitutionality. Brown County v. Martin, 29 Ohio L. J. 317.

An abutting owner who assists in procuring the substitution of artificial for natural stone designated by the ordinance for use in street curbing cannot resist payment of his assessment on the ground that the ordinance was not followed. Brick & T. C. Co. v. Hull, 49 Mo. App. 433.

Consent by a mortgagee to the conveyance by the mortgagor of a small strip of the mortgaged land, followed by the making and recording of a deed, delivery of possession, and the making of improvements, estops both him and his vendees from asserting the superior claim of the mortgage. Haney v. Barney, 15 Ky. L. Rep. 142.

A tenant in common in a dam, ditch, and water right, who participated and assisted in maintaining the dam and diverting water from a natural stream, is estopped from maintaining an action for the diversion of the water. Churchill v. Baumann, 95 Cal. 541.

A residuary legatee who, without qualification, gives her assent to the making by the executor of payments to equalize other legatees with herself and co-legatees, and makes no objection to such payments being made, though knowing that they are made or are about to be made, until they are actually made—is estopped to contest the right of the executor to make such payments. Re Turfler's Estate, 1 Misc. 58.

The sale of a land to a railroad company to enable it to extend its tracks to another point does not estop the vendor from asserting ownership of the fee of a street in which the company had previously constructed its tracks, although the extension proposed would be useless unless such tracks could be used. Syracuse Solar Salt Co. v. Rome, W. & O. R. Co. 67 Hun, 153.

A purchaser at foreclosure sale who, upon the purchase of the property from the mortgagor, disclaims any interest, stating that she has been paid all that she paid out on the sale and has nothing more to do with the property, and advises the purchase, is estopped to assert title thereto, where her statements are relied upon. Moore v. Nye, 49 N. Y. S. R. 168.

A bank which settles in a foreign country with one who has stolen money from it, and, to enable him to make such settlement, solicits a third person to purchase from him a draft which he had procured with part of the stolen money, cannot dispute the title of the purchaser thereto. Capital City Bank v. Parent, 18 L. R. A. 240. 134 N. Y. 527.

A residuary legatee who for a valuable consideration signs an agreement placing a certain construction upon a doubtful clause in the will thereby authorizes the executor to act upon it in construing the will, and is estopped from claiming contrary to the agreement. Woodley v. Holley, 111 N. C. 380.

An indorser of a note is by his indorsement estopped to deny its validity on the ground that it purports on its face to have been made on Sunday. Prescott Nat. Bank v. Butler, 157 Mass. 548, 8 Bkg. L. J. 145.

A mortgagee who makes a parol agreement to

any interest therein, and "that by virtue of said mortgage, decree, and foreclosure sale all of the title in and to said property has become vested in your orator." The bill further alleged a change in the officers of the respective defendant counties, the beginning of three suits by the collector of revenue of Scotland county, to enforce, as a lien upon plaintiff's property, the taxes levied upon the Missouri, Iowa & Nebraska Railroad Company for the years 1872 to 1878, 1880, 1881, 1882, and 1887, and that the same were in violation and contempt of the injunction issued in the Secor case. The bill prayed that such suit might be revived against the counties and their officers in the name of the plaintiff as the same was at the dissolution of the Missouri, Iowa & Nebraska Railway Company, and that the collector of revenue of Scotland county be punished for contempt in instituting the suits for the collection of the taxes in violation of the decree upon the original bill.

On March 3, 1890, defendants interposed a demurrer to the bill for the county of Scotland, which was sustained on March 25 upon the ground that the plaintiff did not occupy such 320] a *relation to the parties to the original suit as to entitle it to file a bill of revivor, and that the decree in such original suit could not be invoked as an estoppel between the Keokuk & Western Railroad Company and the several counties which were made defendants to the bill. The court put its decision upon the ground that the plaintiff acquired its title by the foreclosure of a mortgage executed in 1870, and that it did not appear that the mortgagee or any representative of the mortgagee was made a party to the suit of Secor *et al.* against the railway company and the several counties. Coupled with the order sustaining the demurrer was a general order granting plaintiff leave to amend its bill.

Plaintiff thereupon, and on April 28, 1890, filed an amended bill, setting up that in September, 1880, the Missouri, Iowa & Nebraska Railroad Company leased its road for a term of years to the Wabash Railway Company, the lease containing an agreement that the Missouri, Iowa & Nebraska Company should execute a mortgage to the Mercantile Trust Company of New York to secure certain bonds which were to be guaranteed by the Wabash Company, and covenanting that it would cause the holders of the bonds of 1870 to accept the bonds so guaranteed by the Wabash Company in lieu of the prior bonds, and averring that the decree of foreclosure of the bonds of 1870 was not executed or the railroad property sold thereunder. That in pursuance of such lease the mortgage to the Mercantile Trust Company was executed March 1, 1881, and 2289 bonds were issued and guaranteed by the Wabash Company; that all of the 1870 bonds were exchanged for the guaranteed bonds, with the exception of 17; that the Wabash Company paid interest upon the same until June, 1884, the decree of foreclosure remaining unexecuted, when the Wabash Company became insolvent; that in 1886 the Farmers' Loan & Trust Company filed a supplemental bill of foreclosure against the Missouri, Iowa & Nebraska Railroad Company, the Mercantile Trust

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extend the time of payment limited in the bond and mortgage is estopped from foreclosing before the expiration of the period named, although such agreement is without consideration, where the party to whom the promise was made relied upon such promise in taking title to the mortgaged real estate. Van Syckle v. O'Heran, 50 N. J. Eq. 173.

A corporation is estopped to set up its own irregularities relating to the mode of execution, to defeat a security that it participated in placing upon the market, and the proceeds of which it received, for the purpose of giving precedence to a claim of its own. Colorado Loan & T. Co. v. Grand Valley Canal Co. 3 Colo. App. 63.

One who contracts with the owner of a patent for its use, agreeing to pay a compensation therefor, is estopped to assert its invalidity. Montgomery v. Waterbury, 2 Misc. 145.

One who takes a license to make and sell a patented article is estopped, in an action for royalties for sales made after the expiration of the license, to assert the invalidity of the patent. Denise v. Swett, 68 Hun, 188.

A promise not to use a process without the consent of the inventor, not knowing it was claimed as an invention, creates no estoppel against questioning the validity of a subsequent patent therefor which the inventor obtained to protect his rights, instead of relying on the promise. Leggett v. Standard Oil Co. 149 U. S. 287 (37: 737), 63 Pat. Off. Gaz. 1201.

A mortgagor who holds out to a bank holding notes to secure indorsement upon which the mortgage was made the validity of the bond and mortgage is estopped, as against the bank, to assert their invalidity. First Nat. Bank of Sing Sing v. Knevals, 51 N. Y. S. R. 22.

One who, for the purpose of procuring a machine on credit, represents to the seller that his wife owns certain real estate conveyed to them both and by him conveyed to her, and will give a mortgage thereon to secure the purchase price, is estopped, after the machine has been delivered to him in consideration of such mortgage and his wife has died, from asserting that the property was held by himself and wife by the entirety, and that the mortgage is invalid. Vellum v. Demerle, 65 Hun, 543.

A married woman who signs a power of attorney in blank to transfer a certificate of stock held in her name, partly filled up by her husband and witnessed by him, cannot reclaim the stock from a bona fide holder who has advanced money on the faith of such power of attorney, on the ground that the use thereof was unauthorized by her. Souder v. Columbia Nat. Bank, 156 Pa. 374.

A son having the right as against his father to remove as chattels improvements affixed to land, the equitable title to which he had procured from the latter, is estopped by joining with him in a mortgage of the land in which the improvements are treated as part thereof, to assert that such improvements are not fixtures as against the mortgagees having no notice of such right and those claiming under them. McFadden v. Allen, 19 L. R. A. 446, 134 N. Y. 489.

A vendor of a village lot having a barn at the rear, to which there is no access for teams except across the rear of an adjoining lot retained by him, is estopped, by parol representations made at the time of the sale, that there was a right of way across the latter lot, to deny its existence, although no such right is mentioned in the deed. Mattes v. Frankel, 65 Hun, 208.

An indorser of a note, who upon a purchaser thereof informing him that he has bought a note indorsed by him in a certain amount, tells him that he does not remember indorsing a note for

Company, the Wabash Company, and the Humeston & Shenandoah Railway Company, upon which a final decree of foreclosure was entered and the property ordered to be sold; 321] that upon the confirmation of such *sale the Missouri, Iowa & Nebraska Company, the Humeston & Shenandoah Company, and the Mercantile Trust Company were each ordered to execute and deliver to the purchaser deeds of the property; that in pursuance of such decree the property was sold in 1886, and Jesup and Thatcher became the purchasers; that these purchasers having conveyed the property to the plaintiff the same was turned over to it in December, 1886; that subsequently, in pursuance of such decree, the Missouri, Iowa & Nebraska Company and the Mercantile Trust Company executed to Jesup and Thatcher their respective deeds of conveyance of all their interest in the railway property, and that Jesup and Thatcher afterwards, for a valuable consideration, and in further execution of their said trust, conveyed the same to the plaintiff. Plaintiff further averred that the mortgage of the Mercantile Trust Company was made after the original injunction proceedings were commenced; that by the title acquired through the foreclosure of the same, and the several deeds of conveyance to it, plaintiff became entitled to all the rights and privileges of the injunction decree in the original suit, and to have the same revived against the defendants. To this amended bill the officers of Scotland county filed an answer, denying that any title was acquired by the plaintiff through the lease of 1880, or the mortgage of 1881, but that all such title was acquired through the foreclosure of the mortgage of 1870, and the sale thereunder in 1886. The answer further averred that the whole of the contract, lease, and mortgage of 1880 and 1881 was an abortive attempt to provide against a foreclosure and sale under the mortgage of 1870, and having failed, the whole of said proceedings were practically rescinded by order of the court in which the foreclosure proceedings were carried on.

On January 10, 1891, upon the supplemental bill, the answers, replication and proofs, a final decree was entered dismissing the bill of revivor upon the ground that plaintiff's title to the property related back to the mortgage of 1870, and that it acquired no title under the mortgage of 1881.

From this decree an appeal was taken to this court.

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such an amount, but that if his name is on the back it is good and will be paid, is not estopped to assert that the note has been raised or forged. Pearson v. Hardin, 95 Mich. 360.

A maker of a promissory note who assures one about to purchase it, that it is good and will be paid, and offers to pay it before or about the time of its maturity, is estopped from setting up a defense to the note, or prosecuting an application to open a judgment entered upon a warrant contained therein. Humphrey v. Tozier, 154 Pa. 410.

A maker of a note given upon a consideration which has failed, or procured by fraud, is estopped to deny his liability where he has signed a writing, stating that the note is a bona fide debt and there is no offset discount, or defense thereto, and that it is good against him and will be paid to the payee or his assignee, where the note is purchased in good faith and before maturity, in reliance upon such writing. Crabtree v. Atchison, 14 Ky. L. Rep. 813.

Voting at a subsequent illegal election which results in a tie will not estop a resident in a school district from seeking equitable relief to prevent the school directors from ignoring the result of a legal election which established the site for a school house, and expending the funds upon a site not lawfully selected. School Directors v. Wright, 43 Ill. App. 270.

A corporation is estopped from asserting that an agreement performed by the other party is *ultra vires* on its part. Homestead Bank v. Wood, 1 Misc. 145.

A corporation is estopped to deny that it was legally organized at the time it issued stock to a person because its charter was not registered, if the corporation is legally organized at the time of the suit. Roll v. St. Louis & C. Smelt. & M. R. Co. 52 Mo. App. 60.

A new company formed to take title to all the property of existing corporations, which are in fact to go out of existence for its benefit, is estopped to claim that any of the old corporation are in existence so as to preclude the stockholders in one of them from suing to compel the issue to him of stock in the new company in lieu of that held by him in the old, where it has entered the stock upon its books as belonging to him, and its refusal to deliver it has been placed solely on the ground of his nonpayment of a sum alleged to be equitably owing by him to a third person. Anthony v. American Glucose Co. 49 N. Y. S. R. 857.

One who has acted as a shareholder and proprietor in a corporation is estopped as against creditors from repudiating that relation. Kimball v. Davis, 52 Mo. App. 194.

Defendant in an action of unlawful detainer brought by a mining company in its proper corporate name against one of its tenants who has leased one of its tenement houses and has been engaged in mining coal for it, is estopped to deny the power of the corporation to execute the lease under a different name assumed for its own convenience, where he accepted said lease, occupied the premises and paid rent thereunder. Marmet Co. v. Archibald, 37 W. Va. 778.

A party who has contracted with a corporation as such cannot afterwards raise the objection that at the time he entered into such contract the corporation was not legally incorporated, if such corporation could constitutionally exist. Marmet Co. v. Archibald, *supra*.

A cashier is estopped to deny the right of the bank to commissions for the sale of bonds which he made acting for the bank officially, and at the bank's instigation. Mt. Vernon Bank v. Porter, 52 Mo. App. 244.

Agents of a foreign insurance company who collect premiums for it in the state are estopped, in an action by it for recovery of such premiums, to assert that the company is not authorized to do business in the state. Penn Mut. L. Ins. Co. v. Bradley, 51 N. Y. S. R. 39.

Persons seeking to enforce the liability of a corporation with which they have dealt are not estopped from denying the rightful existence of the corporation and holding the corporators liable as partners. Cleaton v. Emery, 49 Mo. App. 345.

A corporation defendant in a case cannot dispute the fact that a certain person is its president when a recognizance given by the corporation is signed by him as president, and in the absence of such recognizance it would have no standing in court. Babcock v. St. Louis Drayage Co. 51 Mo. App. 24.

Messrs. **John F. Dillon, Felix T. Hughes** and **Thomas De Witt Cuyler,** for appellant:

Deeds, when made by a master or commissioner, have exactly the same effect as if made by the party himself, and such will the effect of the decree, especially where the proceedings are in equity.

Pom. Eq. Jur. § 1817; *Hoffman* v. *Stiger*, 28 Iowa, 302; *King* v. *Bill*, 28 Conn. 598; *Gitt* v. *Watson*, 18 Mo. 274; *Illinois Grand Trunk R. Co.* v. *Wade*, 140 U. S. 65 (35: 342).

The statute of Missouri makes the railroad company operating the road the representative for the assessment and collection of taxes of all interests in the property, and a suit against the railroad company would cut out a bondholder without his being a party on the record to such suit.

Freem. Judgm. (2d ed.) §§ 174, 176; Cooley, Taxn. (2d ed.) §§ 411, 515; Blackwell, Tax Titles, 616; Hilliard, Mortg. §§ 440, 442; *Bowers* v. *Chambers*, 53 Miss. 259; *Harris* v. *State*, 55 Miss. 50; *Knox* v. *Huidekoper*, 21 Wis. 527; *Parker* v. *Baxter*, 2 Gray, 185; *Turner* v. *Smith*, 81 U. S. 14 Wall. 553 (20: 724); *Geekie* v. *Kirby Carpenter Co.* 106 U. S. 379 (27: 157).

The facts in the two cases require different pleadings and proof. The decision in the one case does not necessarily dispose of the other, and as shown by the decision of the court did not do it.

Cromwell v. *Sac County*, 94 U. S. 351, (24:195); *Russell* v. *Place*, 94 U. S. 606 (24: 214); *Nesbitt* v. *Riverside Independent Dist.* 144 U. S. 610 (36: 562).

All cases were appealed to this court, which prevented their use as an estoppel in any case.

Freem. Judgm. (2d ed.) § 325; *Cohn* v. *Lehman*, 93 Mo. 574; *Woodbury* v. *Bowman*, 13 Cal. 634; *Haynes* v. *Ordway*, 52 N. H. 284; *McCordy* v. *Alpha Gold & S. Min. Co.* 3 Nev. 27.

The original Secor decree, although brought by stockholders was in effect a decree in favor of the Missouri, Iowa & Nebraska Railway Company against the counties and tax collecting officials and successors.

Dodge v. *Woolsey*, 59 U. S., 18 How. 331, [15: 401]; *Memphis* v. *Dean*, 75 U. S. 8 Wall. 73 [19: 328].

Messrs. **J. C. Moore** and **F. L. Schofield** for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

This case raises the question whether the Keokuk & Western Railroad Company, which is now the owner of the property and franchises of the Missouri, Iowa & Nebraska Railroad Company, is entitled to revive a suit originally begun by Secor and other stockholders of the last named company, against the officers of three counties in Missouri, to enjoin the collection of taxes upon property formerly belonging to the Missouri, Iowa & Nebraska Railroad Company and now owned by the plaintiff.

(1) Upon demurrer to the original bill, the court held that the plaintiff, deriving its title from the foreclosure of a mortgage given before the suit which it sought to revive had been begun, did not occupy such a relation to Secor and the other stockholders, plaintiffs in the original suit, as entitled it to file the bill or invoke the decree in that court as an estoppel. In the case just decided of the *Keokuk & Western Railroad Company* v. *State of Missouri*, we held the principle of that ruling to be correct. Upon the same day that the order sustaining the demurrer was entered, viz, March 25, 1890, leave was granted to amend the bill, whereupon, and obviously for the purpose of meeting the objection raised by the court that the only title to the property claimed by the plaintiff was one derived from the foreclosure of the mortgage of 1870, plaintiff, on April 18, 1890, procured a deed from Jesup and Thatcher of their interest under the foreclosure of the mortgage of 1881 to the Mercantile Trust Company, and, on April 28, filed an amendment to its bill of revivor, setting up this and other deeds as evidence of title through the mortgage of 1881, which was given after the original injunction proceedings were commenced by Secor and claiming that, by *its title through [322:] the foreclosure of this mortgage, and through the various deeds of conveyance following the same, plaintiff was entitled to the benefit of the injunction decreed in the Secor suits, and to have the same revived and enforced against the defendants.

The court, however, found from the record evidence that the plaintiff derived its title to the property in controversy through the mortgage of June 1, 1870; that its title to the property in question related back to that mortgage, and hence the complainant was not entitled to the benefit of the original decree. In this conclusion we also concur. The facts in this connection, so far as we gather them from the pleadings, appear to have been that a bill to foreclose the mortgage of June 1, 1870, was filed December 30, 1879, a decree of foreclosure rendered thereon October 22, 1880, and the property ordered to be sold. Pending this foreclosure, and on February 12, 1880, the Missouri, Iowa & Nebraska Railway Company, the mortgagor, with the consent of a majority of the bondholders under the mortgage of June 1, 1870, entered into the contract with the Wabash Company to lease its road, and to induce the bondholders to surrender their bonds, and take in exchange therefor bonds of the Wabash Company which were to be secured by a new mortgage upon the Missouri, Iowa & Nebraska Company. Pursuant to such contract, the lease was executed on September 3, 1880, for a term of ninety-nine years, and the Wabash Company entered into possession of the road. On March 1, 1881, in pursuance of the contract and lease, a mortgage was executed to the Mercantile Trust Company to secure the payment of 2269 bonds made by the Wabash Company, with a provision that all the bonds that should be received by the trustee in the course of the exchange for the bonds secured by the mortgage of 1870 should be retained by the trustee for the protection of the bondholders.

The Wabash Company, having become insolvent in 1885, the Farmers Loan & Trust Company, for the purpose of enforcing their decree of foreclosure of October 22, 1880, filed a supplemental bill setting forth the proceedings *subsequent to the decree, and the [324] failure of the lessee company to pay the rentals

alleging that it never was the intention of the bondholders under the first mortgage that their bonds should be canceled, or the decree of October 22, 1880, vacated or annulled, or the right to execute the same be in any way abrogated or impaired; but that it was the design that the old bonds, having been exchanged, should remain in the hands of the Mercantile Trust Company to be used in pursuance of the trust. The bill further charged that the decree of October, 1880, was still in full force, and that the rights of the parties interested could not be fully protected otherwise than by a judicial sale of the road and other property covered by the first mortgage. The bill prayed for the enforcement of the decree of October 22, 1880, and for the same relief that the plaintiff might have had in case the matters subsequent to the decree had not occurred, and that the former decree might be promptly and immediately executed.

A decree upon this supplemental bill was entered on July 8, 1886. The decree adjudged that *the facts set forth in the supplemental bill of complaint were true;* that the decree of October, 1880, was still in full force, and was not reversed, vacated, or discharged. After setting forth the subsequent proceedings connected with the Wabash lease, the exchange of the bonds, etc., the failure of the mortgagor to pay the bonds and mortgages mentioned in the decree, it ordered the mortgaged premises *described in the decree of October, 1880,* to be sold. The sale was made August 19, 1886, and was subsequently confirmed, and a deed executed by the master to Jesup and Thatcher, purchasers, who subsequently, and on November 26, 1886, executed a deed to the Keokuk & Western Railroad Company.

From the maze of bills, supplemental bills, bills of revivor, decrees and deeds involved in this case we think the following facts clearly appear—(1) That the decree of October 22, 1880, was a decree for the foreclosure of the mortgage of 1870, and of that alone; (2) that the supplemental bill of the Farmers' Loan & Trust Company was filed to enforce that de-[325] cree; *(3) that, in the decree of July 8, 1886, rendered upon such supplemental bill, 17 bonds, issued under the mortgage of 1870, which had never been exchanged, were provided for as valid liens under that mortgage, and under that alone; (4) that the bonds held by the Mercantile Trust Company, as trustee, which had been exchanged for the prior bonds, were also recognized as claims secured by such mortgage; (5) that in such decree no mention was made of the mortgage of 1881, except by way of recital, and as part of the history of the case; (6) that the sale ordered was a sale in pursuance of the prior decree; (7) that in the master's deed to Jesup and Thatcher, and in their deed to the Keokuk & Western Railroad Company, no allusion whatever was made to the mortgage of 1881.

There was, it is true, a proviso in the last decree that, by way of a more ample protection to the purchasers, the defendants, the Missouri, Iowa & Nebraska Railway Company, the Humeston & Shenandoah Railway Company, and the Mercantile Trust Company should execute deeds of the property to the purchasers, and that in pursuance of such orders the deeds of 1890 were executed. But it is clear that nothing in fact passed by such deeds, since the deeds of the master to Jesup and Thatcher, and their deed to the Keokuk & Western Railroad Company had already conveyed all the interests of the defendants to the property in question.

The truth is that in these proceedings the mortgage of 1881 was treated as an abandoned security, and was practically ignored in the foreclosure proceedings which culminated in the sale of the road. The deeds of 1890 were evidently an afterthought for the purpose of procuring some kind of title under the mortgage of 1881, and of meeting the decision of the court sustaining the demurrer to the original bill of revivor.

(2) Plaintiff, however, makes a further claim that, under the law of Missouri for the taxation of railroads, the property and all interests therein are taxed as a whole to the company and no one else, and that proceedings against the company by suit or otherwise will divest the mortgagees of their rights *as well as the [326] company itself, notwithstanding they are not made parties to the proceedings; that the bondholders or their trustees are privies to such tax proceedings at law, and that inasmuch as the Secor suit was a bill in equity to prevent a multiplicity of tax suits, which would become necessary in the various years in which the tax was to be collected, during the limited exemption, it follows that if the railroad company becomes the legal representative of the bondholders, or their trustee in the tax suit at law, the same would be true in a proceeding in equity to enjoin such taxes.

Granting the general principles above stated to be correct, that a lien for taxes upon the property is a lien upon all the interests in such property, and that proceedings to enforce such lien will oust the mortgagees of their lien, we do not think the latter part of the proposition follows, that these bondholders or their trustees were privies to the suit in equity to enjoin such taxes. Indeed, it is difficult to see how the fact that the mortgagees would be bound in a proceeding by the state to enforce its lien for taxes would have any bearing upon the point in controversy. The bill sought to be revived is a bill to enjoin the taxes for 1879 and prior years, and the question was whether the plaintiff was entitled to the benefit of the decree in that case. This depended, not upon the question whether the lien of the state for taxes overrode the mortgagees' lien, but whether under the settled principles of law the purchaser under the mortgage is entitled to the benefit of an estoppel under a decree obtained in a suit begun after the execution of his mortgage. We hold that it would not have been estopped by that decree, if such decree had been adverse to Secor in that suit, and hence as estoppels must be mutual, it cannot claim the benefit of an estoppel in this case. The Secor bill was a bill to enjoin the collection of taxes for certain years; if the court had decided that the plaintiffs were not entitled to such injunction, but that the taxes were valid, we know of no reason why the Keokuk & Western Railroad Company would thereby be estopped to maintain a bill of its own for the same purpose, as it derived its title to the property in question from a mortgage long ante-

327]cedent to the *commencement of the suit by Secor. This seems to have been the view taken by the supreme court of Missouri in *Stafford* v. *Fizer*, 82 Mo. 393, in which that court held that although the lien of the state for taxes ranks all other liens whether prior or subsequent, yet in a suit to enforce such lien, the holder of a junior incumbrance must be made a party, if it is desired to divest him of his rights; otherwise he will entitled to redeem from the purchaser under the tax lien. See also *Gitchell* v. *Kreidler*, 84 Mo. 472.

The decree of the court below was correct, and it is therefore affirmed.

B. F. DOWELL, *Pl'ff in Err.*,
v.
DANIEL W. APPLEGATE.

(See S. C. Reporter's ed. 327-346.)

Judgment, when cannot be collaterally attacked—when conclusive—estoppel by judgment, extent of.

1. Although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, yet, if such jurisdiction does not so appear, the judgment of final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.
2. Even if the U. S. circuit court errs in entertaining jurisdiction, its determination of that matter is conclusive upon the parties before it, and cannot be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.
3. A decree in a Federal court which adjudges as between all the parties to the suit in that court, that certain deeds are fraudulent and void, and that the plaintiff is entitled to a sale of the lands sought to be reached in the suit, in satisfaction of his claims and directs such sale, concludes every matter that the defendant, under the pleadings was entitled to bring forward, and after such decree has been fully executed, the defendant cannot have the same issue retried in an independent suit upon a title which he could have set up but chose not to assert before the decree was rendered.
4. A judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented.

[No. 209.]

Argued Jan. 18, 1894. Decided March 5, 1894.

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1:640.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit, see note to Roberts v. Lewis, 36: 579.

As to colorable conveyances to enable suit to be brought; motive of transfer, when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

As to jurisdiction of United States courts over common law offenses, see note to United States v. Coolidge, 4: 124.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

As to judgment, when conclusive; res judicata, see note to Johnson Co. v. Wharton, *ante*, p. 429.

IN ERROR to the supreme court of the state of Oregon, to review a decree of that court, affirming the decree of the circuit court of Douglas county, Oregon, in favor of the plaintiff, Daniel W. Applegate, against the defendant, B. F. Dowell, enjoining said defendant, from asserting any title or claim by virtue of the latter's deed under a decree of the Federal court to a tract of land, in said Douglas county, Oregon, containing forty acres. *Reversed, and cause remanded for further proceedings.*

See same case below, 15 Or. 513, 17 Or. 299.

The facts are stated in the opinion.

Messrs. **B. E. Dowell** and **John H. Mitchell**, for plaintiff in error:

A former judgment between the same parties in which a claim was decided, or was properly involved and might have been decided, is a bar to another action or suit as to such claim.

Stockton v. *Ford*, 59 U. S. 18 How. 418 (15: 395); *Barrett* v. *Failing*, 8 Or. 156; *Bellinger* v. *Craigue*, 31 Barb. 534; *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 619 (19: 205); *Cromwell* v. *Sac County*, 94 U. S. 351 (24: 195); *Davis* v. *Brown*, 94 U. S. 423 (24: 204); *Neil* v. *Tolman*, 12 Or. 289; *Starr* v. *Stark*, 1 Sawy. 275; *Young* v. *Babilon*, 91 Pa. 280; *Wright* v. *Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Nichols* v. *Dibrell*, 61 Tex. 539; *Chapman* v. *Chapman*, 59 Pa. 214; *Edwards* v. *Stewart*, 15 Barb. 67.

If plaintiff's claim was not actually litigated and determined in the case in the Federal court it was properly involved therein, and might and should have been determined; hence the estoppel operates.

Freem. Judgm. § 249; Herman, Estoppel, § 409; *Wright* v. *Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Winfield* v. *Bacon*, 24 Barb. 154; *Foote* v. *Sprague*, 12 How. Pr. 355; *Farmin* v. *Thomasson*, 45 Ga. 553; *Nass* v. *Van Swearingen*, 10 Serg. & R. 145.

A person is estopped who, when he has full opportunity to assert his claim both in court and out of court, stands by and permits a sale of his own property under a judicial decree.

Epley v. *Witherow*, 7 Watts, 165; *Carr* v. *Wallace*, 7 Watts, 400; *Brewster* v. *Striker*, 2 N. Y. 19; *Young* v. *Babilon*, 91 Pa. 283.

The decree of the Federal circuit court is conclusive as to the land in question. It is not vulnerable to collateral attack.

McCormick v. *Sullivant*, 23 U. S. 10 Wheat. 192 (6: 300); *Ex parte Watkins*, 28 U. S. 3 Pet. 193 (7: 650); *Kennedy* v. *Bank of Georgia*, 49 U. S. 8 How. 586 (12: 1209); *Huff* v. *Hutchinson*, 55 U. S. 14 How. 586 (14: 553); *Bell* v. *Merrifield*, 109 N. Y. 203; *Ferrer's Case*, 6 Coke, 7; *Henderson* v. *Henderson*, 3 Hare, 115; *Bagot* v. *Williams*, 3 Barn. & C. 241; *Roberts* v. *Heim*, 27 Ala. 678; *Stafford* v. *Clark*, 2 Bing. 382; *Miller* v. *Covert*, 1 Wend. 487.

Mr. **J. N. Dolph**, for defendant in error:

The circuit court of the United States did not have jurisdiction of the cause.

Little York Gold Wash. & W. Co. v. *Keyes*, 96 U. S. 199 (24: 656); *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Starin* v. *New York*, 115 U. S. 257 (29: 390); *Dowell* v. *Griswold*, 5 Sawy. 39; *Dowell* v. *Applegate*, 7 Sawy. 232; *United States* v. *Isham*, 84 U. S. 17 Wall. 504 (21: 730); *Sime* v. *Howard*, 4 Nev. 473.

The plaintiff in this cause was not estopped

from setting up his title to the land in controversy, acquired by a duly executed and recorded deed, and for a sufficient consideration, prior to the commencement of the suit tried in the United States circuit court, although made defendant therein as to other conveyances, the bill in that suit containing no allegations concerning his deed or title acquired thereunder to the land in controversy in this suit.

Bigelow, Estoppel (5th ed.) 188; *Cromwell* v. *Sac County*, 94 U. S. 351 (24: 195); *Bissell* v. *Spring Valley Twp.* 124 U. S. 231 (31: 413); *Glenn* v. *Savage*, 14 Or. 567; *Caperton* v. *Schmidt*, 26 Cal. 479; *Garwood* v. *Garwood*, 29 Cal. 514; *Foye* v. *Patch*, 132 Mass. 105; *Russell* v. *Place*, 94 U. S. 608 (24: 215); *Chrisman* v. *Harman*, 29 Gratt. 499; *Gardner* v. *Raisbeck*, 28 N. J. Eq. 71; *McNutt* v. *Trogden*, 29 W. Va. 469; *Griffin* v. *Wallace*, 66 Ind. 410; *Parnell* v. *Hahn*, 61 Cal. 131; *Waterman* v. *Morrill*, 72 Cal. 48; *Adams* v. *Adams*, 25 Minn. 72; *Aurora* v. *West*, 74 U. S. 7 Wall. 82 (19: 42); *Secor* v. *Sturgis*, 16 N. Y. 548; *Burlen* v. *Shannon*, 99 Mass. 200.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the title to a tract of land in Douglas county, Oregon, containing forty [328] acres, part of what is known *as the donation land claim of Jesse Applegate, number thirty-eight, in township twenty-two south, of range five west of the Willamette meridian.

The defendant in error, Daniel W. Applegate, holds under a deed executed to him by William H. H. Applegate and wife, dated October 8, 1874, and recorded October 31, 1874. He brought this suit in the circuit court at Douglas county, Oregon, to obtain a decree removing the cloud upon his alleged title created by a deed made to the defendant Dowell by a master in chancery, pursuant to an order of the Circuit Court of the United States for the District of Oregon, in a suit determined by that court in which Dowell was plaintiff and Daniel W. Applegate was one of the defendants. At a sale held in conformity with the final decree in that suit, Dowell became the purchaser of the land in question. That sale was duly confirmed, and a deed executed to him. From that decree of sale no appeal was taken.

Dowell bases his claim to the land upon the decree and orders in the above suit in the circuit court of the United States; and the controlling question before this court is as to the effect of that suit.

The state court did not give to the decree and orders in the Federal court the effect claimed for them; and it is necessary to a clear understanding of the grounds upon which it refused to do so, that we ascertain the precise nature of the proceedings in the latter court.

From the recitals in a supplemental bill filed by Dowell in the suit in the Federal court, it appears that the suit was commenced on the 11th day of October, 1879, in the circuit court of Douglas county, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon. Upon whose application, or upon what grounds, it was so removed, the record before us does not clearly show. But it does appear that Dowell, on the 5th day of April, 1881, in order to conform his pleadings to the practice of the courts of the United States, sitting in equity, filed a bill in the Federal court disclosing the grounds of his suit. The defendants were Jesse Applegate, and his wife, *Cynthia [329] Ann Applegate, William H. H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Long, John C. Drain, Jonas Ellensberg, and Charles Putnam.

The bill filed by Dowell made the following case: In a suit brought on the official bond of one May, secretary of state of Oregon, executed September 6, 1862—his sureties being Jesse Applegate, O. Jacobs, and James Kilgore—judgment was entered, June 24, 1874, in favor of the state for the sum of $1622.50, and the costs, expenses and disbursements of the action. That judgment was unsatisfied in whole or in part when Dowell brought his suit.

On the 4th day of August, 1874, in a suit instituted in the circuit court of Marion county, Oregon, against Dowell and Jesse Applegate, who were sureties on the official bond of May, dated August 4, 1866, for another term of the office of secretary of state, the state recovered judgment for the sum of $8929.85, together with the costs, expenses, and disbursements of the action. That judgment was duly entered August 11, 1877, on the judgment lien docket of Douglas county. Prior to June 27, 1878, Dowell paid on it the sum of $10,837.75; and, on that day, he recovered a judgment in the circuit court of Douglas county against Jesse Applegate, as co-surety, for the sum of $4882.19, with costs, expenses, and disbursements. That judgment was also, and on the day of its rendition, entered on the judgment lien docket of Douglas county.

A balance of $1385.61 due the state on its judgment was paid by Dowell, November 16, 1878. He gave notice, November 28, 1878, in conformity with the statutes of Oregon, that he claimed the benefit of the judgment of the state against Jesse Applegate for contribution of said sum, with costs and expenses, and that notice was duly entered of record. An execution was issued April 4, 1879, on the state's judgment, with costs, etc., and under it the lands levied on were sold May 21, 1879, to Jesse Applegate for upwards of $1200. This left due to Dowell on that execution $284.61, with interest from May 31, 1879.

The amount due Dowell, January 1, 1881, from Jesse Applegate, *on both of the [330] above judgments, with interests and costs, was $6584.09. Execution was issued, September 17, 1879, in his favor for $4882.31, and was duly returned "no property found." A second execution issued October 7, 1879, with a like result.

Jesse Applegate was, at one time, the owner in fee of the north half of a donation land claim, with a life estate in the south half that had been set apart to his wife—such claim having been taken up in 1849, under the laws of the provisional government of Oregon, and afterwards under the Act of Congress, approved September 27, 1850, entitled "An Act to Create the Office of Surveyor General of the Public Lands in Oregon and to Provide for the Survey, and to Make Donations to Settlers, of the said Public Lands." The tract of land

so taken up contained 642 acres, and was known on the surveys and maps of the United States as Jesse Applegate's donation and claim No. 38, in township 22. He was, also, the owner of other lands in Douglas county, Oregon.

Dowell's bill referred to deeds purporting to have been executed in 1867 and 1869 by Jesse Applegate and wife to W. H. H. Applegate, Daniel W. Applegate, Peter Applegate, Sallie Applegate, and Charles Putnam—children and grandchildren of the grantors—for lands aggregating more than a thousand acres, a large part of which was within the above donation claim. It is also referred to a deed executed June 24, 1871, by W. H. H. Applegate, conveying to Charles and John C. Diain, for $2000 in cash paid, 200 acres in the south half of that claim.

In respect of all of the above deeds the charge was that they were fraudulent and void as against the state of Oregon and Dowell; that the respective deeds to William H. H. Applegate and Daniel W. Applegate, dated in 1867, were antedated for the purpose of deceiving, cheating, delaying, and defrauding the state and Dowell, and were, in fact, not made and delivered until 1869. In respect to the deed of June 24, 1871, the charge was that the price paid by the grantee was $2000, "yet the deed, to conceal the value of the land and to cheat and defraud the creditors of 3:31] Jesse Applegate *and to make the price correspond with the said deed of Jesse Applegate and his wife to the said William H. H. Applegate, on its face only expresses the consideration of $500, and it, in place of having a revenue stamp of $2, as was required by the Act of Congress at the date of said deed, only has a revenue stamp of 50 cents on it." Dowell's bill also averred that all of said deeds were "illegal and a fraud under the statute of the United States entitled 'An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt,' approved 30th day of June, 1864, and the amendments thereunto; that an inadequate consideration was expressed in each of said deeds by the grantors and grantees with the intent of evading the provisions of said statute; that the grantors and grantees well knew the land conveyed by each deed was at the date thereof worth in cash more than $1000, and each of them have a revenue stamp on them of 50 cents and no more, not one half the amount required by said Act of Congress, and the recording of each of them was in violation of the spirit meaning of sections 152, 156, and 158 of said statute; that none of said stamps have been cancelled by writing the date when the deed was so used or stamps affixed on the same, and none of them have the initials of the person using them or affixing the same prior to the placing said deed on the records of Douglas county in the state of Oregon."

The relief sought by Dowell was a decree declaring the above mentioned deeds to be illegal, fraudulent and void as to him; ordering the sale of the lands described in the bill under the judgments in favor of himself and the state; that an account be taken of the rents, issues, and profits of each tract for the six years preceding the commencement of the suit; that the grantees be compelled to pay the rents, issues, and profits on the tracts severally deeded to them; and that plaintiff have such other relief as in equity and good conscience was proper.

Daniel W. Applegate, May 2, 1881, filed an answer to Dowell's bill, putting in issue most of its material allegations and denying that Dowell was entitled to the relief asked for in the bill. He denied that his deeds, or either of them, were *"a fraud under the statutes [3:32 of the United States or any statute relating to internal revenue," or that the consideration was expressed in either of them with an intent to evade the provisions of that or any other statute. He admitted that each deed made to him had on it a stamp of fifty cents only, but alleged that stamps were put on each in good faith and without any intent to evade the requirements of the statute of the United States, and that the recording of such deeds was not in violation of any law.

He made no reference in his answer to, and, so far as the record before us discloses, did not introduce in evidence, the deed for the forty acres made to him October 8, 1874, by William H. H. Applegate, *although that deed is made by his bill in the present action the foundation of his claim to that tract.*

By the final decree in Dowell's suit, rendered January 5, 1883, it was adjudged that on and prior to April 19, 1869, Jesse Applegate and Dowell were jointly and severally liable to the state of Oregon in the sum of five thousand and five hundred and forty-six dollars, as sureties on the official bond of August 4, 1866, of May, secretary of state, by reason of the defalcation of that officer, which sum was equal to the value of all the property and assets then owned and possessed by Jesse Applegate; that there was due to Dowell, on the accounts mentioned in his bill, $7488.48, for which sum with interest, he, by virtue of his judgment, obtained June 27, 1878, had a lien upon all the real property of Jesse Applegate, in Douglas county, from and after the entry and docketing of that judgment; that "on and prior to April 19, 1869, Jesse Applegate was the owner in fee simple of 121.55 acres of the north half of the donation claim numbered thirty eight; that "the conveyance of said 121.55 acres by said Jesse Applegate to his sons William H. H. Applegate and Daniel W. Applegate, by deeds dated April 19 and 20, 1869, respectively, was voluntary, and without valuable consideration, and in fraud of the rights of the plaintiff herein, and is, therefore, as to him and his assigns, declared to be null and void." The decree also declared void as against Dowell and his assigns *a deed [3:33 to Peter Applegate for two tracts containing together 41.31 acres, deeds to Daniel W. Applegate and Peter Applegate for 225 acres in the south half of the above donation claim, and a deed to Sallie Applegate.

The decree further provided that unless Jesse Applegate, Peter Applegate, Daniel W. Applegate, William H. H. Applegate, and Sallie Applegate paid the sum adjudged to be due to Dowell, within a named time, the master of the court should sell, as upon execution at law, *all the interest of Jesse Applegate in the above mentioned tract of* 121.55 *acres*, and in the

lands embraced in the deeds to Peter Applegate and Sallie Applegate, containing respectively, 41.31 and 160 acres, and that the purchaser should be entitled to the possession of the premises purchased, upon the receipt of the master's conveyance therefor. *The tract in dispute is part of the tract of* 121.55 *acres.* The bill was dismissed as to Putnam and Ellensberg.

In respect to a conveyance to William H. H. Applegate for 160 acres in the north half of the donation claim numbered 38, and the conveyance of the same date to Daniel W. Applegate of 146 acres in the south half of that claim, they were held to be valid, the court finding they were made in good faith, and at a time when the grantor was otherwise able to meet his pecuniary obligations.

A sale took place under the decree of the Federal court on the 26th of April, 1883, Dowell becoming the purchaser of the lands ordered to be sold, at the price of $7400. The sale was in all things confirmed by the court, and the master, December 6, 1883, pursuant to its order, made and acknowledged a deed to Dowell, which was duly approved, was acknowledged March 28, 1884, and recorded August 19, 1884.

The present suit was brought by Daniel W. Applegate on the 17th day of August, 1866—more than three years after the decree in the Federal court—for the purpose, as we have already stated, of obtaining a decree enjoining Dowell from asserting any title or claim, by virtue of the latter's deed under the decree of the Federal court, to the tract of 40 acres conveyed to the plaintiff herein by William H. H. 334] Applegate, *by deed dated October 8, 1874. The bill, admitting *that that tract was embraced in the deed made by the master to Dowell,* avers that the conveyance by William H. H. Applegate to Daniel W. Applegate was prior in time to the commencement of the suit in the Federal court, and its validity was in nowise put in issue or determined by the decree of that court.

The answer of Dowell, in the present suit, as stated at the outset, bases his claim upon the decree of the Federal court and the sale under it at which he purchased. Referring to the deeds made by Jesse Applegate to his sons William H. H. Applegate and Daniel W. Applegate, the answer charges that they were made with the intent to cheat, delay, and defraud the state of Oregon and the defendant; and that those deeds, as well as the deed from William H. H. Applegate to Daniel W. Applegate, were without any valuable consideration whatever; and that defendant purchased the land in question without any actual notice of the latter deed. The answer further avers that the deed, under which plaintiff now claims the tract of 40 acres, was put in issue in the suit in the Federal court, and was determined by the decree of that court.

The reply of Daniel W. Applegate controverts all the material allegations of Dowell's answer and denies that the Circuit Court of the United States for the District of Oregon had any jurisdiction to hear and determine the suit brought by Dowell, or to render the decree under which the lands here in question were sold.

Upon the hearing of the present cause in the circuit court of Douglas county, the bill was dismissed, the court being of opinion that the decree of the Federal court in the suit brought by Dowell was a bar to the present one. This decree was reversed by the supreme court of Oregon. *Applegate* v. *Dowell,* 15 Or. 513. Upon a second trial of this cause in the court of original jurisdiction, there was a decree in favor of Daniel W. Applegate, which decree, upon the appeal of Dowell, was affirmed upon the authority of the previous decision in the supreme court of Oregon. *Applegate* v. *Dowell,* 17 Or. 299. Among the findings of the circuit court of Douglas county, at the last trial of this case, were *the following: "That no [335 evidence was offered or admitted sustaining or tending to sustain the allegations in the answer of defendant, [Dowell] that the plaintiff and his brother William H. H. Applegate, at the time of the deed of Jesse Applegate to William H. H. Applegate, and the pretended deed from William H. H. Applegate to plaintiff, well knew that Jesse Applegate was largely indebted to the state of Oregon, as one of the sureties of S. E. May, late secretary of state, and both of said deeds were made with the intent to cheat and defraud the state of Oregon and B. F. Dowell, one of Jesse Applegate's co sureties, out of said debt; that the said William H. H. Applegate and Daniel W. Applegate received said deeds with the intent to cheat, delay, and defraud the state of Oregon and B. F. Dowell out of said debt; that both of said deeds were made and delivered to William H. H. Applegate and Daniel W. Applegate without any valuable consideration whatever; and that the deed of William H. H. Applegate to his brother Daniel W. Applegate was made and delivered without any valuable consideration whatever, or any of said allegations." The circuit court of Douglas county, for that reason only, found those allegations and each of them to be untrue.

From this history of the litigation between the parties, it appears that Dowell, in his answer in this suit, asserted his right to the forty acres in dispute under and by virtue of the decree and proceedings in the circuit court of the United States. That right having been denied by the judgment of the supreme court of Oregon, affirming the judgment of the circuit court of Douglas county, it is necessary to inquire—

First, whether the decree and proceedings in the Federal court were, as claimed, void for the want of jurisdiction to hear and determine the suit which was instituted by Dowell in the circuit court of Douglas county, Oregon, and was subsequently removed into the Circuit Court of the United States for the District of Oregon;

Secondly, whether, if such decree and proceedings were not void, the state court gave due effect to them, when adjudging *that [336 Dowell took nothing by his purchase of the lands in dispute under that decree.

If these questions be determined in favor of Dowell, then the judgment below was erroneous in that it denied a right specially set up and claimed by him under the authority of the United States.

1. Dowell, we have seen, brought his suit in

the circuit court of Douglas county on the 11th day of October, 1879, and his bill in the Federal court which took the place of the bill filed in the state court, was filed April 6, 1881. The present transcript does not contain all the proceedings in the circuit court of Douglas county prior to the removal of the cause into the Federal court. Nor does it contain the petition for removal. But the state court below had before it, in the present suit, the bill filed by Dowell in the Federal court, April 6, 1881, his supplemental bill of September 25, 1881, the answer of Daniel W. Applegate of May 2, 1881, and the final decree of January 5, 1883. It was also informed, by the findings of fact in the circuit court of Douglas county, of the sale made by the master in chancery under that decree, the confirmation of that sale by the court, the execution of the deed to Dowell, and that the tract described in Applegate's complaint in this suit is a part of the premises described in the above decree of sale and in the master's deed to Dowell.

In the bill and supplemental bill of Dowell, he and the defendants to the suit in the Federal court are described as citizens of Oregon. But there is no finding, nor anything in the present transcript, showing the citizenship of the parties at the time Dowell brought his suit in the state court, nor at the time of the filing of the petition for removal. It is therefore contended that this court cannot assume that the parties to the suit in the Federal court were all citizens of Oregon at the time that suit was brought, or when it was removed from the state court. *Sterens* v. *Nichols*, 130 U. S. 230 [32: 914]; *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 [33: 144]; *La Confiance Compagnie d' Assurance contre l'Incendie* v. *Hall*, 137 U. S. 61 [34: 573].

If it be assumed that all the parties to Dow-[337] ell's suit were *citizens of Oregon when it was commenced, as well as when it was removed into the Federal court—and such, probably, was the case—it is yet quite apparent that jurisdiction was taken by that court on the ground that the deeds by Jesse Applegate and wife which obstructed Dowell in his efforts to reach the lands described in them, were charged to have been insufficiently stamped under the acts of Congress then in force providing internal revenue for the support of the government and to pay the interest on the public debt, and that the failure to put sufficient stamps on those deeds and to properly cancel them was with the intent to evade such acts. We may so interpret the record, because in the opinion of *Judge* Deady, in *Dowell* v. *Applegate*, 7 Sawy. 232, 239, when that case was before the Federal court upon demurrer interposed by some of the original defendants, he stated that the removal to the Federal court was "on the ground that its determination involved the construction of certain provisions of the Internal Revenue Act of June 30, 1864 (13 Stat. at L. 223) and the amendments thereto."

It thus appears, upon the face of the record of the suit in the Federal court, that the case depended, in part, upon the construction of certain acts of Congress, and upon the effect of the alleged fraudulent omissions of the grantors in the deeds attacked to conform to those acts. If all those deeds were void, by reason of such omissions, then the difficulties in the way of Dowell's reaching the lands embraced by them would probably have disappeared.

If the Federal court erred in assuming or retaining jurisdiction of Dowell's suit—a question not necessary to be examined—would it follow that its final decree, being unmodified and unreversed, can be treated as a nullity when assailed collaterally by one who was a party to the suit in which it was rendered?

In *Kempe* v. *Kennedy*, 9 U. S. 5 Cranch, 178, 185 [3: 70, 73], it was said by *Chief Justice* Marshall that "all courts are inferior courts in relation to the appellate courts before which their judgments may be carried, but they are not, therefore, inferior courts in the technical sense of those words. *They apply to [338] courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are absolute nullities, which may be totally disregarded."

In *Skillern* v. *May*, 10 U. S. 6 Cranch, 267 [3: 220], it appears that after the reversal by this court of a decree of the Circuit Court of the United States for the District of Kentucky, and after the cause was remanded to the court below, it was discovered to be one not within the jurisdiction of that court. The question arose whether the court could dismiss the action for want of jurisdiction, after this court had acted thereon. It was held that "the merits of the cause having been finally decided by it, and its mandate requiring only the execution of its decree, the circuit court was bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

In *Cameron* v. *McRoberts*, 16 U. S. 3 Wheat. 591 [4: 467], a suit brought in the district court of Kentucky, then having the jurisdiction of a circuit court, the pleadings stated that McRoberts, the plaintiff, was a citizen of Kentucky, and that the defendant Cameron, was a citizen of Virginia. The citizenship of other defendants was not stated. The defendants all appeared and answered, and a decree was pronounced for McRoberts. Subsequently Cameron filed a bill of review, and moved to set aside the decree and to dismiss the suit, "because the want of jurisdiction appeared on the record," and upon the allegation that the parties to the bill were all citizens of Kentucky. It was held that the court below had not power over its decree, so as to set the same aside on motion after the expiration of the term at which it was rendered, and that if a joint interest vested in Cameron, and the other defendants, the court had no jurisdiction over the cause, although jurisdiction could be exercised as to Cameron, if a distinct interest vested *in him, so that substantial jus-[339] tice, so far as he was interested, could be done without affecting the other defendants.

In *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 192, 199 [6: 300, 302], certain defendants filed a plea in bar to a suit brought against them, setting up the proceedings and decree in

a former suit brought by the plaintiffs in the district court of Ohio, exercising the powers and jurisdiction of a circuit court. A special replication to this plea was filed, setting forth the record of the former suit, and alleging that the proceedings in that suit were *coram non judice*, the record not showing that the complainants and defendants in that suit were citizens of different states. This court said that the reason assigned in the replication why the former decree could not operate as a bar "proceeds upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction: but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error or appeal, be reversed for that cause. But they are not absolute nullities." It was, therefore, held that the decree in the first suit, whilst it remained unreversed, was a bar to the last suit as to the defendants who were also parties to the first suit.

In *Ex parte Watkins*, 28 U. S. 3 Pet. 193 [7: 650]. *Chief Justice* Marshall said that "it is universally understood that the judgments of the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world," and that an "apparent want of jurisdiction can avail the party only on a writ of error."

Similar views were expressed in *Bank of United States* v. *Moss*, 47 U. S. 6 How. 31, 39 [12: 331, 334], and *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552, 557 [31: 202, 204], in the latter of which cases it was said that "although the judgments and decrees of the circuit court might be erroneous, if the records failed to show the facts on which the jurisdiction of the court exists, such as the **340**]plaintiffs were citizens of different *states from the defendant, yet they were not nullities, and would bind the parties until reversed or otherwise set aside."

These cases establish the doctrine that, although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record (*Börs* v. *Preston*, 111 U. S. 252, 255 [28: 419, 420], and the authorities there cited) yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the circuit court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court. As said in *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* above cited, if the circuit court "kept the case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the circuit court. The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal."

This disposes of the first objection urged against the decree in the Federal court under which Dowell purchased. That *decree [**341** cannot be treated, in this suit, as void for want of jurisdiction.

2. We now proceed to consider what effect should be given to the decree and proceedings in the suit in the Federal court. Although the bill in that suit refers to various deeds executed by Jesse Applegate and wife for lands that Dowell sought to have sold, and charged that they were made with the intent to delay and defraud both the state of Oregon and Dowell, the fundamental question presented was whether the lands themselves, fully identified by the pleadings, could be rightfully sold in satisfaction of Dowell's demands. To that issue, directly made, Daniel W. Applegate was a party. He met all the material allegations of Dowell's bill by denials that put upon the latter the burden of showing that he was entitled to the relief sought by him. The issue thus made was determined adversely to Applegate as to some of those lands.

This court, as we have seen, adjudged that on and prior to April 19th, 1869, Jessie Applegate was the owner in fee of 121.55 acres of the north half of said donation claim, and that the deeds of April 19 and 20, 1869, from Jesse Applegate to W. H. H. Applegate and Daniel W. Applegate, covering said 121.55 acres, were voluntary, without consideration, and in fraud of the rights of Dowell, and therefore, as to him and his assigns, null and void. It was further adjudged that all the interest of Jesse Applegate, on the 1st of January, 1869, in that 121.55 acres (and in other lands referred to in the decree) be sold by the master commissioner of the court. It cannot be said that this decree was not within the scope of the pleadings in the suit in the Federal court. And it certainly covered the lands now in dispute, for it is admitted that the 40 acres described in the deed of October 8, 1874, from W. H. H. Applegate to the present plaintiff are part of the 121.55 acres directed by the decree of the Federal court to be sold, and which was, in fact, sold—Dowell becoming the purchaser.

Upon what principle can it be held that that decree, being unmodified and unreversed, does not conclude the parties to the suit in which it was rendered, in respect to the *liability [**342** of the lands described in it for the demands of

Dowell as ascertained and settled by the court? It is said that the deed of October 8, 1874, under which Daniel W. Applegate claims the forty acres, was not distinctly put in issue by the pleadings or determined by the decree. But its validity was involved in the larger question presented by the pleadings as to the right of Dowell to subject to his demands the interest of Jesse Applegate in all the lands referred to —those covered by donation claim numbered thirty eight, and those not within that claim. The decree directing the sale of all the interest of Jesse Applegate in the 121-55 acres on the 1st of January, 1869, was an adjudication, as between Dowell and the defendants in that suit, who asserted title to those lands, that no claim asserted by either of them could stand against the right of Dowell to have those lands sold.

It is disclosed by the present suit that when Daniel W. Applegate answered Dowell's bill he held the deed of October 8, 1874. If Daniel W. Applegate became, when taking that deed, a bona fide purchaser of the forty acres of land now in dispute, and if the title so acquired was superior to Dowell's right to have that land sold for his demands against Jesse Applegate, it behooved him to assert that title in defence of the suit brought against him. The very nature of that suit required him to assert whatever interest he then had in the lands or any part of them that was superior to any claim of Dowell upon them, whether by judgment liens or in any other form. So far from pursuing that course, he forebore—purposely, as may now be inferred—to claim anything in virtue of the deed of October 8, 1874, and long after the decree under which Dowell purchased, he comes forward with a new, independent suit, based alone upon that deed, as giving him a superior title. His object is—certainly, the effect of his suit, if it be sustained, will be—to re-try the issues made in Dowell's suit so far as they involved the latter's claim to have the 40 acre tract subjected to his demands. The decree in the Federal court was an adjudication, as between all the parties to the suit in that court, that Dowell was en-[343] titled, in satisfaction of his *claims against Jesse Applegate, to subject to sale *all* the lands his bill sought to reach, which the decree directed to be sold. And that decree, never having been modified by the court that rendered it nor by this court upon appeal, necessarily concludes every matter that Daniel W. Applegate was entitled, under the pleadings, to bring forward in order to prevent the sale of the lands claimed by him, by whatever title. Having remained silent as to the deed of October 8, 1874, and having allowed the suit in the Federal court to proceed to final decree upon the question as to whether the lands described in the bill could be subjected to Dowell's demands—which description included the 40 acres here in dispute—and having been defeated upon that issue, and the decree having been fully executed, he cannot have the same issue re-tried in an independent suit based solely upon a title that he was at liberty to set up, but chose not to assert, before the decree was rendered.

The argument to the contrary seems to rest principally, if not altogether, upon the ground that the present suit is upon a cause of action entirely different from that presented in the suit in the Federal court. In that view, our attention is called to the case of *Cromwell* v. *Sac County*, 94 U. S. 351 [24: 195]; *Russell* v. *Place*, 94 U. S. 608 [24: 215] and *Bissell* v. *Spring Valley Twp.* 124 U. S. 231 [31: 413]. Those cases hold that a judgment by a court of competent jurisdiction as to parties and subject matter is a finality in respect to the claim or demand in controversy, "concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." "Thus, for example," the court said in *Cromwell* v. *Sac County*, "a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it is subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action and established by competent evidence, the subsequent *allegation of [344] their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed." In that case it was was further held—and the same principle was announced in the other cases—that "where the second action, between the same parties, is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." To the same effect were prior decisions of this court. *Hopkins* v. *Lee*, 19 U. S. Wheat. 109, 113 [5: 218, 219]; *Smith* v. *Kernochen*, 48 U. S. 7 How. 198, 217 [12: 666, 674]; *Pennington* v. *Gibson*, 57 U. S. 16 How. 65, 77 [14: 847, 852]; *Doe* v. *Ferris*, 67 U. S. 2 Black, 606, 609 [17: 317, 319]. And the same doctrines were subsequently reaffirmed in *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639 [25: 1074] and *Stout* v. *Lye*, 103 U. S. 66, 71 [26: 428, 430], and, at the present term, in *Johnson Co.* v. *Wharton*, *ante*, p. 429. To these we may add the case of *Stockton* v. *Ford*, 59 U. S. 18 How. 418 [15: 395] in which it was said: "One of the questions now sought to be agitated again is precisely the same as this one in the previous suit, namely, the right of the plaintiff to the judicial mortgage under the execution and sale against Prior. The other is somewhat varied, namely, the equitable right or interest in the mortgage of the plaintiff, as the attorney of Prior, for the fees and costs provided for in the assignment to Jones. But this question was properly involved in the former case; and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or any partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present."

So far from the above cases sustaining the

decision of the supreme court of Oregon, they support the views we have expressed. The present suit is not a second one between the same parties, upon a different claim or demand. It seeks, by additional evidence, to reopen the 345] controversy that arose, and *was determined in the suit in the Federal court as to the right of Dowell to have all the lands described in his bill subjected to his claims. While the position of the parties is reversed, Daniel W. Applegate, who contested that right, in the suit of the Federal court—so far as that suit related to the lands then claimed by him, including the 40 acres here in dispute—seeks, under the guise of a new suit, to obtain a re-examination of that question. And he seeks such re-examination, not upon any ground of fraud in obtaining that decree, but in the light simply of the conveyance of October 8, 1874, from W. H. H. Applegate, which conveyance, although existing before Dowell commenced his suit, indeed, before Dowell acquired any judgment lien of record, he deliberately refrained from bringing to the attention of the Federal court, in some appropriate form, in support of his defense. The presenting in this suit of the fact of that conveyance, for the purpose of showing that the 40 acres in question should not have been subjected to sale for Dowell's demands, does not, within the rule announced in the case above cited, make a different claim or demand. On the contrary, the matter now presented was embraced by the issues in the suit in the Federal court, and was then determined, when that court, upon final hearing, adjudged that the 121.55 acres (which embraced the 40 acres now in dispute) should be sold to pay Dowell's claims. The case, consequently comes within the rule, that "a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented."

For the reasons given we are unable to concur in the views expressed by the state court as to the effect to be given to the decree of the Federal court. We are of opinion that due legal effect is not accorded to it, unless it be adjudged, as this court does now adjudge, that never having been modified and being in full force and unreversed when the present suit was instituted, that decree conclusively establishes, as between Dowell and Daniel W. Applegate, that the former was entitled to have the lands, now in dispute, sold 346] for his demands; and, *consequently, that the title acquired by Dowell, under that decree, cannot be here questioned by Applegate.

Under this view, it is immaterial that Dowell did not, in the present case, offer evidence in support of the allegations of fraud against Jesse Applegate in respect to the various deeds made by him, and to which reference was made in the suit and decree in the Federal court. That decree being conclusive, as between Dowell and Daniel W. Applegate, of the question now presented, it was not incumbent upon Dowell to introduce any evidence in this case beyond the record of the former suit.

We are of opinion that the supreme court of Oregon failed to give proper effect to the decree and proceedings in the Circuit Court of the United States for the District of Oregon, and erred in not reversing the final judgment of the circuit court of Douglas county, with directions to dismiss the complaint of Applegate.

The decree is, therefore, reversed, and the cause remanded for further proceedings in conformity with this opinion, reversed.

Mr. Justice **Field** dissents from the judgment in this case.

THE WESTERN NATIONAL BANK OF NEW YORK, *Appt.*, *v.* DAVID ARMSTRONG, Receiver of the Fidelity National Bank.

(See S. C. Reporter's ed. 346-355.)

Power of national bank—borrowing money—power of vice president—ratification—appropriating benefits—depositing money—necessary party—general creditor.

1. The power to borrow money or to give notes is not expressly given by the National Bank Act to national banks, yet the bank may incur liabilities in the regular course of its business, and become the creditor of others.
2. A national bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.
3. The vice president of a national bank, however general his powers, cannot exercise the power to borrow money for the bank, unless specially authorized so to do, and persons dealing with the bank are presumed to know the extent of the general powers of the officers.
4. A ratification, to be efficacious, must be made by a party who had power to do the act in the first place, and it must be made with knowledge of the material facts.
5. A corporation may become liable upon contracts assumed to have been in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of the facts, the benefits of the contracts so made on its behalf.
6. Where the vice president of a bank borrowed money from another bank, the mere placing the money on the books of the latter bank, to the credit of the former bank is no ratification by it of the borrowing, unless the money was so placed with its knowledge and assent; and the withdrawal of the money by drafts drawn by him or by his direction in the name of the bank, does not constitute a receipt by the bank of such money, unless it was in fact received and used by the bank or for its benefit.

NOTE.—*As to liability of banks for collection; failure of collecting banks; liability of receiver or assignee of bank; altered check or draft*, see note to Commercial Nat. Bank v. Armstrong, 37: 353.

As to special deposits, responsibility for, see note First Nat. Bank of Carlisle v. Graham, 25: 750.

As to liability for general deposits, see note to Planters Bank of Tennessee v. Union Bank of Louisiana, 21: 473.

As to power of national banks to take mortgage security, see note to National Bank of Genesee v. Whitney, 26: 443.

7. One who is vice president of a bank and who has paid for and received certificates of paid up increased capital stock of the bank, which increase of stock was unauthorized, and has pledged them as collateral security, is a necessary party to an action brought by the pledgee to be subrogated to the pledgor's rights, on account of the stock and the moneys paid therefor, against the assets of the bank, in the hands of a receiver.

8. One who is vice president of a bank and who has received certificates of paid up capital stock of the bank, being part of a proposed increase of its stock, which bank has become insolvent before the necessary steps to legitimate such increase of stock have been taken, cannot demand back his money paid for such stock by him, as trust money, or as a preferred claim against the assets of the bank, but can only claim as a general creditor, entitled as such to participate in the payments made by the receiver.

[No. 251.]

Argued Feb. 2, 1894. Decided March 12, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio, dismissing a suit in equity brought by the Western National Bank of New York, plaintiff, against David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio, for the relief that the receiver should pay out of the assets of said bank to the plaintiff the amount of a loan made by the New York bank to the Ohio bank, at the request of the vice president of the latter bank, E. L. Harper, and also as a preferred claim, certain moneys paid by said Harper, for unauthorized stock of the bank, to whose rights the plaintiff claimed the right to be subrogated.

Affirmed.

Statement by *Mr. Justice* **Shiras:**

347] *In December, 1888, the Western National Bank of New York, organized under the laws of the United States, and having its place of business in the city of New York, filed a bill of complaint, in the Circuit Court of the United States for the Southern District of Ohio, against David Armstrong, as receiver of the Fidelity National Bank of Cincinnati, Ohio. The bill alleged that the Fidelity National Bank was indebted to the complainant bank in the sum of $207,290, on account of a loan made on May 28, 1887, by the New York bank to the Ohio bank, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf." The bill further alleged that said loan was secured by collateral notes, signed by one A. P. Gahr, and indorsed by said E. L. Harper, and by the indorsement and delivery to the complainant by E. L. Harper of certificates for 1600 shares of the capital stock of the said Fidelity National Bank; that said notes were, when they fell due and still are, entirely worthless by reason of the insolvency of said Gahr and Harper; that said stock certificates did not and do not represent stock of the Fidelity National Bank, but were wholly invalid and void, because they did not constitute a part of the original and authorized stock of said bank, but were a part of a proposed increase of the capital stock of said bank, on account of which E. L. Harper had paid into the bank upwards of $180,000, but which increase had never been voted for by the stockholders of said bank, nor had notice of said intended increase of said capital, with a certificate that the full amount of the same had been fully paid in, ever been sent to the Comptroller of the Currency of the United States, nor had the Comptroller ever assented to such increase of capital, as required by law; but that, nevertheless, said Harper had procured from the president and cashier of said bank the certificates of stock so as aforesaid pledged with the complainant; that when said certificates were so issued to *Harper the stock of the Fidelity [348 National Bank had an established market value of $153 per share, and that the complainant bank relied on said certificates as one of the securities for said loan when it made the same; that said moneys, so paid in by Harper on account of proposed stock, was held by said Fidelity National Bank on special deposit and in trust for said Harper until such increase of stock should be duly authorized. The relief prayed for was that David Armstrong, receiver of the Fidelity National Bank, which had become insolvent, should allow the claim for said loan, and pay, out of the assets in his hands, dividends, the same as to other creditors of said bank, and that the complainant bank should be subrogated to the rights of Harper on account of the moneys so paid in for stock proposed to be issued, and which the complainant alleged to constitute a preferred claim.

Armstrong, receiver, entered an appearance, and demurred to those portions of the bill in which were alleged the facts respecting the proposed issue of additional stock, and in which the complainant prayed to be subrogated to Harper's supposed rights in respect to the same. The alleged grounds of the demurrer were a want of necessary parties, in that the Fidelity National Bank and E. L. Harper were not made parties to said bill, and for multifariousness.

Subsequently, in November, 1889, the court below sustained the demurrer to so much of said bill as was recited therein—being the said allegations seeking subrogations—and gave leave to answer the remainder of said bill.

An answer was duly filed, denying that the Fidelity company was indebted to the complainant bank; that the complainant had, on May 28, 1887, or at any time, loaned the Fidelity National Bank the sum of two hundred thousand dollars or any other sum, and alleging that the notes mentioned in the bill, made by A. P. Gahr and indorsed by E. L. Harper, were discounted by the complainant bank for said Harper, and that the proceeds of such discount were received by said Harper; that the said notes were at no time the property of the Fidelity National Bank, and that the Fidelity National Bank *never had any [349 interest in said transaction, and was in no way responsible therefor.

The cause was put at issue, evidence taken, and, on April 8, 1890, a final decree was entered dismissing the bill at the cost of the complainant. The case comes to this court on appeal from said decree.

Messrs. **Edward Colston,** *Judson Harmon,* and *Geo. Hoadly, Jr.,* for appellant.

The mere fact that the note of another is for

any reason given to evidence a loan will not absolve the real borrower from liability. His liability is for money had and received. It is entirely independent of the note given by the other person.

Marston v. *Boynton*, 6 Met. 127.

If the bank had the power, there is no question as to Harper's authority to exercise it. He had the fullest authority to do everything in the conduct of its business.

The money was drawn by the Fidelity Bank, whatever became of it.

Harper, as vice president and manager, drew one of the drafts, and Hopkins, the assistant cashier, drew the others. Their authority to draw drafts in the name of the Fidelity Bank is not questioned. The drafts used were the regular printed drafts of that bank. They were drawn and presented apparently in the regular course of business. The Fidelity Bank is estopped to say that the amounts for which they were drawn were not duly paid to it. It had and received the money, so far at least as appellant is concerned, when appellant honored those drafts.

Mr. **John W. Herron,** for appellee:

Mr. Harper does not make the application as vice president of the bank; the letter making the application, and every subsequent one upon the subject of the loan, is signed by him individually. Nor does he mention the bank as a proposed borrower.

First Nat. Bank of Xenia v. *Stewart*, 114 U. S. 224 (29: 101).

The transaction was a discount of negotiable paper, and not a loan of money; and as the Fidelity National did not indorse that paper, it is not liable, even if it was the party conducting the negotiation and receiving the proceeds.

Winship v. *Bank of United States*, 30 U. S. 5 Pet. 567 (8: 230); *Emly* v. *Lye*, 15 East, 7; *Coster* v. *Clarke*, 3 Edw. Ch. 411; *Bevan* v. *Lewis*, 1 Sim. 376; *Peterson* v. *Roach*, 32 Ohio St. 374, 30 Am. Rep. 607; *Ford* v. *Williams*, 62 U. S. 21 How. 289 (16: 37); *Bank of British North America* v. *Hooper*, 5 Gray, 567, 66 Am. Dec. 390; *Bass* v. *O'Brien*, 12 Gray, 477; *Slawson* v. *Loring*, 5 Allen, 343; *Pentz* v. *Stanton*, 10 Wend. 276, 25 Am. Dec. 558; *Stackpole* v. *Arnold*, 11 Mass. 27, 6 Am. Dec. 150; Persons, Partnership (4th ed.) p. 89, § 88, note *f*; Byles, Bills (5th ed.) 26.

Mr. Justice **Shiras** delivered the opinion of the court:

Whether the transaction of May, 1887, was a discount by the Western National Bank of New York in favor of E. L. Harper of the four notes made by A. P. Gahr and indorsed by Harper, or was a loan by said bank to the Fidelity National Bank, is the question principally discussed in the briefs and oral arguments of the respective parties.

In disposing of the case we are not assisted by any findings or opinion by the court below, and we are left to conjecture the grounds upon which that court proceeded in dismissing the bill of complaint.

The theory that the case was that of a simple discount by the New York bank of four promissory notes, made by Gahr and indorsed by *Harper*, and secured by the assignment by *Harper of certificates of 1600* shares of the stock of the Fidelity National Bank, comports with the form of the notes themselves. Such a transaction would have been an ordinary one, and in the course of the usual business of such a bank. The letter of May 16, 1887, in which the proposition was made to the New York bank to make the loan, was signed by E. L. Harper in his own name, without any official designation. That the $200,000 were placed on the books of the New York bank to the credit of the Ohio bank was not inconsistent with this version of the case, because it appears that this was done at the request of Harper.

*On the other hand, it is claimed that [350 because the letter of May 16, 1887, was written on the letter paper of the Fidelity National Bank, and because the proceeds of the discount were placed to the credit of the Ohio bank, and were drawn out by drafts of that bank, the transaction was thereby shown to have been made on behalf of the Ohio bank. And C. N. Jordan, vice president of the New York bank, testified that he understood the proposition to come from the Ohio bank for a loan to it, and that he would not have submitted the matter for approval to the board of the New York bank had he not so understood it.

There are other features of the correspondence that are pointed to by the parties as making for their respective contentions. It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount.

There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that "Harper was the vice president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf." The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross examination, wherein he stated that E. L. Harper was the vice president and managing officer, and that by "managing officer" he meant that Harper was "the general manager of the business of the bank." No such office as that of "general manager" is known or named in the national bank acts, nor does any such office exist by usage. *The most that can be claimed in this [351 case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time.

It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the eighth section of the

National Bank Act (Rev. Stat. § 5136, ¶ 7): A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes."

The power to borrow money or to give notes is not expressly given by the Act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court, in the case of *First Nat. Bank of Charlotte* v. *National Exch. Bank of Baltimore*, 92 U. S. 127 [23: 681], "authority is given in the Act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others."

Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

Even, therefore, if it be conceded that it was [352] within the *power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious, must be made by a party who had power to do the act in the first place; that is, in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they ever had any knowledge of the transaction.

It is true that a corporation may become liable upon contracts assumed to have been made in its behalf by an unauthorized agent by appropriating and retaining, with knowledge of the facts, the benefits of the contracts so made on its behalf. But there is no room for such a contention in the present case. The money advanced by the New York bank was, indeed, at Harper's request, placed to the credit of the Ohio bank, but it was shown that it was withdrawn partly by Hopkins, the assistant cashier, and partly by Harper himself, by drafts in the name of the bank, but that the moneys thus drawn never came into the actual possession or use of the bank. The moneys were appropriated by Harper to his own use, or, at all events, it does not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction. The mere placing of the money in the name of the Ohio bank involved no ratification by the bank unless it was so placed with their knowledge and assent, nor did the withdrawal of the money *by drafts [353 drawn by Harper or by his direction in the name of such of the bank constitute a receipt by the bank money, unless it was, in point of fact, received and used by the bank or for its benefit. Not this, but the contrary was shown.

So far, then, as the case of the plaintiff in error depends on the alleged loan of money to the Fidelity National Bank, we find no error in the decree of the court below in dismissing the bill.

This brings us to the consideration of the other phase of the case, namely, that which arose on the claim of the New York bank as the holder of 1600 shares of the stock of the Fidelity National Bank, transferred by it as security by Harper, to be subrogated to the supposed right of Harper to be repaid the moneys paid in by him on account of his subscription for an increase of stock, not voted for by the stockholders, and not approved by the Comptroller of the Currency.

The court below sustained the demurrer to this portion of the bill. Two grounds were asserted in the demurrer—one, the insufficiency of parties, in that neither the Fidelity National Bank nor Harper were made parties; the other, that of multifariousness. It is now contended before us that Harper was not a necessary party because, as is averred in the bill and admitted by the demurrer, he had pledged and assigned this stock to the complainant bank, and it is argued that the bank thereby became vested with whatever rights Harper had to have his money returned to him as a special deposit. It is also contended that asserting such a right of subrogation is so far within the equities of the bill, and so necessary an incident of the transaction, as to relieve the bill of the charge of being multifarious.

It is not easy to see why, if the complainant were really entitled to be subrogated to the rights of Harper in respect to the hypothecated stock, such a claim might not be set up in the same bill in which it seeks to be allowed, as a lender of money to the Fidelity National Bank, to participate in the payments made by the receiver.

But, however that may be, it seems to us that Harper, having procured an issue to himself of certificates of paid up stock, *was in no [354 position, when the bank became insolvent, before the necessary steps to legitimate the increase of stock had been taken, to demand back his money, as if it were trust money, or constituted a preferred claim against the assets of the bank in the hands of the receiver. The

utmost that he could claim would be to be treated as a general creditor, and entitled as such to participate in the payments made by the receiver.

In the case of *Armstrong* v. *Stanage*, 37 Fed. Rep. 508, which was the case of a suit by the receiver of the Fidelity National Bank to recover, from a subscriber to the preferred increase of stock of that bank, the amount of a promissory note given in payment of such subscription, it was held by *Mr. Justice* Jackson, then circuit judge, that, as the necessary steps had not been taken to legitimate such increase of stock before the bank became insolvent, there was a failure of consideration, and the receiver could not enforce payment of the note. We, however, agree with the court below in thinking that such a question could not be raised in the present case, to which Harper was not a party. Harper had paid in the full amount of his subscription, and had procured the issue to himself of certificates for his stock, and has parted with the legal title to the stock by transferring the certificates to the New York bank. In such circumstances it might be claimed, with some appearance of justice, that Harper and his transferee were precluded from opening up the transaction and procuring a rescission of the subscription. If that were so, the holder of such stock, whether Harper or the New York bank, might have been compelled to contribute to the payment of the indebtedness of the insolvent bank. *Germania Nat. Bank* v. *Case*, 99 U. S. 628 [25: 448].

So, too, even if it were held that Harper was not precluded from surrendering his stock and recovering back the money paid on account of it, it might yet be made to appear that Harper, if he were answerable for the mismanagement which resulted in the bank's insolvency, could not, in a court of equity, and as against the creditors of the bank, recover back his subscription money. But it is plain that such questions as these could not be adjudicated in the absence of Harper as a party, and we therefore think the court below did not err in sustaining the demurrer for that reason.

Upon the whole, we are of opinion that the decree of the court below, in sustaining the demurrer, and in dismissing the bill, should be affirmed.

355] *ABBIE A. ISRAEL, *Plff. in Err.*,

v.

JAMES B. ARTHUR, *Administrator, etc.*

Review of state judgment—public policy and estoppel—question of fact.

(See S. C. Reporter's ed. 355-362.)

1. It is not sufficient for the maintenance of the jurisdiction of this court to review the judgments of state courts that a right, title, privilege, or immunity under the Constitution of the United States may have been claimed, but such right, title, privilege, or immunity must have been denied.
2. A conclusion by a state court that a woman, who has attempted to profit by a decree of divorce and has exercised the resulting privilege of remarriage, is estopped to contest the validity of the divorce for the mere purpose of obtaining property, is a decision in a matter of local and general law, and presents no Federal question.
3. In actions at law this court has no jurisdiction to revise the decision of the highest court of a state upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way.

[No. 903.]

Submitted Jan. 29, 1894. Decided March 12, 1894.

IN ERROR to the Supreme Court of the State of Colorado, to review a judgment of that court, affirming the judgment of the county court of Laramie county, Colorado, in favor of the defendant, James B. Arthur, administrator, etc., in the suit brought by Abbie A. Israel, to be declared the sole distributee of the estate, and heir at law of John Arthur, deceased, and that the administrator, be required to account accordingly. *On motion to dismiss, or affirm. Dismissed.*

See same case below, 10 L. R. A. 693, 15 Colo. 147, 18 Colo. 158.

Statement by *Mr. Chief Justice* **Fuller**:

Abbie A. Israel, under the name of Abbie A. Arthur, filed her petition in the county court of Laramie county, Colorado, in the matter of the estate of John Arthur, deceased, May 17, 1881, alleging that John Arthur died intestate and without children; that she was his widow; that James B. Arthur had been appointed administrator and was in possession of decedent's property, and committing breaches of his duty as such; that he, as a brother of John Arthur, and certain other brothers and sisters, and descendants of a deceased sister, claimed to be entitled to the estate as heirs at law; and that the relationship of petitioner to the decedent and her rights in his estate were ignored; and she prayed that she might be declared the sole distributee of said estate, and heir at law of John Arthur, deceased, and that the administrator be required to account accordingly. The defendant *answered, [356 denying any misappropriation of the estate, and that the petitioner was then or ever had been the widow of John Arthur; and for a second defense, defendant, admitting the intermarriage of petitioner with John Arthur, alleged that on February 9, 1875, a decree was duly entered by the county court of Laramie county in favor of John Arthur and against petition-

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see note to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court, to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

As to estoppel in pais, see note to Stowe v. United States 22: 144.

As to estoppel by recital in deed, or will, or other instrument, see note to Carver v. Astor, 7: 761.

As to estoppel by recitals in negotiable bonds or

er, dissolving the bonds of matrimony theretofore existing between them; and for a further defense alleged that on June 12, 1877, a second decree of divorce was duly made and entered in said court in favor of John Arthur and against petitioner. Replication was filed July 21, 1881, denying the new matter in the answer. On March 30, 1884, petitioner filed her amended and supplemental petition to her original petition, wherefrom it appeared that the judgment of the county court on the trial of the issues made as above stated was against petitioner, but that that judgment was reversed by the supreme court of Colorado, as were also the decrees of divorce of 1875 and 1877, both of which were held to be null and void and of no effect for want of jurisdiction. *Israel* v. *Arthur*, 7 Colo. 5, 12, 6 Colo. 85.

The amended and supplemental petition detailed alleged misfeasances and wastes of the administrator and reiterated petitioner's claim to the proceeds of the estate as the widow of John Arthur, and prayed relief. The amended and supplemental answer of the defendant, filed April 9, 1884, admitted that the decrees of divorce were voidable at the option of petitioner for want of due and legal service upon her, but averred that after the decrees were rendered, petitioner, with full knowledge thereof, "ratified, affirmed, assented to, and acquiesced in the same and each of them, in this, to wit, in that after the same had been rendered and in the lifetime of said John Arthur, the said defendant, by force and virtue of the said decrees and under and in pursuance thereof, entered voluntarily into a contract of marriage with one James H. Israel and caused and procured the said contract of marriage to be duly and legally solemnized, and thereunder took upon herself and assumed the relations of wife to the said James H. Israel, and thenceforward and at all times thereafter continuously, by virtue of *the said solemnization of said [357 marriage contract, lived and cohabited with the said James H. Israel as his wife until and ever since the death of the said John Arthur."

The answer also set forth the particulars of the elopement of petitioner with and marriage to Israel, and grounds why it had been impossible for the administrator to learn the facts in time to plead them to the original petition.

In a further answer, filed the same day, the charges of waste and misfeasance were denied. To this answer a demurrer was interposed April 28, 1884. A further supplemental answer was filed August 28, 1884, setting up that the administrator had in all things faith-

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securities, see note to Mercer County v. Hackett, 17: 548.

As to estoppel as to contracts, limiting the time within which action must be brought, see note to Southern Exp. Co. v. Caldwell, 22: 556.

As to when vendee is estopped from disputing the title of his vendor, see note to Watkins v. Holman, 10: 873.

As to estoppel; stranger not bound by, and cannot take advantage of; who are not privies; infants; husband and wife, see note to Deery v. Cray, 18: 653.

Estoppel, as applied to married women and widows.

Wherever statutes enable a married woman to enter into contracts as though single, there the doctrine of estoppel applies to her without any limitation (Dingens v. Clancey, 67 Barb. 566; Fryer v. Rishell, 84 Pa. 521; Towles v. Fisher, 77 N. C. 437; Godfrey v. Thornton, 46 Wis. 677) and even she may thus be estopped by the acts of her husband. McCha v. Woolf, 42 Ala. 389; Bodine v. Killeen, 53 N. Y. 93; Treman v. Allen, 15 Hun, 4; Hockett v. Bailey, 86 Ill. 74. For circumstances in which she has been held not estopped, see Oglesby Coal Co. v. Pasco, 79 Ill. 164; Upshaw v. Gibson, 53 Miss. 341; McBeth v. Trabue, 60 Mo. 642; 2 Pom. Eq. Jur. 279.

Where she represents by sworn statements, that a contract is for her own benefit, and induces another to act in good faith on such statement, she is estopped from asserting that the contract is one of suretyship, which, by the Indiana Married Woman's Act of 1881, is excepted from the general power conferred upon married women to contract. Ward v. Berkshire L. Ins. Co. 108 Ind. 301.

A married woman who represents that she is executing a mortgage to secure money for her own use is estopped, as against one who in good faith relies on such representations, to claim that she executed the mortgage as security for her husband. Rogers v. Union Cent. L. Ins. Co. 111 Ind. 343.

Independently of legislation there is an estoppel against her, either when she is attempting to enforce an alleged right or to maintain a defense. Stafford v. Stafford, 1 De. G. & J. 193; Skottowe v. Williams, 7 Jur. N. S. 118; Jones v. Higgins, L. R. 2 Eq. 538, 544; Jones v. Frost, L. R. 7 Ch. 773; Bigelow v. Foss, 59 Me. 162; Frazier v. Gelston, 35 Md. 298; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477, 483; Carpenter v. Carpenter, 25 N. J. Eq. 194; Drake v. Glover, 30 Ala. 382; Connolly v. Brunstler, 3 Bush, 702, 96 Am. Dec. 278; Couch v. Sutton, 1 Grant, Cas. 114; McCullough v. Wilson, 21 Pa. 433; 2 Pom. Eq. Jur. 279.

Where the widow knowingly permits the purchaser to part with his money for real estate, it constitutes an estoppel *in pais*; and she will not be permitted to set up a claim to dower in premises. Wood v. Seely, 32 N. Y. 116.

Where property was sold by order of a surrogate, and the terms of sale were that a clear and satisfactory title should be given and the widow was cognizant of the terms and present at the sale and joined in the conveyance—she was estopped from claiming dower as against the purchaser. Hart v. Duffy, 2 Redf. 154; Deshler v. Beery, 4 U. S. 4 Dall. 300 (1: 842).

Where real estate was sold in which a widow was entitled to dower; and the administrator, by her consent and with her knowledge, stated in the terms of sale that a clear title would be given; and a full price for the land was paid without any disclosure by the widow of a claim to dower,—it was held that she committed a fraud upon the purchaser, which precluded her from afterward setting up a title to dower. O'Brien v. Elliott, 15 Me. 125, 32 Am. Dec. 139.

The statement of a widow at the sale of lands that she has no claim upon the property, and her request to the buyer to purchase, and her taking a lease from him after the purchase, constitute an effectual estoppel *in pais* against any claim or title in hostility to the purchaser. Maloney v. Horan, 36 How. Pr. 269, 53 Barb. 40; Smiley v. Wright, 2 Ohio, 511; Dougrey v. Topping, 4 Paige, 94.

Even where the facts and circumstances were sufficient to estop the widow from claiming her dower as against the mortgagees, yet such estoppel would not extend to a claim she had as grantee of the title and interest of her children. Williams v. Kinney, 43 Hun, 10; Hawley v. James, 5 Paige, 453.

Upon the sale of her husband's land, a widow stated to the purchaser that the title was perfect,

fully discharged the duties of his trust and administered the estate and was ready to make his final accounting whenever required by order of court. To this answer a replication was filed by petitioner September 23, 1884.

The record proper does not show the action either of the county court or of the supreme court on these pleadings, but in the opinion of the supreme court of Colorado in this case it appears that judgment was rendered in favor of the petitioner and the cause again taken to the supreme court, which held that the facts set up in the amended answer was sufficient to debar or estop petitioner from claiming any property rights as the widow of John Arthur, deceased.

Upon the cause being again remanded to the county court the petitioner filed a new replication, January 27, 1891, to the amended and supplemental answer of the administrator, averring the alleged decrees of divorce to be absolute nullities, and that the supreme court of the state had so declared, and that the administrator was thereby estopped from saying that she was not the widow of John Arthur when he died; and the replication proceeded as follows:

"And in this petitioner avers that she is a citizen of the United States and a citizen of the state of Colorado, and, as widow of said John Arthur, deceased, as aforesaid, she became at his death the sole heir of his said estate, consisting of certain lands, tenements, and hereditaments and personal property at the said county of Laramie, and as such heir at-law of him, *the said John Arthur, the said lands, ten [358 ements, and hereditaments immediately vested in her and she is now and ever since has been seized of the same and entitled to the possession, use, and enjoyment of the same; that the personal estate of him, the said John Arthur, was and is more than sufficient to pay all the debts of him, the said John Arthur, and that she, the said petitioner, as such sole heir, is the sole distributee of the said personal estate after the payment of said debts and the cost of administration, and the same and the right thereto became thereupon vested in her and thence hitherto has been vested in her as an indefeasible right guaranteed to her by the laws and constitution of the state of Colorado and by the Constitution of the United States, and that she has never been summoned or impleaded in any court or action in which any of her said rights or property have been adjudged lost, forfeited, or taken from her by any due

and that the will provided for dower—the widow believing at the time that the provision of her husband's will excluding her dower right was enforceable. The will was of record, accessible to the purchaser. He bought the land without requiring her to relinquish dower, "being convinced in his own mind that she had no dower." Held, that the widow was not estopped from subsequently claiming dower. Martien v. Norris, 91 Mo. 465.

The operation of the estoppel against a married woman must be confined to cases where she is attempting affirmatively to enforce a right inconsistant with her previous conduct upon which the other party has relied. Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448; Merriam v. Boston, C. & F. R. Co. 117 Mass. 241; Bemis v. Call, 10 Allen, 512; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Kane County v. Herrington, 50 Ill. 232; Williams v. Baker, 71 Pa. 476; Glidden v. Strupler, 52 Pa. 400; Rumfelt v. Clemens, 46 Pa. 455; Keen v. Hartman, 48 Pa. 497, 86 Am. Dec. 606, 88 Am. Dec. 472; 2 Pom. Eq. Jur. 279.

The mere silence of a married woman when an account is presented to her husband by a party to whom she has mortgaged his crop of cotton, on which she has a lien by virtue of a second mortgage or trust deed executed to secure her for money advanced to her husband, will not estop her from subsequently asserting a claim to the money so appropriated. Weathersbee v. Farrar, 97 N. C. 105; O'Dougherty v. Remington, 7 Hun, 516.

Although a married woman, apparently occupied as a helper in the same shop where her husband had his general store, had asserted no claim of interest in the goods, she was not estopped from asserting against creditors of her husband that the husband was a debtor to her for actual advances to him as a loan. Norris v. McCanna, 29 Fed. Rep. 757.

Where by fraud, misrepresentation or concealment, a married woman leads another into contracting with her, she will not be permitted to gainsay representations which may have induced another to act, who in good faith relied on them. Cupp v. Campbell, 103 Ind. 213; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Powell's App. 98 Pa. 403; Bigelow, Estoppel, 513; Cooley, Torts, 117.

The law of estoppel can attach to a married woman only in respect to her separate estate, either directly or indirectly. Wood v. Terry, 30 Ark. 393.

Under Indiana Revised Statutes 1881, section 5117, providing that a married woman may be bound "by an estoppel" like any other person, she is bound by representation as to the character of the contract which she seeks to enter into, and from which she asserts she will receive the benefit, where the person to whom the representations are made has exercised reasonable care and diligence to ascertain their truth, and relies upon them. Ward v. Berkshire L. Ins. Co. 108 Ind. 301.

By this legislation, a married woman is, as to her separate estate, relieved from all the restrictions imposed upon her by the common law, and is to be treated as if she was a *feme sole*. Ainsley v. Mead, 3 Lans. 120.

She is *sui juris* to the extent of the enlarged capacity to act, conferred by statute, and may be estopped by her acts and declarations, and is subject to all the presumptions which the law indulges against others with full capacity to act for themselves. Sherman v. Elder, 24 N. Y. 381; Bodine v. Killeen, 53 N. Y. 96.

A married woman cannot be estopped by anything in the nature of a contract; but where it would amount to a fraud to allow her to repudiate her acts she is estopped. Hodges v. Powell, 96 N. C. 64, 60 Am. Rep. 401.

The fraud consists in the denial of what was previously affirmed. Anderson v. Hubbie, 93 Ind. 570, 47 Am. Rep. 394; Pitcher v. Dove, 99 Ind. 175; Continental Nat. Bank v. National Bank of Com. 50 N. Y. 575; Blair v. Wait, 69 N. Y. 113.

A wife who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct. Sexton v. Wheaton, 21 U. S. 8 Wheat. 229 (5: 603); Besson v. Eveland, 26 N. J. Eq. 468; City Nat. Bank of Providence v. Hamilton, 34 N. J. Eq. 162; Cupp v. Campbell, 103 Ind. 213.

Her act in allowing her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, was to be deemed done with intent to defraud her creditors. Anderson v. O'Reilly, 54 Barb. 620.

process of law; that the supreme court of this state in its judgments heretofore rendered has declared and adjudged that this petitioner was the widow of the said John Arthur at the time of his decease, and that such decisions constitute the law of this case, and that by virtue of the laws of the state of Colorado she is, as such widow, the sole heir of him, the said John Arthur; that a judgment of this court dismissing her said petition and giving her said property to others would, if affirmed by the supreme court of this state, be the taking of her private property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States; that a judgment of this court dismissing her said petition for the commission of supposed crimes averred in said supplemental answer to have been committed by her would, if affirmed by the supreme court of this state, constitute an *ex post facto* law of the state of Colorado, in contravention of section 10, article 1, of the Constitution of the United States; that a judgment of this court dismissing her said petition for the supposed crimes alleged in said supplemental answer to have been committed by her would, if affirmed by the supreme court of this state, constitute a law of attainder of the state 359] *of Colorado, in contravention of section 10, article 1, of the Constitution of the United States; that a judgment of this court dismissing her said petition and transferring her said property to others would, if affirmed by the supreme court of this state, constitute an act of judicial legislation without the sanction of law and against the rights of this petitioner guaranteed to her by both the constitution of this state and the Constitution of the United States.

"And this petitioner denies that after the said pretended decrees of divorce were rendered, she with full or any knowledge that they had been rendered, or otherwise or at all, ratified or affirmed or assented to or acquiesced in the same or either of them; denies that there were any decrees to ratify, affirm, assent to, or acquiesce in, and avers that the pretended judgments and decrees of divorce mentioned in said amended and supplemental answer were *nil* and could not be ratified or affirmed or assented to or acquiesced in by her.

"Denies that said pretended judgments or decrees of divorce had or were of any force or virtue; denies that in the lifetime of the said John Arthur, by force and virtue of said pretended decrees or under or in pursuance thereof or otherwise, she entered voluntarily or otherwise into a contract of marriage with one James H. Israel; denies that she caused or procured any contract of marriage to be duly or legally or at all solemnized between herself and the said James H. Israel in the lifetime of the said John Arthur; denies that any contract of marriage could have been duly and legally solemnized between her and the said James H. Israel in the lifetime of her late husband, the said John Arthur, deceased; and this said petitioner denies that in the lifetime of said John Arthur, upon the supposed knowledge that the said pretended degrees of divorce had been rendered coming to the said petitioner and the said James H. Israel, she desired to use the said supposed privilege conferred by said pretended decrees or to accept the supposed benefit, thereof, and denies that she procured a marriage to be solemnized between her and the said James H. Israel in the lifetime of her late husband, John Arthur, deceased, and she avers that said pretended decrees of *divorce [360 conferred no privilege she could use and provided no benefits whatever which she could have accepted."

She further denied that she and Israel went away from the place where they were living to some place unknown or remote therefrom, or were married secretly in due form of law in the lifetime of John Arthur, or that she had ever admitted or confessed that she had been duly or at all married to Israel after the rendition of the pretended decrees and in the lifetime of Arthur, as averred in the answer.

On June 8, 1891, the case came on for trial in the county court, and the following appears in the bill of exceptions:

"Thereupon on behalf of the petitioner it was stipulated and admitted by the respondent that the decree set up in the respondent's amended and supplemental answer were rendered as therein alleged, and that the same are and were void when rendered, and that the only question now being tried is as to whether the plaintiff is estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees or whether she has ratified them by her conduct."

The testimony introduced on both sides is then set forth. The county court found in favor of defendant, and gave judgment, June 23, 1891, with costs, "that the petitioner, Abbie A. Israel of right ought to be and is estopped to aver or claim that she is the widow or heir of the said John Arthur, deceased, or the distributee of his estate. Wherefore it is considered, adjudged, and decreed by the court that the petition of the said petitioner be and the same is hereby denied and dismissed." The cause was taken by writ of error to the supreme court of Colorado and on June 17, 1893, that court rendered its judgment, affirming the judgment of the county court. The court reviewed the evidence, and held that the proof was sufficient to warrant the trial court in finding that plaintiff in error had actually contracted and consummated the marriage between herself and the second husband before the death of the first, and that the substance of the issue formed upon the amended complaint was proved; and the ruling in *Arthur* v. *Israel*, 10 L. R. A. 693, 15 Colo. 147, that the amended answer was sufficient in law to debar or estop petitioner from *claiming any property [361 rights as the widow of John Arthur, deceased, was reaffirmed. *Israel* v. *Arthur*, 18 Colo. 158. A petition for rehearing was filed and overruled and thereupon a writ of error was allowed to this court, which defendant in error moved to dismiss.

Mr. **George A. King** for defendant in error, in favor of motion.

Messrs. **W. S. Decker** and **J. J. O'Donnell** for plaintiff in error, in opposition.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is not sufficient for the maintenance of our

jurisdiction to review the judgments of state courts, that a right, title, privilege, or immunity under the Constitution of the United States may have been claimed, but such right, title, privilege, or immunity must have been denied. Assuming that plaintiff in error, by her replication of January 27, 1891, duly set up a right of protection under the Constitution, yet if she were debarred from asserting property rights in the estate of John Arthur, as his widow, then that right was not denied for want of the subject-matter to be protected.

The supreme court of Colorado ruled in *Arthur* v. *Israel*, 10 L. R. A. 693, 15 Colo. 147, that public policy required "that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election;" and that "when, therefore, the wife, without cause, deserts her husband and home, and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, she may not, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process, and successfully assert against other 362] heirs her right under *the statute of descents and distribution to deceased's estate as his widow." And on the subsequent writ of error sustained the judgment of the county court against plaintiff in error upon the facts.

With the conclusion on the facts we have nothing to do, and the conclusions of law were conclusions in matters of local and general law which suggest no Federal question.

By stipulation of record plaintiff in error admitted at the trial that, the invalidity of the divorce decrees being conceded, the only question to be tried was whether she was "estopped by her conduct as alleged in said answer in dispute or contest the validity of said decrees or whether she has ratified them by her conduct."

That question was determined against her, and the judgment rested solely on the ground that she could not under the facts be allowed, as to John Arthur's personal estate, to assert the property rights conferred by law upon a widow. To review that judgment would be to overhaul the application by a state court of principles of public policy and of estoppel, which it is not within our province to do. This was so held in *Marrow* v. *Brinkley*, 129 U. S. 178 [32: 654], and in effect in many other cases. *Adams County* v. *Burlington & M. R. Co.* 112 U. S. 128 [28: 678]; *Chouteau* v. *Gibson*, 111 U. S. 200 [28: 400]; *Beaupré* v. *Noyes*, 138 U. S. 397 [34: 991].

In *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111], it was ruled that a decision by the supreme judicial court of Massachusetts that a creditor of an insolvent debtor who proved his debt in insolvency proceedings under the state statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no Federal question for review. And it has been often held, at least in actions at law, that this court has no jurisdiction to revise the decision of the highest court of a state upon a pure question of fact, although a Federal question might arise if the question of fact were decided in a particular way. *Dower* v. *Richards*, *ante*, p. 305, and cases cited.

Writ of error dismissed.

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*THE STATE OF MICHIGAN *ex rel.* [363
the ATTORNEY GENERAL, *Plff. in Err.*,
v.
THE FLINT & PERE MARQUETTE RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 363-368.)

Federal question.

Where the judgment of the state court rested upon the decision of a question which was not Federal, such as estoppel, this court has no jurisdiction to review it, and the writ of error will be dismissed.

[No. 913]

Submitted Jan. 29, 1894. Decided March 12, 1894.

IN ERROR to the Supreme Court of the State of Michigan, to review a judgment of

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NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and to Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

As to estoppel in pais, see note to Stowe v. United States, 22: 144.

As to estoppel by recital in deed, or will, or other instrument, see note to Carver v. Astor, 7: 761.

As to estoppel by recitals in negotiable bonds or securities, see note to Mercer County v. Hackett, 17: 548.

As to estoppel as to contracts limiting the time within which action must be brought, see note to Southern Exp. Co. v. Caldwell, 22: 556.

As to when vendee is estopped from disputing the title of his vendor, see note to Watkins v. Holman, 10: 873.

As to estoppel; stranger not bound by, and cannot take advantage of; who are not privies; infants; husband and wife, see note to Deery v. Cray, 18: 653.

Estoppel, by silence; as to title or interest in lands; by laches or acquiescence; by receiving benefits.

There can be no estoppel or even waiver by silence, except under circumstances where it becomes the duty of the party to speak. Knoedler v. Glaenzer, 20 L. R. A. 733, 55 Fed. Rep. 895.

The doctrine of estoppel *in pais* has no application to the failure to object to the improper manner in which one does work which he contracted to do properly. Hawley v. Florsheim, 44 Ill App. 320.

An attorney who has made a contract with a testator for the prosecution of certain litigation at

that court, reversing a decree of the Ingham Circuit Court, Michigan, in favor of complainant, and directing to be dismissed with costs a suit or information filed on behalf of the State of Michigan, against the Flint & Pere Marquette Railroad Company *et al.*, claiming title to certain lands under and by virtue of the Swamp Land Grant of Congress, of September 28, 1850. *On motion to dismiss. Dismissed.*

See same case below, 89 Mich. 481.

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill of information filed on behalf of the state of Michigan in the Ingham circuit court, December 13, 1887, against the Flint & Pere Marquette Railroad Company and others, claiming title to certain lands under and by virtue of the grant by Act of Congress of September 28, 1850, commonly known as the Swamp Land Grant. 9 Stat. at L. 519, chap. 84.

The claims of the respective parties appear in the pleadings, which were in substance as follows:

The bill alleged that the grant transferred to the several states named, and among others the state of Michigan, the whole of the swamp and overflowed lands therein made unfit for cultivation and remaining unsold on the 20th of September, 1850, and that it was the duty of the Secretary of the Interior to make lists and plats of the land, and, at the request of the governor of the state, to issue patents; that the effect of the grant was vest title in the state, and that the state afterwards asserted title to all the land, and that such title was recognized by the United States. It was further averred that on or about November 21, 1850, certain instructions were prepared relative to the designation and description of said swamp lands by the Commissioner of the General Land Office, of which a copy was sent to the surveyor general and another copy to the governor, by

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a fixed sum cannot recover such sum from the executor where he fails to notify the latter of the existence of the contract and allows him to employ other counsel to carry on the litigation. Bolte v. Fichtner, 68 Hun, 147.

The fact that one claiming a lien on lumber for its manufacture sees a purchaser at the mill, and that the lumber is marked with certain initials, without knowledge brought home to him of such purchaser's acceptance of a contract for its sale, of the terms of the contract, or of the time or place of delivery,—does not estop him from setting up his lien. Hughes v. Tanner, 96 Mich. 113.

The silence of the owner of property does not estop him to recover against an officer for a breach of his official bond in wrongfully seizing and selling said property. Schilling v. Black, 49 Kan. 552.

A stockholder in a corporation who transfers all his stock under an agreement providing that the corporation or its successors shall indemnify the prior stockholders against the debts, a list of which is furnished by him, is not estopped, as against a new corporation succeeding the former and not a party to the agreement, from asserting a debt in his favor against the corporation, not included in such list, where the agent of the purchaser of the stock and the treasurer of the new corporation knew of the claim at the time, and there was no misrepresentation as to the extent of the debt. Outterson v. Fonda Lake Paper Co. 49 N. Y. S. R. 556.

A vendor to whom money is offered as a cash payment upon the contract on the day fixed therefor, and who refuses to receive it solely because he deems a mortgage also tendered insufficient, without making any further objection, cannot, in an action for his breach of the contract, complain that there was an insufficient tender of the cash payment. Hartsock v. Mort, 76 Md. 281.

Failure of a collector to inform an importer of the decision by the Secretary of the Treasury of an appeal from a decision of the former, after having informed the latter that the secretary had refused to consider the appeal or to reconsider that determination, does not estop the collector from asserting the limitation of ninety days from the decision against a suit to recover the alleged excess of duties, either as an individual or as a government officer. John Shillito Co. v. McClung, 51 Fed. Rep. 868.

A surety upon a note who remains silent while an alteration is made therein by the principal, in his presence, after the payee's agent has refused to accept the note in its original form, and while the money is paid thereon in its altered form, is, as well as his personal representative, estopped from setting up the alteration to defeat the note. Sanders v. Bagwell, 37 S. C. 145, 160.

A land owner is not estopped by his mere silence from claiming title up to the true boundary line, as against an adjoining owner, where the facts were open equally to both parties, and the former never did or said anything to mislead the latter, and although he had a survey made which he thought showed a slight encroachment on his lands, he was not certain about it and thought the latter knew where the boundary line was. Mullaney v. Duffy, 145 Ill. 559.

Mere silence of the ostensible grantor after another has parted with his money on the faith of a forged deed will not operate to render the deed operative in the latter's favor. McCalla v. American Freehold Land Mortg. Co. 90 Ga. 113.

A landowner who stands by and without objection allows a street to be raised several feet by filling, so that the earth is deposited on his land and the surface water dammed up, and seeing that his fence is being covered by the earth, tears it down, himself removing the boards, is estopped from maintaining trespass against the city for such filling. Collins v. Grand Rapids, 95 Mich. 286.

Knowledge by the owner of the fee of a street, that a railroad company which, without license or payment of damages, has constructed its road in the street, has mortgaged the property, and that such mortgage has been foreclosed, and the property is to be sold and his failure to make any claim or give notice of his title to the land, does not estop him to maintain an action against the company claiming under such sale, where he did not attend the sale, or know or understand that the purchaser or such company was led to believe or believed that the property sold included the right of way in the street as against himself. Syracuse Solar Salt Co. v. Rome, W. & O. R. Co. 67 Hun, 153.

One who, although knowing that he has an interest in land, permits or induces another by his conduct or silence to buy it at a judicial sale thereof, cannot assert such interest fifteen years thereafter, when it has become greatly enhanced in value. Roeder v. Fouts, 5 Wash. 135.

The holder of a mortgage which is on record is not estopped from setting it up against a purchaser of the land, by the fact that he stood by and saw him purchase and pay for the land in ignorance of the mortgage and influenced by the mortgagee's conduct. Murphy v. Jackson, 69 Miss. 403.

The mere fact that a mortgagee of lands knew that a purchaser thereof, who had knowledge of the mortgage but supposed his deed gave him a

which the surveyor general was instructed to make out lists and to regard the field notes on 364] *file in his office as the basis thereof, if the state was willing to adopt them, and if not, and the state furnished him with satisfactory evidence that any lands were of the character embraced by the grant, to so report them; that the surveyor general transmitted a copy of his instructions to the governor and desired information whether the state authorities would accept the field notes, or conclude to have a survey "to determine the boundaries of the swamp and overflowed lands."

It was further alleged that the governor suggested delay, and that on January 3, 1851, the surveyor general gave his opinion that the field notes would show a greater amount of swamp lands than an actual resurvey.

The bill then stated that the survey spoken of indicated the sections or subdivision of sections of government lands which were of a swampy character, and that pursuant to the propositions and suggestions aforesaid the legislature of Michigan passed an act, approved June 28, 1851, adopting the notes of the surveyor on file in the office of the surveyor general, as the basis upon which the state accepted the lands, and that such legislation was well known to the Land Department in Washington, and understood to be the basis agreed upon for the adjustment of the lands granted by said grant.

That this proposition and these acceptances by the state "operated and had the legal effect to perfect in the state of Michigan, full, complete, and absolute title to all the lands shown by the surveyor general's minutes to be swamp and overflowed lands, and all subdivisions of land the greater part of which appeared by said minutes to be of a swampy nature."

It was further averred that the surveyor general thereupon proceeded to prepare plats, and designate upon such plats the lands of a swampy nature and character which came

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clear title, was making valuable permanent improvements, will not estop him from foreclosing, where he did and said nothing to mislead the purchaser. Kendall v. Tracy, 64 Vt. 522.

A wife, who, with knowledge of a sale of community land by her husband and that the purchaser claims to own it, remains silent for nearly four years, is estopped to assert that the sale was void as made without her consent. Mudgett v. Clay, 5 Wash. 103.

A married woman owning property, record title to which is in her name at the time her husband makes a contract in his own name as the owner of the premises, for the erection of a building thereon, who does not know that he is holding himself as the owner, is not estopped from denying his ownership, in an action to establish a lien for erecting such building, by the fact that she did not forbid its erection. Campbell v. Jacobson, 145 Ill. 389.

The widow of a partner, made a party to the bill by the executors of the surviving partner for an accounting and sale of the partnership assets, is estopped, as against a purchaser of partnership lands, to assert a dower right independent of the partnership, which she did not assert in the suit. Free v. Beatley, 95 Mich. 426.

There is no acquiesence in or ratification of, the surrender of a life insurance policy by a guardian in socage, made without the knowledge of the beneficiaries when they were minors, where they have not consciously or intentionally acquiesced in or ratified it, or taken the fruits of it, or done anything to mislead or prejudice the insurance company. Foley v. Mutual L. Ins. Co. 20 L. R. A. 620, 138 N. Y. 333.

A mill owner who, for six years, fails to object to the setting back of water by the raising of a dam below, of which he has knowledge, is estopped as against a subsequent grantee whom he allows to make large expenditures in replacing such dam at the same height after it is carried away, without notice of any claim that the height is excessive. Dean v. Benn, 69 Hun, 519.

An estoppel against the opening of a dedicated city street to its full width does not arise from delay to assert the claim for a period of sixteen years, during which time abutting property had been purchased under the belief that the street was being worked to its full width, and improvements erected which would be destroyed if the street was widened. Witherspoon v. Meridian, 69 Miss. 288.

Failure to repay or tender back money, the retention of which operates as an estoppel, is not excused by the fact that the money has been spent, and that the persons so estopped are indigent and able only to supply themselves with the necessaries of life. Brewer v. Nash, 17 R. I. 793.

A stockholder in a national bank, who, with full knowledge of all the steps taken in placing it in liquidation, receives and retains a dividend paid by the officers in control of the liquidation, is estopped to deny the validity of such liquidation. Watkins v. National Bank of Lawrence, 51 Kan. 254, 8 Bkg. L. J. 431.

A school township which has wrongfully received and converted to its own use taxes belonging to another school town cannot, in an action by the latter to recover them, controvert the legality of the tax imposed or the regularity of the assessment. Jefferson School Twp. v. Worthington School Town, 5 Ind. App. 586.

That moneys were advanced by a bank to a mortgagor on the faith of the mortgage will not estop the latter's wife and son from maintaining a suit for its cancellation on the ground of his incompetency, where such advancement was made after notice of such incapacity. Brothers v. Bank of Kaukauna, 84 Wis. 381.

A married woman who takes part in proceedings by a non-resident railroad company having a right to do business in the state but not to condemn lands, to condemn her separate property, accepts the award, and retains it for years, is estopped while still retaining it to maintain ejectment for such land on the ground that it was illegally condemned. St. Louis & S. F. R. Co. v. Foltz, 52 Fed. Rep. 627.

A railroad company which has taken advantage of an act permitting its station agents to act as conservators of the peace and make arrests cannot attack the constitutionality of the act when sued for an alleged wrongful arrest made by one of its agents. Illinois Cent. R. Co. v. King, 69 Miss. 852.

A married woman who permits a railway company to grade its roadbed through her lot, and receives payment therefor through her husband as her authorized agent, and thereafter stands by and permits the company to expend its money in constructing its road, is estopped, not only as to that company, but as to its subsequent grantee. Ragan v. Kansas City & S. E. R. Co. 111 Mo. 456.

An owner of real estate is not estopped to assert that the employment of a broker by one whom he has authorized to sell the land was unauthorized, by consummating the sale negotiated by such broker and receiving its fruits. Carroll v. Tucker, 2 Misc. 397.

within the grant; that the maps and plats are now on file in the office of the Michigan land commissioner, and are the identification of the swamp lands granted to the state of Michigan by the said Act, and "which this informant submits are effective and binding both upon the United States and all persons claiming from them as well as the state of Michigan;" that 365] the action* of the state and the lists were reported to the General Land Office.

The bill then stated that the title of the state of Michigan having been perfected in this manner, afterwards Congress, by Act of June 3, 1856, granted lands to Michigan to aid in the construction of certain railroads, and, among others, the Flint & Pere Marquette Railroad, and that a large quantity of the lands selected by the railroad company were lands which were shown by the minutes of the surveyor general to be swamp.

That the proposal by the Commissioner of the General Land Office as to the method of identification, the action taken thereon, and the selection of swamp lands, were with the approval of the Secretary of the Interior; that by reason thereof and sundry subsequent confirmatory acts of Congress the title of the state became complete; and that by the means particularly detailed in the bill these lands became diverted from the swamp land grant, and passed to the railroad company as railroad lands. The prayer was that the lands might be declared to be swamp lands, and that the railroad company had no right in them; that the title of the state be confirmed, and that the defendants be required to account for land and timber sold; and for an injunction to prevent further sales.

The answer denied that the state of Michigan had any power or control over the lands or any of them, and stated that the defendant trustees held the title for the railroad company; that this title came from the United States through the state of Michigan by an act of the legislature of February 14, 1857, and sundry subsequent conveyances; denied that the effect of the grant was, as stated in the information, to vest title in the state prior to identification; and that the correspondence spoken of in the bill could have the effect to increase the rights of the state of Michigan beyond the terms of the Act of Congress granting said lands.

The answer further stated that it was a matter of common knowledge that many of the surveys in Michigan were false and fraudulent, in many cases surveys not having been made 366] *in the field at all, but the field notes and maps which were returned being wholly false and fictitious; that in consequence resurveys were made pursuant to the authority of Congress; that Congress made appropriations for that purpose, and that the notes of the resurvey and the maps of the resurvey became the notes of the survey; that the Federal authorities and the state authorities accepted the resurveys as the only valid surveys, and had acted upon these resurveys as such from that time until the filing of this bill.

It was denied that any of the lands mentioned and referred to in the bill were in fact swamp or overflowed lands within the meaning of the Act of Congress; and stated that there had been a reorganization of the Flint & Pere Marquette Railroad Company, and that a new corporation had been organized to take the title of the original company, and that all the lands mentioned had been certified by the Secretary of the Interior and the Commissioner of the General Land Office of the state of Michigan as lands identified as being within the Act of June 3, 1856, for the benefit of the Flint & Pere Marquette Railroad Company.

It was further averred that no patents were issued under the grant of June 3, 1856, to the railroad company, but that the title passed by statute, which title was made complete by the identification and certification of the United States Land Office at Washington; that the greater portion of these lands had been offered for sale for more than twenty years, and more than four fifths of them had been in fact sold, and that many of the parcels had been occupied by purchasers for more than fifteen years and that the title of these purchasers had never been questioned until the filing of this information.

The answer claimed that the certification of the lands under the railroad grant was itself an adjudication by the Secretary of the Interior that the lands were not of the character described in the Swamp Land Act of 1850, and was a conclusive adjudication that said lands were included within the railroad grant of 1856.

The answer further stated that if the state did become the owner, as specified in the bill, so much time had elapsed *that the state [367 was prohibited by law, by its own statute of limitations, from bringing any suit for the recovery of the lands; that the claim of the state was stale and that so much time had elapsed, and other rights had become so involved by the issue of bonds by the railroad company secured upon these lands, and by the sale of so large a portion of the lands to parties who bought in good faith, that the state should be held estopped from now raising the question at issue; and further, because the state of Michigan had, by virtue of special acts of its legislature, caused lists to be made of these lands and sent to the assessing officers, and that for many years, under the authority of the state of Michigan, they had been especially assessed as railroad lands, and the railroad company had paid many thousands of dollars for taxes imposed upon them under these acts of the legislature.

The answer also alleged that application was made by the railway company in 1870 to the commissioner of the state land office to know whether any of these lands were claimed by the state as swamp lands, and the company was then advised by the commissioner of the state land office that the state did not lay any claim to any of the lands in question; and reiterated the averment of estoppel.

Proofs were taken and upon hearing a decree was entered in the court below in favor of complainant, declaring the title to be in the state; that the cloud thereon arising from the claim of defendants be removed; and referring the cause to a commissioner to take evidence of taxes paid by defendants on the lands and the value of the timber cut therefrom; whereupon the cause was taken by appeal to the supreme court of Michigan, which reversed the

decree and directed the bill to be dismissed with costs. *State* v. *Flint & P. M. R. Co.* 89 Mich. 481. The cause was then brought by writ of error to this court.

Mr. **Wm. L. Webber** for defendants in in error, in favor of motion.

Mr. **A. A. Ellis,** Atty. Gen. of Michigan, for plaintiff in error, in opposition.

368] **Mr. Chief Justice* **Fuller** delivered the opinion of the court:

The supreme court of Michigan held that the state might be estopped by its acts, conduct, silence and acquiescence; that the only question necessary to be considered and determined was the question of estoppel; and, after a full consideration of the facts applicable to this branch of the case, reached the conclusion that the claim of the state had no foundation in equity, justice or good conscience; that it had become stale; and that the state was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this court has no jurisdiction to review it, and the writ of error must be dismissed. *Adams County* v. *Burlington & M. R. Co.* 112 U. S. 123 [28: 678]; *Israel* v. *Arthur, ante* p. 474.

Writ of error dismissed.

WILLIAM B. MADDOCK, *Plff. in Err.*,
v.
DANIEL MAGONE, Collector of the Port of New York.

(See S. C. Reporter's ed. 368-373.)

Commercial meaning of words in Tariff Act—construction—established usage—refusal to instruct jury.

1. If the words used in the tariff acts to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention.
2. While tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown.
3. The commercial designation of goods imported is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.
4. Where an instruction which plaintiff asked should be given to the jury, was altogether too broad, plaintiff cannot complain of the refusal to give it in the terms in which it was requested.

[No. 244.]

Argued Feb. 1, 1894. Decided March 12, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of defendant in an action brought by William B. Maddock, plaintiff, against Daniel Magone, Collector, defendant, to recover duties paid under protest upon imported goods. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action to recover duties paid under protest. The bill of exceptions, omitting formal parts, was as follows:

"The plaintiff imported in the year 1886 into the port of New York certain goods, consisting of mugs, plates, cups and saucers, made of china, of small size, and claimed by him to be dutiable as toys. Duty was assessed by the defendant and paid by the plaintiff at the rate of sixty per cent ad valorem *under protest[369 as follows: 'Against your decision and assessment of duties as made by you and the payment of more than 35% ad valorem on our importations below mentioned, consisting of certain china toys, claiming that under existing laws and particularly by Sch. 'N,' Act March 3, 1883, as toys said goods are liable at no more than 35% ad valorem and not at 60% ad valorem as charged by you.'

"Due appeal was made and suit was brought in due time.

"Plaintiff further introduced evidence tending to show that the articles in question were in fact toys, and in addition that they were known in trade and commerce in March, 1883, and prior thereto, as toys, and were bought and sold under the denomination of toy plates, toy teas and toy cans.

"In behalf of the defendant evidence was introduced tending to show that these articles were not handled by toy houses, but that they were bought and sold under the name of A B C plates, A B C mugs, A B C cans, and the cups and saucers were known as Minton teas or after dinner coffees, and were also used in restaurants to serve coffee in, and that they were used by children to eat and drink out of, and not merely for the purpose of amusement.

"The court, at the conclusion of the evidence, submitted the question to the jury as follows:

"'You are to answer the question by yes or no whether these goods are or are not toys. You have heard the evidence, and all that is necessary for me to do in leaving the case in your hands is to give you the definition of the word toy: "A toy is a plaything; a thing the main use or purpose of which is the amusement of children." Bearing that definition in mind and as instructed by the evidence, you will determine as to these articles whether they are or are not toys.'

"Thereupon counsel for plaintiff requested the court to charge that if these articles were known as toys in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover; which request the court refused so to charge, and plaintiff's counsel duly excepted, and the exception was duly allowed."

The record states that "after hearing the evidence for the *respective parties and the[370 argument of counsel, the jury say that they find the goods in suit are not toys, and, by direction of the court, that they find a verdict for the

NOTE.—*As to lien of United States for duties,* see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to *Greely v. Thompson,* 12: 397.

defendant." Judgment was thereupon entered on the verdict in favor of the defendant, with costs, and this writ of error taken out.

Mr. **Edwin B. Smith** for plaintiff in error.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiff contended that the articles in question should have been assessed under the clause in Schedule N, in the Tariff Act of March 3, 1883, chap. 121, "dolls and toys, thirty-five per centum ad valorem;" but the collector assessed them under Schedule B of that Act, imposing a duty on "china, porcelain, parian, and bisque, earthen, stone and crockery ware, including placques, ornaments, charms, vases, and statuettes, painted, printed, or gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem." 22 Stat. at L. 495, 512.

After giving the ordinary definition of the word "toy," the court left to the jury the question whether these goods were or were not toys. No exception was reserved to this part of the charge nor to the action of the court in that regard. The evidence on behalf of the plaintiff tended to show that the articles were in fact toys, and on behalf of the defendant that they were "used in restaurants to serve coffee in, and that they were used by children to eat and drink out of, and not merely for the purpose of amusement;" but the plaintiff, in addition to the contention that they were in fact toys, attempted to establish that such was their commercial designation. Accordingly he offered evidence tending to show that "they were known in trade and commerce in March, 1883, and prior thereto, as toys, and were bought and sold under the denomination of toy plates, toy teas, and toy cans;" while defendant's evidence tended to show "that these articles were not handled by toy houses, but that they were bought and sold under the name [371] of A B C plates, A B C mugs, A B C *cans, and the cups and saucers were known as Minton teas or after dinner coffees."

Plaintiff requested the court to charge "that if these articles were known as toys in trade and commerce in March, 1883, and prior thereto, the plaintiff is entitled to recover." The court refused so to charge and this refusal is the subject of the only exception in the record.

In *Cadwalader* v. *Zeh*, *ante*, p. 115, it was said that "it has long been a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted." But it is also true that, as observed by *Mr. Chief Justice* Waite in *Swan* v. *Arthur*, 103 U. S. 597, 598 [26: 525, 526], "while tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown."

The inquiry was whether, in a commercial sense, the articles were so known, trafficked in, and used, under the denomination of toys, that Congress, in the use of the particular word should be presumed to have had that designation in mind as covering such articles.

Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.

The sole instruction requested by plaintiff was that he was entitled to recover if these articles were known as toys in trade and commerce at the time of the passage of the Act and prior thereto. The prevalence of the usage related to the date of the Act, and although if a special meaning were attached to certain words in a prior Tariff Act, it would be *pre [372] sumed that Congress intended that they should have the same signification when used in a subsequent Act in relation to the same subject matter, *Reiche* v. *Smythe*, 80 U. S. 13 Wall. 162 [20: 566], this presumption is not conclusive, and the instruction was not objectionable because not referring to the date of the first appearance of toys in tariff legislation.

But the difficulty is that if these articles were only so known in one trade or branch of trade or in one part of the country, partially and locally, and not uniformly and generally, the conclusion announced by the instruction would not follow. Recovery could not be had on a theory involving different rates of duty at different ports of entry, or distinct and differing designations.

Plaintiff did not attempt to prove that the articles were handled by toy houses, though evidence was adduced by him that they were known as toys and bought and sold as "toy plates, toy teas, and toy cans," but not by toy dealers according to defendant's evidence; and if it were admitted that their signification as toys was confined to a particular locality, or to a particular class, as, for instance, to those who imported them (in which case there might be danger that the designation would vary with the rates) and not to those who dealt in them, and that a different meaning obtained elsewhere or among the latter, then the usage relied on would fail to be made out.

The instruction, without qualification in the direction of the essential elements of such a usage, was altogether too broad, and plaintiff cannot complain of the refusal to give it in the terms in which it was requested.

The jury found a special verdict that the articles were not toys, and, then, by direction of the court, found a general verdict for the defendant. To this no exception was taken, but plaintiff contends that the general verdict was based upon the special verdict, and so was given upon an immaterial issue, and that it was error, there being evidence to establish commercial usage, to direct the general verdict as the legal result of the special finding. This, however, does not appear, and as the judgment was the logical, legal conclusion from the *gen- [373] eral verdict, and no exception to the direction

was preserved, there is nothing open to our review on this branch of the case.

Judgment affirmed.

Mr. Justice **Gray** was not present at the argument and took no part in the decision of this case.

JULIUS BERBECKER ET AL., *Plffs. in Err.*,

v.

WILLIAM H. ROBERTSON, Collector of the Port of New York.

(See S. C. Reporter's ed. 373-377.)

Commercial designation of imported goods—usage.

1. The usage from which it may be inferred that Congress intended to use particular words in a particular sense in a Tariff Act, must be definite, uniform, and general, and such designation is to determined as of the date of the Act.

2. Where the evidence of a definite, general, and uniform usage was so slight, any at all, that a verdict based upon it would be set aside, the circuit court committed no error in striking it out and in directing a verdict contrary thereto.

[No. 245.]

Argued Feb. 1, 1894. Decided March 12, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment or plaintiffs, Julius Berbecker *et al.*, against William H. Robertson, Collector, defendant, for part only of the sum claimed for duties paid under protest upon imported goods. As to the balance of the claim a verdict was directed for defendant. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action to recover duties paid under protest upon importation of nails, described in the bill of particulars as "upholstering nails," between September 21, 1883, and January 22, 1884.

Schedule C of the Act of March 3, 1883, contained the following provisions (22 Stat. at L. 498, 501):

"Horse-shoe nails, hob nails, and wire nails, and all other wrought iron or steel nails, not specially enumerated or provided for in this Act, four cents per pound."

"Britannia ware, and plated and gilt articles and wares of all kinds, thirty-five per centum ad valorem."

Manufactures, articles, or wares, not specially enumerated or provided for in this Act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem."

These paragraphs are numbered in the tariff index as 168, 210, and 216.

The collector applied the last paragraph to these nails and *the plaintiffs protested [374 that one or the other of the preceding clauses gave the applicable rate. At the trial a verdict was found, under the direction of the court, for a portion of the duties collected, and plaintiffs consequently recovered a judgment, but a judgment for less than the amount they claimed. The only witness was one of the plaintiffs, and the bill of exceptions, containing his testimony and the subsequent rulings, is as follows:

"I am interested in manufacturing. I have been in manufactories abroad, and have seen these goods made, and know how it is done. The heads of the nails are tumbled in barrels of water and chemicals to give them a nice gold color. Before they go into the barrels they are the natural color of brass. These samples are known in trade and commerce as gilt nails and are bought and sold as such.

"Being cross examined by counsel for defendant:

"I cannot describe the exact color of brass except I went into a brass mill and showed you a piece of brass. (Referring to a nail in a board). If I saw it at a distance I should probably say it was brass, but still it does not look like the nails before they go into the barrel. Before they go into the barrel there is no lustre on them, or very little. I do not see anything here that looks like the sheet brass of which the nails are made. With regard to the contents of the barrel referred to by me in my direct examination as 'water and chemicals,' I do not care to state what the chemicals are, because it is a trade secret, but I am willing to state it to the judge alone, so that nobody else hears it. It is a liquid substance of the color of water. It looks like water and nothing else. The process through which these exhibits are put is called by some polishing; not polishing by means of rubbing, but it is done by friction, by the shaking of them up, by the rolling of the nails in the barrel. The length of time they are rolled depends upon what color you want to get on them; sometimes an hour, sometimes two hours, and sometimes it takes longer. I roll them until I get the color I want. Increased rolling tends to darken the color sometimes and sometimes to lighten it.

* These nails are bought and sold in [375 this country under the name of gilt nails. That is the proper name for these. They may be sometimes sold under another name, but meaning a gilt nail of first and second quality. We do not sell them as upholstery nails. I cannot tell what other parties do. I cannot swear to that. I know only how they are labeled, and if by accident they should be billed as upholstery nails I should consider it a mistake. I cannot swear that they are not bought and sold in trade and commerce of this country as upholstery nails, because I do not know what other parties do. I can only speak for myself and at the same time as to what is the general usage in the trade. The general usage has been, know as long as I have been in the business, whenever a person asked me what was the price of nails, of gilt nails, or they might have asked for upholstery nails, I knew that they meant gilt nails. They are bought and sold in this country under the name of gilt

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

nails. They may possibly have been ordered from a large dealer by a dealer in this country under the name of 'upholstery nails.' They are sometimes bought and sold in trade and commerce of this country as 'French nails,' 'chair nails,' and as 'furniture nails.'

"Defendant's counsel then moved to strike out the testimony as to the fact that they were called 'gilt nails.' The court granted the motion, and plaintiffs' counsel duly excepted, and the exception was duly allowed.

"Plaintiffs thereupon rested, and counsel for the defendant moved the court for the direction of a verdict for the defendant upon so much as was sought to be recovered upon the nails which did not appear to be actually gilt or not to have gold upon them, which motion the court then and there granted and directed the jury to find a verdict for the defendant: to which ruling and direction the counsel for the plaintiffs then and there duly excepted and the exception was allowed, and the jury thereupon found a verdict for the defendant."

Judgment having been entered on the verdict, a writ of error was duly taken out.

Mr. **Edwin B. Smith** for plaintiff in error.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error.

376] **Mr. Chief Justice* **Fuller** delivered the opinion of the court:

Upon this record, it is apparent that these nails did not fall within the first of the three paragraphs, as they are referred to in the evidence as made of sheet brass. Counsel produced in argument some nails with wrought iron shanks and brass heads, which he claimed were the same as those in question, but they were not before us as exhibits, and, moreover, appeared to be in the nature of brass ornamentation.

Nor did the nails come within the second of the paragraphs, "Britannia ware, and plated and gilt articles and wares of all kinds," unless the principle of commercial designation could be properly applied and such designation was made out, for we concur in the view that gilt articles and wares taken in connection with Britannia and plated ware mean articles actually gilded by overlaying, and not merely made to look gilt by rolling them in a secret chemical solution. We are not prepared to hold that, under such circumstances, this paragraph would be applicable, even if nails thus manipulated were commercially designated as "gilt nails;" but, if applicable, we are still of opinion that the judgment must be affirmed.

It has just been held that the usage from which it may be inferred that Congress intended to use particular words in a particular sense in a Tariff Act, must be definite, uniform, and general, and that such designation is to be determined as of the date of the Act. *Maddock* v. *Magone, ante*, p. 482.

Tested by this rule, the evidence was entirely insufficient to show such a usage in respect of denominating this class of nails, "gilt nails," contemporaneous with the Tariff Act of March 3, 1883, or otherwise.

True, plaintiff testified that the articles "are known in trade and commerce as gilt nails and are bought and sold as such," but his testimony on cross-examination practically *limit- [377 ed his personal knowledge of usage in the trade to his own practice; he could not say that they were not bought and sold in trade and commerce as upholstery nails; and he admitted that they were sometimes so bought and sold as French, chair, and furniture nails. The evidence of a definite, general, and uniform usage was so slight, if any at all, that a verdict based upon it would be set aside, and the circuit court committed no error in striking it out and in directing a verdict for defendant as to these particular nails.

Something was said about the lack of precision in the motion "to strike out the testimony as to the fact that they were called 'gilt nails,'" and the effect of not making it until the conclusion of the testimony of the witness; but as no further evidence was offered, the motion practically amounted to a demurrer to evidence, and if it was not sufficiently comprehensive, that was cured by the direction of the verdict.

The circuit court was right, and the judgment is affirmed.

Mr. Justice **Gray** was not present at the argument, and took no part in the decision of this case.

HENRY DUNCAN, *Plff. in Err.*, *v.* STATE OF MISSOURI.

(See S. C. Reporter's ed. 377-384.)

Review of state judgment—14th Amendment——due process of law—ex post facto law—creation of new courts—Federal question.

1. A writ of error from this court to review a state judgment can only be maintained under the circumstances defined in section 709 of the Revised Statutes.
2. The privileges and immunities of citizens of the United States, protected by the 14th Amendment, are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution.
3. Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.
4. An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional

NOTE.—*As to what is due "process of law,"* see note to Pearson v. Yewdall, 24: 436.

As to constitutionality of ex post facto laws, see note to Calder v. Bull, 1: 648, and to Sturges v. Crowninshield, 4: 529.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

punishment to that then described; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.

5. The prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition against *ex post facto* laws.

6. To give jurisdiction to this court to review a state judgment the title, right, privilege, or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it.

[No. 1038.]

Submitted Jan. 12, 1894. Decided March 12, 1894.

IN ERROR to the Supreme Court of the State of Missouri, to review an order denying motion to transfer to court *in banc* a criminal case, being an indictment against Harry Duncan, for the murder of one James Brady, which resulted in his conviction and sentence to death, in the St. Louis Criminal Court, from which judgment he took an appeal to the Supreme Court, where the judgment was affirmed by division No. 2 of that court, and thereupon motion was made in his behalf to transfer the cause to the supreme court *in banc*, which motion was denied. On motion to dismiss. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

Under the constitution of Missouri, in force at the time of the commission of the homicide to which this case relates, the judicial power of that state was vested in a supreme court and other inferior courts as therein mentioned in the supreme court consisting of five judges, any three of whom constituted a quorum. Mo. Const. 1875, art. 6.

In 1889 the general assembly of Missouri passed a concurrent resolution submitting to the qualified voters of the state an amendment to the constitution, concerning the judicial department, to be voted upon at the general election to be held on the Tuesday next following the first Monday in November, A. D. 1890, which vote was had accordingly, and the amendment ratified and adopted. This amendment provided among other things as follows:

"Section 1. The supreme court shall consist of seven judges, and, after the first Monday in January, 1891, shall be divided into two divisions, as follows: One division to consist of four judges of the court and to be known as division number one; the other to consist of the remaining judges and to be known as division number two. The divisions shall sit separately for the hearing and disposition of causes and matters pertaining thereto, and shall have concurrent jurisdiction of all matters and causes in the supreme court, except that division number two shall have exclusive cognizance of all criminal cases pending in said court: *Provided*, That a cause therein may be transfer- [379] red *to the court as provided in section four of this amendment. The division of business of which said divisions have concurrent jurisdiction shall be made as the supreme court may determine. A majority of the judges of a division shall constitute a quorum thereof, and all orders, judgments, and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court."

"Sec. 4. When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a Federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision." Mo. Laws, 1889, 322.

All provisions of the constitution of the state and all laws thereof, not consistent with the amendment, were declared rescinded upon its adoption.

In accordance with the amendment, the supreme court became thereafter composed of seven members (two being added as provided) divided into divisions one and two.

Harry Duncan was indicted at the January term, 1891, of the St. Louis criminal court, for the murder of one James Brady, October 6, 1890, and, after he had been arraigned and pleaded not guilty, the cause was removed, on his application, to the circuit court of St Louis county, wherein it was tried at September term, 1892, and resulted in his conviction and sentence to death. From this judgment he prosecuted an appeal to the supreme court, where the cause was heard by division No. 2. The errors assigned on Duncan's behalf embraced the various points which had been saved upon the trial, but no Federal question was raised either in the appellate or the trial court. The supreme court, division No. 2, on May 16, 1893, delivered an opinion discussing the errors relied on (reported in advance of the official series, 22 S. W. Rep. 699) and affirmed the judgment. On May 26, Duncan applied for a rehearing, which was denied May 30. No *reference to any Fed- [380] eral question was made in the opinion or in the application for a rehearing.

Thereupon, June 7, a motion was filed on behalf of Duncan for the transfer of the cause to the supreme court in banc, upon the grounds that the cause was determined solely by a minority of the supreme court; that a Federal question was involved in that the amendment to the constitution of Missouri was in conflict with the Constitution of the United States; that the offense with which Duncan stood charged was committed October 6, 1890, and before the adoption of the amendment, and that said amendment and the proceedings thereunder were in violation of section 10, article I. of the Constitution of the United States inhibiting the passage of *ex post facto* laws; and in contravention of the 14th Amendment in that thereby the privileges and immunities of appellant were abridged; he was denied the equal protection of the laws; and would be deprived of life without due process of law; and that such amendment and proceedings were in conflict with fundamental principles. The motion was denied, and, subsequently, this writ of error was allowed by the Chief

Justice, and now comes before the court on a motion to dismiss.

Messrs. **R. F. Walker,** Atty. Gen., of Missouri, and **David A. De Armond,** for defendant in error, in favor of motion.

Messrs. **E. M. Hewlett** and *Walter M. Farmer* for plaintiff in error, in opposition.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The amendment to the constitution of the state of Missouri provided for the separation of the supreme court into two divisions for the transaction of business, and that when a Federal question was involved, the cause, on the application of the losing party, should be transferred to the full court for decision. Doubtless, the particular division would direct, of its own motion, the transfer of cases involv-
381] ing a Federal *question without a hearing in the first instance, as was also allowed by the amendment, but to justify transfer, whether before or after judgment, the question must be involved in the sense of arising for decision.

But it is conceded that the record in this cause as it came into the supreme court, division No. 2, disclosed no Federal question to be determined, thereby inviting the division to transfer the cause, or, after the disposal of which, the losing party would be entitled to such transfer. On the contrary, the contention is in effect that division number two had no jurisdiction whatever, because the amendment, if operative on Duncan, was unconstitutional; and this involved the conclusion that there was no appellate court to which the case could be taken as the prior provision in that regard had been repealed. Yet the objection was not raised before or at the hearing on the merits, nor on the application for rehearing, but was first taken, after judgment affirmed and application denied, on a motion to transfer the cause and as a reason for the transfer, although that motion, in respect of the question sought to be raised, could derive no force from the amendment whose validity was denied. Indeed, if the motion had been granted, and the judgment of the circuit court had thereupon been affirmed by the full bench, it is difficult to see why plaintiff in error might not as well then have questioned the jurisdiction of the supreme court, as constituted with seven judges under the amendment, as he now does the power of division number two with three judges.

A writ of error from this court to review a final judgment in any suit in the highest court of a state in which a decision in the suit could be had can only be maintained under the circumstances defined in section 709 of the Revised Statutes.

The judgment brought up by the writ in this case is the judgment of the supreme court of Missouri, entered by division No. 2, and it is obvious that the validity of the constitutional amendment was not drawn in question in the cause on the ground of repugnancy to the Constitution of the United States, and its validity sustained by that decision. But the question of validity arises, if at all, in connection
382] with the claim that a right,* title, privilege, or immunity under the Constitution of the United States was specially set up by plaintiff in error, and denied.

The argument seems to be that the constitution secured to plaintiff in error the right to have his case adjudicated on appeal by a supreme court of five judges, as provided by the state constitution at the time of the commission of the offense with which he stood charged, although his motion accepted the jurisdiction of a bench of seven, and he objects that that right was denied to him in the adjudication of his case by a court composed of three judges in accordance with the amendment. And he insists that the amendment is as to him obnoxious to the objections that it denies due process and the equal protection of the laws, and abridges his privileges and immunities in contravention of the 14th Amendment. But the privileges and immunities of citizens of the United States, protected by the 14th Amendment, are privileges and immunities arising out of the nature and essential character of the Federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; and there is no suggestion of deprivation in these regards, except as covered by the point really pressed, that the amendment to the state constitution was, as to Duncan, *ex post facto*, and therefore void.

It may be said, generally speaking, that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offense or its consequences, alters the situation of a party to his disadvantage (*Cummings* v. *Missouri*, 71 U. S. 4 Wall. 277 [18: 356]; *Kring* v. *Missouri*, 107 U. S. 221 [27: 506]) but the prescribing of different modes of procedure and the abolition of courts and creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of *crime, are [383] not considered within the constitutional inhibition. Cooley, Const. Lim. (5th ed.) 329.

Accordingly, in *State* v. *Jackson*, 105 Mo. 196, the precise questions sought to be raised here were decided by the supreme court of Missouri, at April term, 1891, of that court adversely to the position taken by plaintiff in error, the case having been transferred to the court in banc in order that these questions, which were raised by motion for rehearing in division number two, where the judgment of the lower court had been affirmed (106 Mo. 174) might be considered by a full bench. The case had been before the supreme court on two former occasions (95 Mo. 623; 99 Mo. 60) and the constitutional amendment in question was adopted after the appellant took his last appeal. The supreme court held that it could not "be doubted that it was entirely competent for the people to adopt such a change in their organic law as to take away from this court as a whole all cognizance of criminal causes, and to confer such jurisdiction

on a portion or division of this court, though less in numbers and different in personnel from this court as organized when the crime in question was committed;" and that the amendment was not contrary to the 14th Amendment nor to section 10 of article 1 of the Federal Constitution as applied to one convicted of murder, who had appealed before the amendment took effect.

But we are not called on to place our decision upon concurrence in that view, since we are of opinion that the plaintiff in error did not bring himself within the provisions of section 709 of the Revised Statutes. To give jurisdiction to this court, the title, right, privilege, or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it; whereas, in this case, the question was not suggested until after judgment, and after an application for rehearing had been overruled, and only then in the form of a motion to transfer the cause. Whether that motion was held to come too late for the purposes of transfer we are not informed, but its denial was in no aspect equivalent to a decision against a right under the Constitution of the United States specially set up or claimed at the proper [384] *time and in the proper way. *Texas & P. R. Co.* v. *Southern Pac. Co.* 137 U. S. 48 [34: 614]; *Caldwell* v. *Texas*, 137 U. S. 692, 698 [34: 816, 818]; *Butler* v. *Gage*, 138 U. S. 52 [34: 869]; *Leeper* v. *Texas*, 139 U. S. 462 [35: 225].

The writ of error is dismissed.

UNITED STATES, *Appt.*,
v.
PHILIP R. ALGER.

UNITED STATES, *Appt.*,
v.
ALBERT W. STAHL.

(See S. C. Reporter's ed. 384 396.)

Graduated pay of officer of the Navy—construction of statute.

1. Under the Act of March 3, 1883, an officer of the Navy, who resigns one office the day before his appointment to a higher one, though in a different branch of the service, is only entitled to longevity pay as of the lowest grade, having graduated pay held by him since he originally entered the service.
2. Where the meaning of an Act is doubtful, its practical construction by the Navy Department is entitled to great weight, but where the meaning of the statute appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect.

[Nos. 885, 886.]

Petition presented March 3, 1894. Decided March 19, 1894.

PETITIONS for rehearing of the above two cases which were decided at the present term in favor of the United States. *Petitions denied.*

NOTE.—*As to extra pay or compensation to officers, see note to United States* v. Macdaniel, 8: 587.

See same case before this court, *ante*, p. 192. The facts are stated in the opinion.

Mr. **Wm. A. Maury** for petitioner.

Mr. Justice **Gray** delivered the opinion of the court:

These two cases were decided at the present term in favor of the United States, upon the ground that under the Act of March 3, 1883, chap. 97 (22 Stat. at L. 473) an officer of the Navy, who resigns one office the day before his appointment to a higher one, though in a different branch of the service, is only entitled to longevity pay as of the lowest grade, having graduated pay, held by him since he originally entered the service. *Ante*, p. 192.

The principal grounds of the petitions for rehearing, and the only ones which require to be noticed, were not suggested in the briefs upon which the cases were submitted for decision. Those grounds are that, by the settled practice of the Navy Department (as shown by documents now laid before the court for the first time) officers in one branch of the service are required to resign from the Navy before accepting an appointment in any other branch of the service; the longevity pay of officers so transferred from one branch of the service to another is computed upon the theory that the new appointment is a new entry into the service; and the names of such officers are placed, without regard to their previous rank, at the foot of the list of officers of the same grade in the new corps.

As it now appears that the resignation of every officer, under such circumstances, is absolutely required by the Navy Department, it is evident that no case of the kind could be open to the suggestion made, by way of hypothesis only, and not as applicable to either of these claimants, in the former *opinion in [397] Alger's case, that if such a formal resignation were sent in for the purpose of eluding the statute and claiming longevity pay on the higher scale, the attempt would be unbecoming in the officer or his advisers.

But the habitual requirement of such a resignation by the Navy Department, as a preliminary to the new appointment, puts beyond doubt (what was before in some degree a matter of inference from the specific facts found) that each resignation was tendered with no intention of leaving the service; and confirms us in the opinion heretofore announced, that the actual service of each claimant from the time he first entered the Navy was for a single and continuous period, within the meaning of the longevity pay Act.

If the meaning of that Act were doubtful, its practical construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect. *Swift & C. & B. Co.* v. *United States*, 105 U. S. 691, 695 [26: 1108, 1109]; *United States* v. *Graham*, 110 U. S. 219 [28: 126]; *United States* v. *Tanner*, 147 U. S. 661 [37: 321].

This case does not present for judicial determination (if it could be so presented in any form) the question whether the practice of the Navy Department with regard to the rank and

precedence of such officers conforms to section 1485 of the Revised Statutes, which directs that "the officers of the staff corps of the Navy shall take precedence in their several corps and in their several grades, and with officers of the line with whom they hold relative rank, according to length of service in the Navy."

In the petitions for rehearing, illustrations are given of the inequality of the operation of the longevity pay Act, as construed by this court. But as that Act, upon any possible construction, distinguishes the case of continuous from that of interrupted service, it is impossible that there should not be some cases of apparent disproportion in the allowances for length of service. The duty of the courts is to apply the general rule prescribed by Congress. If injustice attends the application of the rule in 398] particular cases, Congress alone *can afford a remedy, by changing the rule for the future, or granting additional compensation for the past. *Petitions for rehearing denied.*

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

GEORGE G. MURPHY, *Plff. in Err.*,
v.
ELISHA A. PACKER.

(See S. C. Reporter's ed. 398-405.)

Evidence of title in Pennsylvania—recital in patent—title, how established—estoppel—when title vested.

1. In Pennsylvania a purchaser voucher and a purchase blotter on file in the land office of the state, stating that a certain person took out certain warrants for land and paid the purchase money, are evidence of such payment, and gives to him the ownership of the warrants, with a right to maintain ejectment.
2. A recital in a patent of a prior conveyance to the patentee is not evidence against third parties to affect rights vested in them.
3. In Pennsylvania a legal title in land under a warrant from the state, is established by the warrant, survey, and payment of the purchase money, and it is not competent for the state to affect that title by a subsequent patent to a stranger.
4. A county in Pennsylvania is estopped from asserting title in itself under a tax sale, when the commissioners had bought in the land, as against a purchaser from the county treasurer.
5. In Pennsylvania a legal title becomes vested in a person by his ownership of the warrant of public land and his payment of the purchase money, and a stranger to that title, claiming under another title, cannot avail himself of the statute of April 22, 1856, in respect to resulting trusts, after five years.

[No. 107.]

Argued Jan. 16, 17, 1894. Decided March 19, 1894.

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed, see note to Watts v. Lindsey, 5: 422.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania, to review a judgment for the plaintiff, Elisha A. Packer, against Charles G. Murphy, defendant, in an action of ejectment, for the recovery of the possession of a tract of land situate in the county of Cumberland, Pennsylvania. *Affirmed.*

Mr. **A. Ricketts**, for plaintiff in error:

When unseated land is sold for the payment of taxes, the title of the real owner, whatever it may be, passes to the purchaser, whether it be assessed and sold in his name, the name of the warrantee, or a stranger, and whether the person in whose name it is taxed and sold has or has not any title.

Strauch v. *Shoemaker*, 1 Watts & S. 166; *Russell* v. *Werntz*, 24 Pa. 337; *Fager* v. *Campbell*, 5 Watts, 287; *Hockenbury* v. *Carlisle*, 5 Watts & S. 348; *Irwin* v. *Trego*, 22 Pa. 368; *Olcott* v. *Bynum*, 84 U. S. 17 Wall. 44 (21: 570); *Downing* v. *Gallagher*, 2 Serg. & R. 455.

The execution by a public officer of a power to sell lands for the nonpayment of taxes, must be in strict pursuance of the law under which it is made, or no title is conveyed; and the party who sets up title under such sale, must furnish the evidence that every prerequisite to the exercise of the power to sell has preceded the sale.

Williams v. *Peyton*, 17 U. S. 4 Wheat. 77 (4: 518); *Thatcher* v. *Powell*, 19 U. S. 6 Wheat. 119 (5: 221); *Mason* v. *Fearson*, 50 U. S. 9 How. 248 (13: 125); *Early* v. *Homans*, 57 U. S. 16 How. 610 (14: 1079); *Moore* v. *Brown*, 52 U. S. 11 How. 414 (13: 751).

The treasurer had no authority to make the sale in 1842, because one of the essential prerequisites to such authority was the fact that a tax had been duly assessed, and remained due and unpaid for the space of one year before the sale.

Laird v. *Hiester*, 24 Pa. 452; *McReynolds* v. *Longenberger*, 57 Pa. 13; *Breisch* v. *Coxe*, 81 Pa. 336, 348; *Miller* v. *McCullough*, 104 Pa. 624.

In a controversy respecting title to lands in a state, this court will administer the law of the state in all respects as if it were a court sitting there and reviewing the decision of an inferior court in that state.

Clark v. *Graham*, 19 U. S. 6 Wheat. 577 (5: 334); *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); *Lloyd* v. *Fulton*, 91 U. S. 479 (23: 363); *Lippincott* v. *Mitchell*, 94 U. S. 767 (24: 315); *Slaughter* v. *Glenn*, 98 U. S. 242 (25: 122).

No one can complain of being misled who has a knowledge of his rights or has the means of learning the same.

Hepburn v. *McDowell*, 17 Serg. & R. 383, 17 Am. Dec. 677; *Crest* v. *Jack*, 3 Watts, 238, 27 Am. Dec. 353; *Carr* v. *Wallace*, 7 Watts, 394, 401; *Com.* v. *Moltz*, 10 Pa. 527, 51 Am. Dec. 499; *Glidden* v. *Strupler*, 52 Pa. 400.

The commissioners were simply the agents of the county, and, even in the ordinary case of principal and agent, their acts outside of the authority delegated to them would not bind their principal.

Hough v. *Doyle*, 4 Rawle, 291; *Kerns* v. *Piper*, 4 Watts, 222; *Baltimore & O. Employés Relief Asso.* v. Post, 2 L. R. A. 44, 122 Pa. 483

579; *Mechanics Bank of Alexandria* v. *Bank of Columbia*, 18 U. S. 5 Wheat. 326 (5: 100); *Le Roy* v. *Beard*, 49 U. S. 8 How. 451 (12: 1151).

Where the title has been completely obtained from the commonwealth, there can be no such thing as abandonment by which the title can be lost.

Naglee v. *Albright*, 4 Whart. 291; *Bunting* v. *Young*, 5 Watts & S. 188; *Urket* v. *Coryell*, 5 Watts & S. 60; *Bear Valley Coal Co.* v. *Dewart*, 95 Pa. 72; *Putnam* v. *Tyler*, 117 Pa. 570.

A plaintiff in ejectment can only recover upon the strength of his own title, and the possession of the defendant gives him a right against every man who cannot show a good title.

Welker v. *Coulter*, Add. 390; *Covert* v. *Irwin*, 3 Serg. & R. 283; *Lahman* v. *Howley*, 95 Pa. 295.

A trust will not be presumed in evasion or violation of an act of the legislature.

Camden v. *Anderson*, 5 T. R. 709; *Curtis* v. *Perry*, 6 Ves. Jr. 739a; *Ex parte Yallop*, 15 Ves. Jr. 60; *Ex parte Houghton*, 17 Ves. Jr. 251.

The evidence upon which the claim is made, does not show the full payment of the money necessary to secure the title.

Nixon's App. 63 Pa. 279; *O'Hara* v. *Dilworth*, 72 Pa. 397; *Earnest's App.* 106 Pa. 310; *Olcott* v. *Bynum*, 84 U. S. 17 Wall. 44 (21: 570).

No action for recovery of land will lie, unless the same be brought within five years after the sale thereof for taxes. This limitation is in full force in Pennsylvania.

Robb v. *Bowen*, 9 Pa. 71; *Sheik* v. *McElroy*, 20 Pa. 25; *Johnston* v. *Jackson*, 70 Pa. 164.

Messrs. **James Ryon**, *John W. Ryon*, and *S. P. Wolverton*, for defendant in error:

In Pennsylvania, the party who paid for the land is the owner of the warrant.

Huidekoper v. *Burrus*, 1 Wash. C. C. 114; *Campbell* v. *Galbreath*, 1 Watts, 70.

The grant to plaintiff could not be affected by a subsequent grant to a stranger.

Penrose v. *Griffith*, 4 Binn. 231; *Maclay* v. *Work*, 5 Binn. 154; *Woods* v. *Wilson*, 37 Pa. 379; *Delaware & H. Canal Co.* v. *Dimock*, 47 Pa. 393; *Urket* v. *Coryell*, 5 Watts & S. 60; *Balliot* v. *Bauman*, 5 Watts & S. 155; *Smith* v. *Vasbinder*, 77 Pa. 180.

The patent is but a confirmation of the warrant and survey.

Delaware & H. Canal Co. v. *Dimock*, 47 Pa. 393; *Kelly* v. *Graham*, 9 Watts, 116.

Though a patent conveys the legal estate against the commonwealth, it will not prevail over a prior estate by warrant and survey.

Maclay v. *Work*, 5 Binn. 154, *Gonzalus* v. *Hoover*, 6 Serg. & R. 118; *Woods* v. *Wilson*, 37 Pa. 379.

A patent enures to the benefit of the owner of the title, though issued to another.

Woods v. *Wilson*, *supra*; *Hagerty* v. *Mathers*, 31 Pa. 348.

A patent is not operative against the rights of a third person existing before the issuing of the patent.

Balliot v. *Bauman*, 5 Watts & S. 155; *Smith* v. *Vasbinder*, 77 Pa. 180.

A patent is but prima facie title against prior claimants.

Woods v. *Wilson*, 37 Pa. 382; *Lewis* v. *Bradford*, 10 Watts, 76; *Duer* v. *Boyd*, 1 Serg. & R. 203; *Gingrich* v. *Foltz*, 19 Pa. 40, 57 Am. Dec. 631.

One who has conveyed his right can by no subsequent confession effect the right which he has conveyed.

Dings v. *Downing*, 4 Serg. & R. 353; *Smith* v. *Webster*, 2 Watts, 478; *Lewis* v. *Bradford*, 10 Watts, 76; *Gingrich* v. *Foltz*, *supra*; *Brock* v. *Savage*, 46 Pa. 87; *Green* v. *Brennesholtz*, 73 Pa. 426; *Marsh* v. *Brooks*, 55 U. S. 14 How. 513 (14: 522), 49 U. S. 8 How. 223 (12: 1056).

The patentee is trustee for the owner.

Hoffman v. *Bell*, 61 Pa. 444.

The right to redeem land sold at treasurer's sale is exclusively in the owner; but if actually redeemed by another, it will enure to the benefit of the owner.

Orr v. *Cunningham*, 4 Watts & S. 294; *Laird* v. *Hiester*, 24 Pa. 452.

Mr. Justice* **Shiras delivered the [399 opinion of the court:

This was an action of ejectment brought, in the Circuit Court of the United States for the Western District of Pennsylvania, by Elisha A. Packer, a citizen of the state of New York, against Charles G. Murphy, a citizen of the state of Pennsylvania, to recover possession of a tract of land containing four hundred and sixty-two acres, situate in the county of Cumberland and state of Pennsylvania. The plaintiff's evidence to show title in himself consisted of six warrants for tracts of land of some four hundred acres each, one of which, to Nathaniel Brown, dated November 26, 1793, embraced the land in question; also survey under said warrant made on the 21st day of October, 1794; also, papers on file in the land office of Pennsylvania, namely, a purchaser voucher No. 12,969, and a "purchase blotter" No. 12,969, dated June 14, 1794, stating that Dr. Thomas Ruston applied for and took out the warrant to Nathaniel Brown and five other warrants, and paid the purchase money.

Under the well settled law of Pennsylvania this evidence of payment of the purchase money by Dr. Ruston availed to clothe him with the ownership of the warrants and with a right to maintain ejectment. *Campbell* v. *Galbreath*, 1 Watts, 78; *Ross* v. *Barker*, 5 Watts, 391; *Sims* v. *Irvine*, 3 U. S. 3 Dall. 425 [1: 665]; *Evans* v. *Patterson*, 71 U. S. 4 Wall. 224 [18: 393]; *Huidekoper* v. *Burrus*, 1 Wash. C. C. 114. With the ownership of the land embraced in the Nathaniel Brown warrant and survey thus in Dr. Ruston, the plaintiff put in evidence the record of a suit against said Ruston at No. 44, April session, of the Circuit Court of the United States for the Eastern District of Pennsylvania, showing a judgment obtained on October 13, 1796, sale of said tract of land, and conveyance by the United States marshal on October 11, 1803, to Nicholas Le Fevre. This was followed by proof of the will of Nicholas Le Fevre and of proceedings thereunder, in the orphans' court of Philadelphia and Columbia counties, whereby the title of Le Fevre to the Nathaniel Brown tract be-

came vested in one Joseph Probst on May 9, 1837. By various deeds, wills, and sheriff's sales 400] *put in evidence, but which need not be set forth here, the Nathaniel Brown tract became finally vested, on March 20, 1883, in Elisha A. Packer, the plaintiff below. The plaintiff likewise put in evidence showing that the Nathaniel Brown tract had been sold for unpaid taxes by the treasurer of Northumberland county on June 13, 1840, and conveyed to Charles Pleasants on August 16, 1840; and also, for unpaid taxes, had been sold and conveyed by the treasurer of Columbia county to James Pleasants by deed dated August 17, 1842. These tax titles to Charles and James Pleasants were shown to have become vested, before the bringing of this suit, in the plaintiff below.

These various documents and proceedings on which the plaintiff relied as showing title in himself were particularly set forth, in accordance with a rule of the circuit court pertaining to trials of ejectment, in a statement or brief of title. This statement was not formally controverted by the defendant below, who filed a statement of his own title, which was substantially as follows: 1st, the warrant to Nathaniel Brown, November 26, 1793; return of survey of the same, October 21, 1794, this being identical with plaintiff's title; 2d, a patent for the Nathaniel Brown tract, dated April 13, 1797, to one Peter Grahl, reciting a conveyance by Nathaniel Brown to Grahl, dated November 27, 1793; 3d, assessments of Nathaniel Brown tract, as unseated lands, for unpaid taxes for the years 1826 and 1827; 4th, sale for unpaid taxes and conveyance by the treasurer of Columbia county, on June 2, 1828, to the commissioners of said county; 5th, minutes of commissioners of Columbia county of unseated lands, showing sale to said commissioners in 1828 and sale made by said commissioners of said tract to Charles G. Murphy, the defendant, by deed, acknowledging the receipt of $305, dated September 18, 1882.

At the trial the plaintiff, as above stated, sustained his brief or statement of title by putting in evidence the warrant, survey, and subsequent deeds, documents and proceedings vesting in him the title to the Nathaniel Brown tract. So far as we are advised by the record, the defendant did not object to the plaintiff's evidence, but proceeded to offer evidence to 401] *sustain the history of his own title contained in his brief or statement of title. The offers of the defendant were rejected by the court below, and a peremptory charge was given to the jury to find a verdict for the plaintiff, which was done, and a judgment was entered in favor of the plaintiff, to which the writ of error in this case was sued out.

Error is alleged in the action of the court in refusing to admit the defendant's offers of evidence, and in instructing the jury that the plaintiff was entitled to a verdict.

The first offer of the defendant below was a patent from the commonwealth of Pennsylvania to Peter Grahl, dated April 13, 1797, with recital therein of a conveyance by Nathaniel Brown to Peter Grahl, dated 27th November, 1793, more than six months before the warrant issued or was paid for. The defendant did not offer any such conveyance in evidence, but relied upon the recital in the patent. Such recital was not evidence against Dr. Ruston and those claiming under him. In the case of *Herron* v. *Duter*, 120 U. S. 464 [30: 748], which was an action in ejectment for the land embraced in one of the other warrants owned by Dr. Ruston, and called the Lewis Walker, in the Circuit Court of the United States for the Eastern District of Pennsylvania, the court below rejected a precisely similar offer, namely, a patent to Peter Grahl, with the recital therein of a conveyance by Lewis Walker to Peter Grahl, and such action of the court below was, on error, approved by this court. It was held, following the doctrine of the Pennsylvania cases, that a legal title in Dr. Ruston had been established by the warrant, survey, and payment of the purchase money, and that it was not competent for the commonwealth of Pennsylvania to affect that title by a subsequent patent to a stranger. To the same effect are *Maclay* v. *Work*, 5 Binn. 154; *Woods* v. *Wilson*, 37 Pa. 379.

We, therefore, think that the court below was right, in the present case, in rejecting the defendant's first offer.

The next assignment of error is founded upon the refusal of the court to admit the defendant's offer of the sale book of the commissioners of Columbia county, showing sale of *Nathaniel Brown tract, August 31, 1882, [402 to C. G. Murphy, the defendant, together with a deed of said commissioners to said Murphy, dated and acknowledged September 18, 1882. The plaintiff objected to this offer as irrelevant and incompetent to affect the plaintiff, because the defendant offered no evidence to show title in the county commissioners of Columbia county but a tax title or sale in 1828, and that whatever title was acquired at such sale in 1828 was divested by the tax sale to Pleasants in 1842, and because at the sale in 1882, the presumption had become conclusive that the taxes of 1826, 1827, and 1828 had been paid, and the land redeemed from the sale of 1828.

This action of the court below was justified by the ruling of the supreme court of Pennsylvania, in the case of the *Diamond Coal Co.* v. *Fisher*, 19 Pa. 267, where the very question presented to us in this assignment of error was considered, and it was held that the county was estopped from asserting title in itself under a tax sale, when the commissioners had bought in the land, as against a purchaser from the county treasurer, notwithstanding that the directions of the act of 1815, which prescribes the duties of the commissioners in reference to the holding and disposal of the lands sold to them, were disregarded.

The learned counsel for the plaintiff in error challenges the soundness of the decision of the supreme court of Pennsylvania in the case of *Diamond Coal Co.* v. *Fisher*, and cites the case of *Herron* v. *Murphy*, 22 W. N. C. 181, to the contrary, as overruling the former case.

If, indeed, the decision in the case of *Herron* v. *Murphy* must be read as contended for by the plaintiff in error, we might be constrained thereby to sustain this assignment of error. But our examination of that case does not satisfy us that the case of *Diamond Coal Co.* v. *Fisher*, was thereby overruled. The case of *Herron* v. *Murphy* does not appear in the reg-

ular reports of the decisions of the supreme court of Pennsylvania, and from this we are, perhaps, permitted to infer that the court did not consider the case of sufficient importance to be reported, which could scarcely have been the 403] *case if it was intended to thereby overrule *Diamond Coal Co.* v. *Fisher*, which appears in the official reports. Moreover, in *Herron* v. *Murphy* the case of *Diamond Coal Co.* v. *Fisher* is not noticed or referred to, nor any other case, and the principal questions considered by the court were whether the acknowledgment of a deed by a county treasurer after his term of office had expired was invalid, and the admissibility in evidence of the minute book of the commissioners' office. The defendant's evidence in the case appears to have been ruled out because their abstract of title had not given notice of the treasurer's sale. However this may be, we are unable to accept the contention of the plaintiff in error that it was the intention of the supreme court of Pennsylvania, in the case of *Herron* v. *Murphy*, to overrule the doctrine announced in *Diamond Coal Co.* v. *Fisher*.

The course of the court below, in the present case, in rejecting evidence to show a commissioners' sale nearly sixty years after the sale to them in 1828, without any evidence of claim during this time upon the part of the county to the land, is also sought to be sustained by the contention that, by this long lapse of time, the presumption had become conclusive that the taxes for 1826, 1827, and 1828, for which the lands were sold to the commissioners in 1828, had been paid, and the lands redeemed from the sale of 1828. To sustain this contention the case of *Woodburn* v. *Farmers & M. Bank*, 5 Watts & S. 450, is cited, in which it was intimated, if not directly held, that a presumption of payment would arise from lapse of time against the lien of county taxes. We are not, however, called upon to adopt this view of the case, because we think the ruling in *Diamond Coal Co.* v. *Fisher* sufficiently disposes of the second assignment of error.

Another assignment of error is based on the refusal of the court below to admit defendant's offer of a subsequent treasurer's sale in 1846. The evidence to sustain this offer was the treasurer's sale book for 1846, but on inspection the entry in that book does not show any sale to any one else, but does show that on November 19, 1847, the taxes on the Nathaniel Brown tract were paid by James Pleasants, and the 404] land *redeemed. It is, indeed, claimed by the plaintiff in error that the entry of payment and redemption by James Pleasants was irregular and unauthorized. But the defendant seems to have made no offer to show that the entry was unwarranted and illegal, and we think, in the absence of evidence, it is a fair presumption, after so long a period, that an entry of this kind in the book of the treasurer was properly made. Nor can we accept the claim that such entry, even if admissible to show payment of taxes, does not show a redemption by James Pleasants; for the entry itself, as shown by the copy thereof in the brief of the plaintiff in error, discloses that the payment of the taxes was entered under a heading in the words, "By whom redeemed and when." Such an entry and heading contained in a county treasurer's book might well be regarded, after so long a period, as an admission of such facts to affect the county, and might properly have been offered as such on the part of the plaintiff below. At any rate, and this is all that concerns us now, no injury was suffered by the defendant below in the court's rejection of his offer.

The effect of this alleged tax sale of 1846 is again raised in the sixth prayer for instructions on behalf of the defendant, asking the court to charge the jury that if the land, after the sale to James Pleasants in 1842, was again sold to the commissioners by the treasurer in 1846, such sale divested the title of Pleasants, and that his subsequent payment of the taxes for which the land was sold would not operate to reinvest him with the title. The answer to this is that the redemption act of 1815 (Purd. Dig. p. 1682, pl. 52) provides that upon the redemption the commissioners shall reconvey all the county's title to the owner, and it has been held that the entry of the "redemption" in the tax books is received as evidence of the fact, and that the redemption is good and revests the title without a deed from the commissioners. *Philadelphia* v. *Miller*, 49 Pa. 456. However, as the defendant's evidence was not before the jury, this and the other prayers for instructions, so far as they were based on the defendant's rejected evidence, are not before us for consideration.

*But it is contended that even if Dr. [405 Ruston did pay the purchase money for the Nathaniel Brown tract, that such payment merely enured to the benefit of Ruston by way of a resulting trust, and that the act of assembly of April 22, 1856 (Purd. Dig. 1064) forbids the assertion of any implied or resulting trust after the lapse of five years, unless such trust shall have been acknowledged in writing by the party to be charged therewith.

It is difficult to see how this statute affects the present controversy. If, indeed, Nathaniel Brown, in whose name the warrant had issued, had taken hostile possession of the tract, and excluded Dr. Ruston, the beneficial owner, and if at that time the act of 1856 had been in force, such a question might have arisen. But as we have seen that, under the well settled law of Pennsylvania, a legal title became vested in Ruston by his ownership of the warrant and his payment of the purchase money, and as his title has, by instruments in writing and by proceedings of record, become vested in the defendant in error, a stranger to that title claiming under another and distinct title, originating in a commissioners' sale in 1882, cannot avail himself of the statute referred to.

Finding no error in the rulings of the court below its judgment is affirmed.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

THE CORINNE MILL, CANAL & STOCK COMPANY, *Plff. in Err.*,
v.
ALEXANDER TOPONCE.

(See S. C. Reporter's ed. 405-411.)

Services of general manager—question of fact—when verdict will not be set aside—long account.

1. A general manager of a corporation, who is at the same time, a director and the vice president thereof, may recover of it for his services as general manager, which were clearly outside of his duties as vice president and director, where they were rendered under such circumstances as raise an implied promise to pay for them on the part of the corporation.
2. A conflict of testimony presents but a mere question of fact, upon which the verdict of the jury is conclusive. It is enough to sustain the verdict that there was positive and direct testimony to the existence of the facts as found.
4. Where plaintiff's claim is for services as general manager for defendant, extending through a number of years, and defendant has a counterclaim of an account for pasturage of cattle and for horses sold to him and for money loaned and paid out for him and goods furnished to him, during those years, which account consists of hundreds of items, these are between the parties, open, mutual and current accounts, within the meaning of the statute of limitations.

[No. 257.]

Submitted March 6, 1894. Decided March 19, 1894.

IN ERROR to the Supreme Court of the Territory of Utah, to review a judgment of that court, affirming the judgment of the district court of the county of Weber, in that territory, in favor of Alexander Toponce, plaintiff, against the Corinne Mill, Canal & Stock Company, defendant, for moneys paid out for defendant, for feeding and caring for defendant's stock, for services as general manager of defendant, etc. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

The facts in this case are as follows: On June 9, 1888, the defendant in error, as plaintiff, commenced his action in the district court of the county of Weber, in the territory of Utah. His complaint consisted of five counts. The first, for moneys paid out for the defendant; the second, for feeding and caring for certain stock of the defendant; the third, for his services as general manager of the defendant; the fourth and fifth, respectively, a claim for work and labor, and one for board alleged to have been due from defendant to Lea Owsley, and by him assigned to plaintiff.

The defendant answered denying all but the claim in the fourth count of the complaint, and pleading also certain counterclaims. The case went to trial before a jury, which returned both a special and a general verdict, and on such verdicts judgment was rendered, March 19, 1889, in favor of the plaintiff, for the sum of $11,339.56. Subsequently, on July 12, 1890, this judgment was affirmed by the supreme court of the territory, and thereupon defendant sued out this writ of error.

Messrs. **C. W. Bennett and John A. Marshall** for plaintiff in error.

Mr. **James N. Kimball** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

There are but two questions presented, and they grow out of the claim set forth in the third count of plaintiff's complaint. That claim is for the sum of $14,750 for services as general manager of the defendant corporation from January 1, 1883, to December 1, 1887. During all this time the plaintiff *was a director [407 and the vice president. It is conceded that there was no express contract or authority for compensation, and it is insisted that all that he did in behalf of the company was within the proper scope of his duties as an officer, or, if not, was done upon the understanding that such services were to be gratuitously rendered.

In the assignment of errors there is no complaint of the instructions of the court as to the law governing in such cases, but the contention is that the court did not, when requested, peremptorily instruct the jury to disregard that claim, and also that the jury erred in finding, as they did, that there was due to the plaintiff the sum of $9538.40 for such services.

The court charged in substance that for services rendered in the discharge of his duties as vice president and director he could not recover; that before recovery could be had, the jury must find that the services rendered "were clearly outside of his duties as vice president and director, and that they were rendered under such circumstances as raises an implied promise to pay for the services on the part of the company."

With reference to this question of fact it may be premised that the plaintiff and John W. Kerr owned substantially all the stock of the plaintiff corporation in about equal proportions; the other stockholders, who were also directors, apparently holding just enough stock to enable them to qualify as directors.

The charter was comprehensive in its terms, but the business which was actually carried on by the corporation was that of a ranch, stock, and mill. It had part of the time a ranch of 80,000 acres of land near Corinne, Utah, which, however, before the time of the trial had been reduced by sales to some 60,000 acres. It also had some sheep in Wyoming. Now, the plaintiff testified in reference to the property in Utah as follows: "I had charge of the entire business—had charge of the land, sold and purchased the land, purchased horses and sold them, sold land, and done everything;" and on cross examination, in reply to a question as to what his duties consisted in and what his labors were, he said: "Well, knocking around, tending to the business of the company. Chasing *fellows off the land, trying to [408 guard the land, tending to the stock on the ranch, digging ditches, superintending putting up fences, all contracts, and so forth."

NOTE.—*As to officers of corporations; fiduciary relations; dealings by them with the corporation or with its property*, see note to McGourkey v. Toledo & O. Cent. R. Co. 36: 1079.

As to extra pay or compensation to officers, see note to United States v. Macdaniel, 8: 587.

Lea Owsley, who was foreman at the ranch, testified that the plaintiff was "general manager of the business;" "made all contracts of everything that came on the ranch;" "collected the bills;" "bought the feed, hay, and grain," and "had general charge of everything—land, cattle, ranch, and everything."

Neither the charter nor the by-laws of the corporation cast any special duties on the vice president or director. The vice president was only required to act in the absence of the president, and no special duties of management were in terms cast upon the president. It was provided that he preside at all meetings, sign all certificates of stock, contracts, checks, etc., "and generally do and perform such other duties as are incidental to his office and not in conflict with these by-laws and the articles of association." No duty was cast on any individual director as such. The board of directors, as a body, were charged with the usual duty of care of the affairs of the corporation, but all the power and duty cast upon them was upon them as a board, and not individually. Obviously, therefore, under the testimony which we have referred to, from the plaintiff and the foreman of the ranch, the services which the plaintiff performed were not those of a director or vice president, but outside thereof, and similar to those of a general manager.

It is unnecessary to refer to the testimony which tends to weaken the scope of these general statements of the plaintiff and the foreman, because such conflict presents but a mere question of fact, upon which the verdict of the jury is conclusive. It is enough to sustain the verdict that there was positive, direct, testimony to the existence of the facts as found. Neither is it clear, as contended by the defendant, that this claim for compensation as general manager was an afterthought, and in retaliation for a claim made by Kerr, the president, for interest; for, while it is conceded by the plaintiff that there was a dispute between 409]Kerr and himself as to *the matter of interest, yet his version of that is substantially this: When he commenced work as general manager nothing was said in respect to his compensation, but sometime afterwards, when sheep were purchased by the corporation from Kerr, and the price agreed upon, a question was raised as to interest upon the deferred payments, and then, as he says, Kerr agreed to waive interest on condition that he waived any claim for compensation for his services as manager, and yet, notwithstanding this agreement, Kerr afterwards insisted upon and recovered interest from the corporation.

It is unnecessary to consider the contradictory testimony or to attempt to determine the actual facts in reference to this matter. It is enough that the jury by their verdict have practically affirmed the truth of plaintiff's story; and that shows an understanding on the part of the parties in interest that he was to receive compensation for his services as manager, and that the two parties who owned substantially all the stock and properties of the corporation attempted to make an arrangement in respect to such compensation, which arrangement proved a failure, and proving a failure left the corporation under the implied obligation to pay for the services. We concur with the supreme court of the territory, when it says: "It was the peculiar province of the jury, under proper instructions from the court as to the law governing plaintiff's right to recover for the services claimed to have been rendered, to determine from the evidence whether or not he was entitled to compensation therefor. The jury found the issue in plaintiff's favor. Plaintiff claimed $250 per month from January 1, 1883, to December 1, 1887, amounting to $14,750. The jury allowed him $8850 and $688.40 interest, amounting to $9538.40. While the evidence to sustain this verdict is not entirely satisfactory, and while, if submitted to this court originally on the printed testimony, a different conclusion might possibly be reached, yet, the jury having found for the plaintiff on part of his claim and the judge who heard the case in the court below having refused to set the verdict aside, we do not think it is so far unsupported by the evidence as to justify this court in doing so."

*The other matter is this: This action[410 was commenced, as stated, in 1888, and the claim for compensation as manager was for a term extending from January 1, 1883, to December 1, 1887, and the contention is that part of this claim was barred by the statute of limitations. The statutory provisions applicable thereto are the following:

"Within two years. 1st. An action upon a contract, obligation or liability not founded upon an instrument of writing; also on an open account for goods, wares and merchandise, and for any article charged in a store account: *Provided*, That action in said cases may be commenced at any time within two years after the last charge is made, or the last payment is received." Utah Comp. Laws 1888, § 3145.

"In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side." Utah Comp. Laws, 1888, § 3149.

Now, whatever might be the rule, if all that was involved in this case was a simple claim for compensation as manager, there was within the very terms of the statute a "mutual, open, and current account" between the parties, and into that account the matter of such compensation entered as one of the items, and so the court did not err in refusing this instruction asked by the defendant: "When services in the management of a farm and household are performed under a general retainer, without any express agreement as to the time or measure of compensation or the term of the employment, and such services continue for a series of years, no payments being made, the law for the purpose of determining when the statute of limitations begins to run will not imply an agreement that the payment of compensation shall be postponed until the termination of the employment, but will regard the hiring as from year to year, and the wages as payable at the same time."

Not only was there an account presented by the plaintiff for $4882.23, for moneys paid out at the instance and request of the defend-

ant, from January 1, 1883, to December 1, 1887, 411] *and also one for the further sum of $1138.25, for feeding, caring for, and keeping its horses during the same time, but also in its answer the defendant presented by way of counterclaim, first, an account against plaintiff and Owsley, as partners, for the pasturage of certain cattle, varying in number from 56 to 299, from the year 1883 to June 10, 1888, at twenty-five cents per head a month, on which only $414.40 was admitted to have been paid; also a claim against plaintiff and said Owsley jointly for the sum of $325.75 for horses sold and delivered to them; and finally, as a last counterclaim, defendant alleged: "That prior to and at the commencement of this action the plaintiff was and still is indebted to defendant in the sum of $3614.51, a balance upon an account for money loaned, paid out and expended to and for plaintiff and for goods and materials furnished to him, and for divers and sundry other items and matters of charge, all on open running current account and at plaintiff's request, between January 27, 1883, and June 10, 1888. That said sum of $3614.51 was, at the commencement of this suit, and is due from and unpaid by plaintiff to defendant, and no part thereof has been paid."

On the trial the defendant offered the account taken from its books, running from January 27, 1883, to June 10, 1888, an account consisting of hundreds of items, and filling twelve pages of the printed record. Obviously, there were between the parties open, mutual, and current accounts, and as one item in those accounts was this claim for compensation as manager, and this, whether that was to be payable monthly or annually, we see no error in the record, and the judgment is affirmed.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

412] *JOHN HALSTEAD, *Appt.*,
v.
A. G. GRINNAN ET AL.

(See S. C. Reporter's ed. 412-425.)

Laches—lapse of time—ignorance—delay of over twenty years.

1. The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule.
2. Laches is an equitable defense controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.
3. There can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend.
4. Laches is a good defense to a suit in equity to set aside a survey which had stood unchallenged for over twenty-five years, where all the facts alleged to sustain the suit were known to plaintiff for more than twenty years before the suit was brought.

[No. 128.]

Argued Dec. 4, 5, 1893. Decided March 19, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of West Virginia, dismissing a suit in equity brought by John Halstead, plaintiff, against A. G Grinnan *et al.*, to obtain a decree that plaintiff is the owner of an undivided half of a tract of land, and for a partition and new survey setting off to him the one half, so as to connect with another tract of land, and denying rehearing in two other cases heard with the above case. *Affirmed.*

Statement by *Mr. Justice* **Brewer**:

On January 24, 1885, plaintiff filed in the District Court of the United States for the District of West Virginia his bill of complaint against A. G. Grinnan, the Forest Hill Mining & Manufacturing Company, Robert Soutter, trustee; William Wyant, and the unknown heirs of William K. Smith, deceased. At that time there was no circuit court in the district, the district court having the powers of a circuit court, but before the final disposition of this case a circuit court was established by the Act of Congress of February 6, 1889 (25 Stat. at L. 655) and to it the case was transferred. On November 30, 1887, the plaintiff, by leave of court, filed an amended and supplemental bill. Intermediate those dates, and on May 4, 1887, there was filed in that court the records of two cases transferred from the state circuit court of Greenbrier county, entitled, respectively, "*A. G. Grinnan* v. *S. C. Long et al.*," and "*F. B. Chewning* v. *J. F. Cowan et al.*" The plaintiff Halstead had been made party defendant in those cases, and notified by publication, and after decrees by default against him he appeared in each case by petition, praying for an opening of the decree and a rehearing, and, while those *applications were [413 pending, removed cases as above stated to the United States court. To the original and supplemental bills in the case commenced in the district court, Grinnan and Wyant duly answered. Proofs were taken, and the three cases being heard together, on May 26, 1888, a final decree was entered as follows:

"John Halstead *v.* Wm. Wyant & Others.	In Equity.	Heard together.
A. G. Grinnan *v.* S. C. Long and Others.	In Equity.	
F. B. Chewning *v.* J. F. Cowan and Others.	In Equity.	

"These causes this day came on to be heard together and were argued by counsel; where-

NOTE.—*As to laches, when a good defense*, see note to Felix v. Patrick, 36: 720.

As to length of time as bar to relief in cases of fraud; statute of limitations as a plea in equity; state claims; cases of undiscovered fraud: when laches bars remedy, see note to Hammond v. Hopkins, 36: 135.

As to statute of limitations, when not applicable to trusts, see note to Gibson v. Charter Oak L. Ins. Co. 35: 1029.

upon, upon consideration hereof, it is adjudged, ordered, and decreed that the bill and amended and supplemental bill in the first above mentioned cause be, and the same are hereby, dismissed, and that the defendants therein recover of the complainant, John Halstead, their costs about their defense in that behalf expended.

"And it is further adjudged, ordered, and decreed that the petition for rehearing filed by said Halstead in said second and third suits above mentioned and the rule awarded said Halstead in said suits against the defendant, William Wyant, be each of them, and the same are, hereby dismissed; and it is further adjudged, ordered, and decreed that the defendants in said petition and said rule respectively recover their costs against said Halstead; but in taxing the costs recovered in this decree but one attorney's fee shall be allowed."

A petition for rehearing having been denied, an appeal was taken to this court.

The burden of this controversy rests on these facts: On June 15, 1859, A. G. Grinnan, W. K. [414] Smith and A. G. Grinnan as *trustee, conveyed to the Forest Hill Mining & Manufacturing Company (hereinafter called the Forest Hill Company) a tract of land in the county of Fayette, in the then state of Virginia (now West Virginia) containing 2000 acres, more or less, and also another tract and a right of way described in the deed, as follows:

"Also a certain piece or parcel of a certain tract of land known as the Huddleston tract, to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract, to be bounded on the south by the tract herein above conveyed, and on the north by the Great Kanawha river, and containing one hundred acres, more or less. Also the perpetual right of way to the said party of the second part, their successors and assigns, through a tract of land known as the 'Elk Ridge tract', lying between the tract of 2000 acres, hereinabove conveyed, and Armstrong's creek, with the privilege of the said party of the second part of entering thereupon by their agents and servants, and constructing upon and over the same such roads or railroads as they may deem necessary for convenient access to and from the lands hereby conveyed."

This Huddleston tract was conveyed by Huddleston to Grinnan by metes and bounds, and in the deed was estimated to contain 200 acres, though in fact it contained nearer 250 acres. It was bounded on the north by the Kanawha river, its west line straight but its east line quite a zigzag, with considerable frontage on the Kanawha, but narrowing towards the southern end, and for some little distance towards that end bordering on the tract of 2000 acres previously described in the deed to the Forest Hill Company.

On the same day of the conveyance to it the Forest Hill Company placed a trust deed upon the property to secure the payment of sixteen promissory notes and eighty bonds. On June 6, 1864, the trustee, in execution of the trust and in consideration of the sum of $3500, conveyed the property to plaintiff. In this trustee's deed the description of the Huddleston tract and the right of way is as follows:

"Also a lot, piece, or parcel of land (containing 100 acres, *more or less, provided [415] in said deed to be surveyed off the west side of the tract of land known as the Huddleston tract, as the same was ascertained and bounded by the survey made subsequently to the execution of the said deed and in pursuance thereof) adjoining the above; also the right of way through and across the Elk Ridge tract, also adjoining the above, which said lands and right of way are more fully described in a deed from William K. Smith and wife and Andrew G. Grinnan and wife and the said Andrew G. Grinnan, trustee, to the aforesaid Forest Hill Mining & Manufacturing Company, bearing the same date as the deed or conveyance in trust first above mentioned."

The survey, thus referred to, was made in the year 1859 by Thomas S. Robson, the county surveyor of Fayette county. By this survey a tract of 105 acres was set off to the Forest Hill Company, on the west side of the Huddleston tract, but so surveyed that no part of the land given to the company touched the 2000 acre tract heretofore referred to. The contention of the plaintiff was that such survey was inaccurate in that the part set off to the Forest Hill Company did not at any point touch the 2000 acre tract, and, therefore, did not comply with the terms of the deed; and the prayer was that he be decreed the owner of an undivided one half interest in the Huddleston tract, and that a partition and new survey be made setting off to him the one half, so as to connect with the aforesaid tract of 2000 acres.

The defendant Wyant claimed to have purchased the balance of the Huddleston tract, not set apart to the Forest Hill Company, at a judicial sale, in April, 1883, at the price of $60.50 per acre, amounting to over $9000; that he bought relying upon a map shown at the sale of the commissioner which conformed to the survey made by Robson, and in ignorance of any claim of the plaintiff; that he entered into possession and had expended about $7000 in building houses and opening mines. This commissioner's sale was by virtue of a decree rendered in the cases heretofore referred to as transferred from the state court, and consolidated with the suit in the district court, and in which cases prior to the decree plaintiff had been served by publication.

Mr. **A. Burlow** for appellant.

Messrs. **W. Mollahan, J. F. Brown** and *Eppa Hunton* for appellees.

Mr. Justice* **Brewer delivered the [416] opinion of the court:

The plaintiff, by this suit, invoked the aid of a court of equity to set aside a survey which had stood unchallenged for over twenty-five years. Such a long delay suggests laches, and a careful examination of the testimony satisfies us that the circuit court did not err in sustaining this defense. The defense itself is one which, wisely administered, is of great public utility, in that it prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice, for so

strong is the desire of every man to have the full enjoyment of all that is his, that, when a party comes into court and asserts that he has been for many years the owner of certain rights, of whose existence he has had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that his alleged rights either never existed, or had long since ceased. We have had before us lately several cases in which this defense has been presented, and in which the rules determining it have been fully stated and its value clearly demonstrated. *Hammond* v. *Hopkins*, 143 U. S. 224 [36: 134], and cases cited in the opinion; *Felix* v. *Patrick*, 145 U. S. 317 [36: 719]; *Foster* v. *Mansfield, C. & L. M. R. Co.* 146 U. S. 88 [36: 899]; *Johnston* v. *Standard Min. Co.* 148 U. S. 360 [37: 480]. The length of time during which the party neglects the assertion of his rights, which must pass in order [417] to show *laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them. There must, of course, have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend. And yet, as said by *Mr. Justice* Brown, speaking for the court in *Foster* v. *Mansfield, C. & L. M. R. Co. supra:* "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In this case there is no question as to plaintiff's knowledge. In the deeds from Grinnan and Smith to the Forest Hill Company, and from that company to the trustees, the description is of a piece, or parcel, of a certain tract "to be surveyed off the western side of said tract by a line running from the northerly to the southerly side of said tract." And in the deed from the trustee to plaintiff, which was made on June 6, 1864, the description is of a lot, piece, or parcel of land containing 100 acres, more or less, "as the same was ascertained and bounded by the survey made subsequently to the execution of the said deed, and in pursuance thereof," so that in the deed made to the corporation, of which he was a stockholder, twenty-five years before the commencement of this suit, was a provision for a survey, and in the deed to himself, made more than twenty years before this suit, was a declaration that the survey called for by the previous deed had been made. When, therefore, he took title he took it with notice that a survey had been made, and would not now be [418] heard to *say that he had no knowledge of that fact. Further, the survey which was made by the county surveyor, Robson was made in 1859. In 1861 the same surveyor made a plat showing the Forest Hill tract of 2000 acres, and the Huddleston tract, as surveyed, with the adjoining lands, which plat, or so much of it, at least, as is material, will be found on the following page.

A mere glance at this plat shows that the Huddleston tract is so surveyed that the part set off to the Forest Hill company at no point touches the 2000 acre tract, but is separated therefrom by a narrow strip—a part of the land reserved to Grinnan and Smith. Now, in reference to this map, the plaintiff alleges, in his amended and supplemental complaint, as follows:

"The map filed with the deposition of T. S. Robson, marked 'T. S. R. No. 2,' was made from a survey made by said Robson in 1861, and your orator believes that it shows correctly the location of the Forest Hill tract of 2000 acres and the Huddleston tract and the division made by him in 1859 and their relations to each other. Your orator avers that he saw this map for the first time in about 1867. It will be seen by this map, which is asked to be read and considered as a part of this bill, that the division of the Huddleston tract made by T. S. Robson in 1859 is so made that the part retained by Grinnan intercepts that part laid off to the Forest Hill company from the Forest Hill tract of 2000 acres, so that they do not join each other."

In other words, he admits that eighteen years before he brings this suit he saw the map which discloses the survey, and it is apparent at a glance, as he himself alleges, that the part set off to the Forest Hill Company does not, at any point, touch the 2000 acre tract.

But beyond this direct admission there is testimony tending to show that both he and his grantor had knowledge at a much earlier date. The Forest Hill Company was organized in the year 1859. The plaintiff was a stockholder in the company. Dr. Hale was its president, and, after the deed to plaintiff and up to the time of this suit, he continued to reside, as the agent of the plaintiff, on this 105 acres, set off to the *Forest Hill Company. [420] The northern part of this Huddleston tract along the Kanawha river was comparatively level, and it is evident that the Forest Hill Company bought with a view of putting up buildings on this level ground near the river, and with the understanding that the grantors should immediately cause the survey to be made. The survey was in fact made that same fall, and the company entered into possession of the land surveyed off to it, and erected buildings thereon, in the course of its improvements, placing some fences along the division line between the two parts of the tract as surveyed by the county surveyor. This is the testimony of the president of the company in respect to the matter:

"Ans. There were six or seven dwelling-houses—small cottage houses—a coal mine and oil factory, and all the necessary machinery and plant, and my own house, some twelve or fifteen acres enclosed in fence and cultivated. There was a blacksmith shop, cooper's shop, barn, and stable. That is all I think of.

"25th Q. Were not said improvements con-

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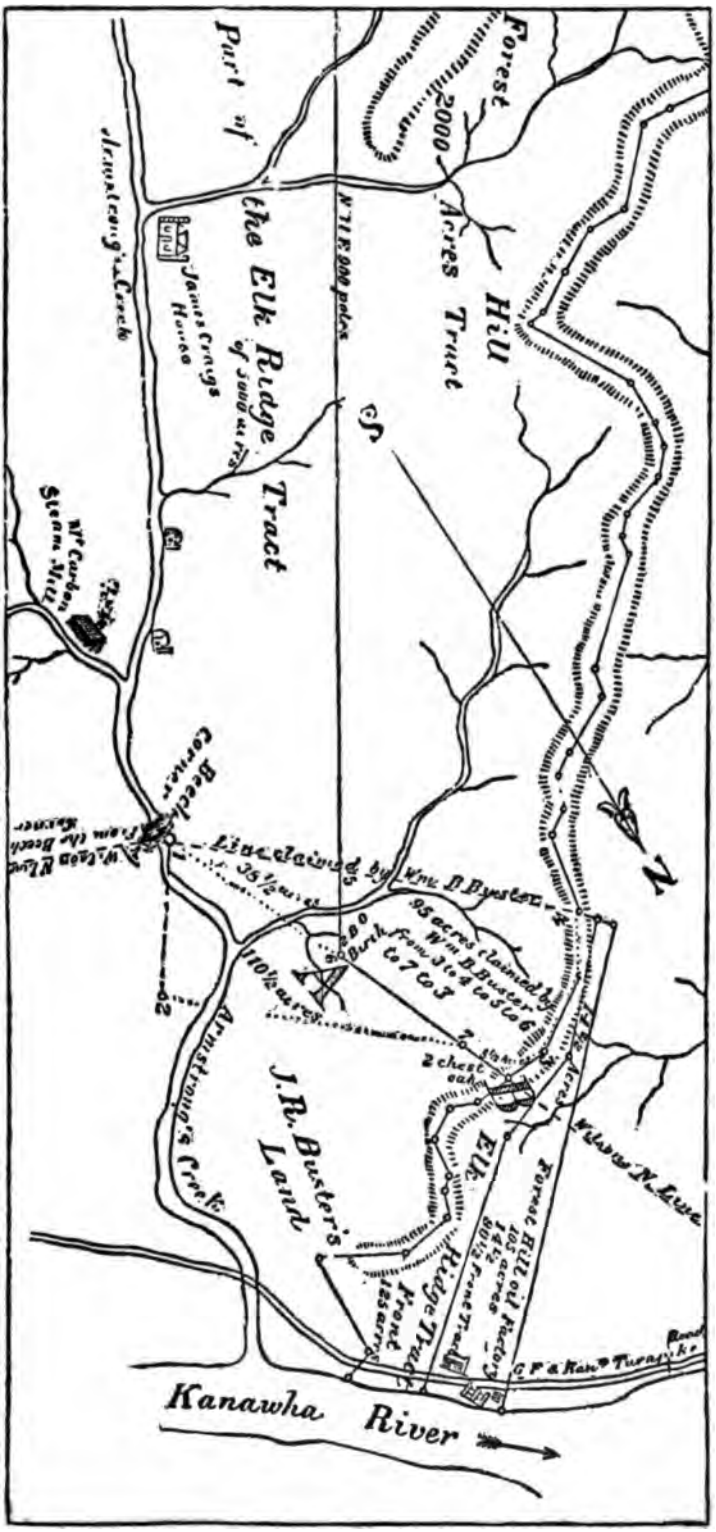
Part of the Elk Ridge Tract
Forest Hill
2000 Acres Tract
James Craigs House
Armstrong's Creek
Beech Corner
Line claimed by Wm. B. Buster
95 acres claimed by Wm. B. Buster
110½ acres
2 chest oaks
J. R. Buster's Land
Armstrong's Creek
Elk Ridge Tract
Forest Hill oil Factory
Kanawha River
N

fined exclusively to the western side of the division line drawn by Robson as shown by Exhibit 'B' with this deposition?

"Ans. Yes.

"26th Q. Were not a part of the fences around the enclosures built on and along said division line?

"Ans. I believe they were part of the way."

It is probably true, as some of the officers say, that it was specially interested at the time only in the level ground along the river, and paid no attention to the lines of the survey towards the southern end which runs up into steep mountainous land, and yet, according to the testimony of the engineer, the improvements made by the company extended back between 1500 and 1800 feet from the river. Giving full credence, however, to all this testimony, it remains undisputed that the company knew that the land had been surveyed; knew where the division line ran on the northern part of the tract; accepted that line as correct, and made improvements with reference to it, and simply did not consider the southern end of the tract as of sufficient importance to 421] examine and see* where the lines were run. If the company was, in fact, ignorant of the location of the division line at the southern end of the tract it was an ignorance resulting from its own indifference to the matter, and although it knew that the line had been run.

Still further, we find this in the testimony of the president, Dr. Hall:

"It was a part of their agreement with the Forest Hill Company that the survey should be made and that the lines should be run properly. I was in New York when Grinnan had the lines run by Robson, and when I came back in 1859 I learned for the first time that the lines had been run and the division had been made. This survey was made and the lines run in the fall of 1859. . . . The whole tract of 2000 acres was surveyed by Robson some time about February, early in 1861, and after that survey was made we had a plat given us not only showing the 2000 acres, but also the 100 acres of frontage. It was then for the first time that we knew or indeed had any suspicion that the Huddleston frontage did not unite with the Forest Hill tract. This occurred just at the beginning of the war, in 1861."

There is more testimony to like effect coming from other officers of the company. The plaintiff, also, in his deposition, testified as follows: "When the Forest Hill Company took possession, in 1859, I was told that Robson ran the lines for the purpose of laying off the westerly half of the Huddleston tract so that they would know where to locate their buildings. I don't know of anything more being done until Robson surveyed the entire tract, as is shown by his map, dated 1861." In the amended bill it is alleged "that said company had no occasion to examine the lines run by T. S. Robson in 1859, except to see that they were properly run for a short distance back from the Kanawha river, about 1000 feet, where it was interested, and about to locate its buildings for the manufacture of coal oil and erect the necessary dwelling houses for its officers and employés, and where it did so erect them. It took no part in running the division lines in 1859 except to see that they were properly run through the bottom land on *the [422 Kanawha river, for the reasons above stated, and did not accompany said surveyor any further on his survey, but said company supposed, as a matter of course, until the mistake was discovered by it, that A. G. Grinnan had had the Huddleston tract divided according to the requirements of his deed to and agreement with said company."

It also appears from his own testimony that plaintiff's attention was called to the fact that the two tracts did not join, that he was urged to buy the intervening land but declined on account of the price, $30 an acre, and also because he supposed his deed gave him a right of way through the Huddleston tract to the Kanawha river as through the Elk Ridge tract to Armstrong creek. We quote from his deposition as follows:

"For several years A. G. Grinnan had been urging me to buy his adjoining tract, and I told him I had already too much unproductive property on hand, but in the year 1880 I wrote him to this effect: That I would like to make the connection between the front and back land more complete, so that it would show to better advantage on the map, and that I would give him one hundred dollars for so much of the land as he owned running back from about where the Wilson line crosses the tract; that it was part of the frontage intended to connect the two tracts, and had not the Forest Hill Company been obliged to suspend their operations on account of the war there is no doubt but they would have claimed it as their right. I had somehow gotten the impression from seeing Robson's map that I could only claim the right of way, because the survey was not corrected whilst the company held possession, and that impression was not removed from my mind until I hunted up the Forest Hill Company's deed after A. G. Grinnan had sold to Wyant what did not belong to him without giving me any notice, as any fair-minded man would have done, knowing it would depreciate the value of my property many thousands of dollars. An examination of the deed showed, to my surprise, that the right of way did not apply to the front tract, but that the deed called for a connection of the two tracts."

But it is unnecessary to multiply these quotations from *and references to the testi- [423 mony and pleadings. It will be difficult to find a clearer case of ample and long continued knowledge of the exact situation; and if ever the knowledge of a mistake created a duty of taking some action to correct it, it surely did in the present instance.

We have thus far considered this case on the assumption that the survey made by Robson in 1859 was erroneous, and failed to give to the Forest Hill Company that which it claimed and was entitled to, yet there is testimony casting doubt at least upon this matter. That of the surveyor is that both the grantor and the grantee were represented at the time of the survey, and that it was made in accordance with their instructions, those instructions being to give an equal frontage on the river; that the deed to the Forest Hill Company was not produced, nor his attention called to the

particular language of the description in that deed, nor anything said with reference to forming a connection with the 2000 acre tract.

Further, while the deed to the Forest Hill Company requires that this tract be surveyed off the western side of the Huddleston tract "by a line running from northerly to southerly side of said tract, to be bounded on the south by the tract hereinabove conveyed and on the north by the Great Kanawha river," it is apparent from the plat that the 2000 acre tract referred to does not join the Huddleston tract on its south line, but only along the irregular east line. Now, if one call in the deed is explicitly followed, and the partition line run from the north to the straight line on the south, the land to the west of that will not connect with the 2000 acre tract, unless, indeed, the part reserved to Smith and Grinnan is separated into two parcels, the one south and the other north of the place of such connection. Apparently the exact situation of these two tracts was not at the time of the deed accurately known, and it was supposed that the 2000 tract ran along the whole southerly side of the Huddleston tract, and so it appears on some of the maps which were known to the parties at the time of the conveyance: and it was in view of such supposed location that this des-
424]cription was *introduced. One call as we see was explicitly followed in the survey, that of a line from the northerly to the southerly side of the tract. The amount to be set off was exceeded, 105 acres being surveyed off to the Forest Hill Company, and if that part was not bounded on the south by the 2000 acre tract, it was because on the south the 2000 acre tract did not join the Huddleston tract.

Stress is now laid upon the supposed importance of having access to the 2000 acre tract from the Kanawha river, and the claim is that such access was one of the main inducements to the purchase of this 100 acres, but so far as can be judged from the testimony, the steep, mountainous character of the land at the southern end of the Huddleston tract would interfere greatly with easy access from the Kanawha river, and the bringing of coal or other products of this 2000 acre tract to the water was apparently provided for by a right of way through the Elk Ridge tract to Armstrong creek. In addition, the conduct of the parties at the time indicates that the main thought in the purchase of this 100 acres was of the level ground near the Kanawha river, and the desire of the company was to get as large a portion of that as possible, ignoring wholly the survey in the southern part of the tract. It is, therefore, to say the least, a doubtful question whether there was any mistake in the survey as made, and also whether the surveyor did not, in obeying the immediate directions of the respective parties, make a survey which conformed as nearly as was practicable to the calls in the deed. It is unnecessary, however, to lay stress upon this matter, and we only notice it to show that there were likely other reasons, besides those given by the plaintiff, why no challenge of the survey was made until this late day.

It only remains to notice the fact that Wyant *purchased in 1883, at a judicial sale, the balance of the Huddleston tract; that at such judicial* sale, conducted by a commissioner duly appointed by the court, a plat and description corresponding to the survey made by Robson in 1859 were presented as the basis of the sale, and that, relying upon that survey and description, Wyant made his purchase and paid his money, in *ignorance of any claim of plaintiff, [425 or of any question as to the correctness of the survey; that he entered into possession and expended several thousand dollars in improvements before any challenge of his rights was made by plaintiff. Under those circumstances, injustice would be done to him to disturb the survey and his possession of the property. As this situation of affairs was brought about through the negligence of the plaintiff, the court rightfully held him guilty of laches, and properly dismissed his bills.

The decree is affirmed.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

THE MORGAN ENVELOPE COMPANY, *Appt.*, *v.* THE ALBANY PERFORATED WRAPPER PAPER COMPANY.

(See S. C. Reporter's ed. 425-436.)

Rejected claim of patent—anticipation—subsequent user—right of purchaser—element of combination.

1. Where the patentee has once presented his claim in a particular form, and the Patent Office has rejected it, and he has acquiesced in such rejection, he is estopped to claim the benefit of his rejected claim or such a construction of his claim in the subsequently issued patent as would be equivalent thereto; the principle is the same if the rejected claim be narrower than the one allowed.
2. Patent No. 325,410, issued to Oliver H. Hicks Sept. 1, 1885, for a package of toilet paper known as the "Oval Roll" or "Oval King" package, when construed as for an oval or oblong roll, is

NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see note to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of inventions, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefore, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

anticipated by the patent of March 6, 1883, issued to one Peacock, and is also without invention.

3. The patentee having once received his royalty upon his patented device, cannot treat the subsequent seller or user as an infringer.

4. The purchaser of a patented machine from one authorized to sell it, has the absolute ownership, and may sell it, with the right to use it, to another.

5. The rule that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement, has no application to a case where the element made by the alleged infringer is an unpatentable article of manufacture, perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically, whenever the device is put to use.

6. The patents to Oliver H. Hicks, No. 325,174 of Aug. 25, 1885, and No. 357,993 of Feb. 15, 1887, for a fixture and apparatus for toilet paper are not infringed by selling oval rolls of paper of the seller's manufacture, with the patentee's fixture bought of him, or by selling the paper to persons who had previously bought the fixtures of him.

[No. 254.]

Argued March 8, 9, 1894. Decided March 19, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of New York, dismissing a suit in equity, except as to the fifth claim of patent No. 357,993, brought by the Morgan Envelope Company, plaintiff, against the Albany Perforated Wrapper Paper Company, defendant, for the infringement of three letters patent issued to Oliver H. Hicks, and assigned to the plaintiff, for patents in reference to toilet paper, and in favor of plaintiff, for damages for the infringement of the fifth claim of patent 357,993. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a bill in equity to recover damages for the infringement of three letters patent issued to Oliver H. Hicks of Chicago, and assigned to the appellant, viz: Patent No. 325,-[426] 410, *issued September 1, 1885, for a "package of toilet paper," known as the "Oval Roll" or "Oval King" package. (2) Patent No. 325,174, issued August 25, 1885, for a "toilet paper fixture." (3) Patent No. 357,993, issued February 15, 1887, for an "apparatus for holding toilet paper." These are known as the "Oval King" fixtures.

The answer made the usual denials of novelty and infringement.

Upon a hearing upon pleadings and proofs, the court dismissed the bill, except as to the fifth claim of patent No. 357,993, upon which a decree was ordered for plaintiff without costs. From this decree plaintiff appealed to this court.

Messrs. **Melville Church, Charles E. Mitchell** and *J. B. Church* for appellant.

Mr. **Esek Cowen** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Prior to the inventions covered by the patents in this case, toilet paper had been put up in packages of sheets cut to a convenient size, sometimes attached together by a wire, or in cylindrical rolls of continuous length, either perforated transversely at proper intervals for the convenient detachment of the sheets, or in similar rolls not perforated, but designed to be cut by a device having a sharp edge to which the rolls were attached. All these methods proved to be objectionable on account of the temptation offered to greed or wastefulness, in the facility with which unnecessary amounts of paper could be detached, which were either carried off or allowed to fall on the floor. Where perforated paper was employed in roll form, the litter was increased by the dropping of small particles of paper intended to have been removed by the perforating machine, but which remained attached until the paper was unwound, when they fell upon the floor and became very difficult to remove.

*(1) In the specification of his patent [427] No. 325,410, which is for a package of toilet paper, the patentee states that he had in view to furnish a toilet paper in the form which would prevent in a large measure this vast amount of wastage. "In carrying out this object I have put up one or more lengths of paper in the form of a continuous band (as contradistinguished from a roll) of oblong or oval shape, the short rounded ends of the bundle thus produced serving as guides for determining the proper points at which the paper has to be separated in order to produce sheets of a size desirable for use, and affording also the most advantageous surfaces upon which to tear the paper. The band I make of a thickness calculated to produce sheets severed at the point stated of practical and economical lengths from the time the bundle is opened until it is consumed."

The band he makes of an oblong or oval shape so that it may be mounted in a fixture shown in a previous patent for that purpose, or used detached from the fixture, one hand of the user being slipped into the interior, and the other hand being employed to grasp the pendant end of the paper, and by drawing the paper tightly over one of the short rounded ends of the bundle causing it to separate at that point and produce a sheet of convenient length. His claim was for "a bundle of paper consisting of one or more lengths formed into a continuous band whose internal diameter is greater than the thickness of the paper, substantially as described." The invention in question, as described in the specification and illustrated in the drawings annexed to the patent, is for a band of paper rolled in an oval instead of the usual cylindrical shape, with a view of affording a convenient method of tearing off sheets of a proper size, the fracture in each case being at the end of the roll. It is difficult to see, however, how any waste is thereby prevented, since it is nearly, if not quite as easy, to unwind long strips of this paper from an oblong as from a cylindrical roll. So, too, if the patent were construed as for an oblong roll, the fact that from time immemorial, cotton and woolen goods and silks have been almost universally wound about a flat board or core, precisely as described in the patent, would indicate that there is no novelty in the oblong or oval shape, *and that the patent if sup- [428] ported at all, must be for the different purpose for which toilet paper is wound in this form.

Upon examining the claim, however, in connection with the original application, it appears that, if the patent involved any invention at all, it is not limited to bands of oval or oblong shape, since the claim contained in the original application was for "a bundle of toilet paper consisting of one or more lengths of paper formed into a flexible continuous band of oblong or oval shape, the short rounded ends of such band serving as guides for determining the proper points at which the paper is to be separated in order to produce sheets of a size desirable for use, and affording, also, the the most advantageous surfaces upon which to tear the paper, substantially as described." This claim, which corresponds with the specification and drawings, and was Hicks' real invention, was rejected as indefinite, because it failed to point out any construction over an ordinary paper roll, and was also rejected upon a prior patent to one Peacock. The patentee thereupon amended his application by changing his claim to "a bundle of paper consisting of one or more lengths formed into a continuous band whose internal diameter" (by which we understand the internal diameter, when rolled into a cylindrical form) "is greater than the thickness of the paper, substantially as described."

If this claim be good it would seem to follow that any band of paper wound in such manner that the internal diameter is greater than the thickness of the paper, would be an infringement, whatever be its shape, or for whatever purpose used. The size of the roll, too, is not made material, except that it must bear a certain relation to its inner diameter. Certainly it would apply to all toilet paper, even if wound in a cylindrical form, as the language of the claim, though not of the specification, indicates that it should be. It would also follow that, even if the roll of paper, when purchased, had an internal diameter less than the thickness of the paper, such internal diameter would become relatively greater with the progressive using of the paper, until its thickness was so far reduced as to become less than the internal diameter, when it would fall within the descrip-
429] tion of the claim. Indeed, it is *difficult to see what function is performed by a band of paper so constructed, or what difference it makes whether the internal diameter is greater or less than the thickness of the paper, unless the paper be made in an oval form.

It is insisted in this connection, however, that under the words "substantially as described" the patentee is entitled to claim a band of oval or oblong shape, and that, looking at his specification and drawing in connection with the claim, it is obvious that the latter should be so limited. But the patentee having once presented his claim in that form, and the Patent Office having rejected it, and he having acquiesced in such rejection, he is, under the repeated decisions of this court, now estopped to claim the benefit of his rejected claim or such a construction of his present claim as would be equivalent thereto. *Leggett* v. *Avery*, 101 U. S. 256 [25: 865]; *Shepard* v. *Carrigan*, 116 U. S. 593 [29: 723]; *Crawford* v. *Heysinger*, 123 U. S. 589, 606 [31: 269, 274]; *Union Metallic Cartridge Co.* v. *United States Cartridge Co.* 112 U. S. 624 [28: 828].

It is true that these were cases where the original claim was broader than the one allowed, but the principal is the same if the rejected claim be narrower. Why the claim of the present patent was allowed after the rejection of the narrower claim does not appear. The objections made to the claim as originally presented seem to be equally applicable to this.

But construing this claim as for an oval or oblong roll, it is clearly anticipated by the patent granted March 6, 1883, to one Peacock, for a toilet paper case, used for carrying toilet paper, which was wound in an oval form about a spool or core, precisely as described in plaintiff's patent. Apparently it differs from the Hicks' roll only in being smaller and having its core hinged to a stiff case, in which the paper for convenience was carried.

There was also put in evidence by the defendant a device known as the Wheeler Pocket Companion, which was a small package of toilet paper of an oval form, differing from those covered by the Hicks' patent only in size, and in the fact that no attention was paid to the relation of the inner to the outer convolutions and no intent shown that when one convolution was *torn off the end of the next one would [430 drop down into position to be grasped. While neither of these devices is a precise anticipation of the Hicks' patent in the manner in which they are used it is impossible to say that a mere enlargement of these devices to the size contemplated by Hicks would constitute invention, although by such enlargement, the roll became capable of being used in a somewhat different manner.

(2) Patents No. 325,174 and No. 357,993 are practically the same, and are for a combination of the paper roll described in the former patent, with a mechanism for the delivery of the paper to the user in an economical manner. The object of both inventions is said to be "to so arrange the paper as to prevent more than a given quantity of it to be withdrawn from the roll at a single operation, and so that, in the act of withdrawing such given quantity it shall be automatically severed from the roll, leaving pendant from the roll a free end, which shall serve as a means of withdrawing a like quantity by the next user." This is accomplished by the combination of an oscillating roll of toilet paper actuated in one direction by a pull upon its free end, of a knife or cutter co-operating with the roll to sever the unwound portion when the roll has reached the limit of its motion in one direction, and a stop for so limiting the motion of the roll. The principal difference between the two patents is that No. 325,174 is limited to an appliance in which a knife or cutter for arresting the roll of paper, when oscillated, is employed; while the later one, No. 357,993, is broad enough in its scope to include a structure in which a mere stop, which has no cutting action at all, is employed to arrest the roll.

Each patent contains five claims, and in all of them, except the fourth and fifth of the the first patent, and the fifth of the second, the paper roll is included as an element of the combination.

No question is made but that the mechanism of these patents, by which paper is served out

to the user, involves a patentable novelty; but it is claimed, first, that the roll of paper being perishable: and the machine being constructed 431] for the *purpose of delivering this paper to users in convenient lengths, such a roll is not a proper part of the combination; second, that conceding it to be a part of the combination, there was no infringement.

The first defense raises the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. If this be so, then it would seem to follow that the log which is sawn in the mill; the wheat which is ground by the rollers; the pin which is produced by the patented machine; the paper which is folded and delivered by the printing press, may be claimed as an element of a combination of which the mechanism doing the work is another element. The motion of the hand necessary to turn the roll and withdraw the paper is analogous to the motive power which operates the machinery in the other instances.

But, without expressing an opinion upon this point, we think the facts of this case fail to sustain the charge of infringement. Defendants neither made, sold, nor used the mechanism invented by Hicks to serve out the toilet paper, except as they purchased it of the patentee, and the only acts proven against them were in selling oval rolls of paper of their own manufacture, with fixtures manufactured and sold by the plaintiff, in combination with its (the plaintiff's) paper to persons other than the defendants, the fixtures having been obtained by defendants from the original purchasers of the patented combination; and also of selling oval rolls of paper of defendants' own manufacture to persons who had previously purchased fixtures and paper from the plaintiff, with the knowledge and intention that the paper so sold was to be used in connection with the plaintiff's fixtures. In this connection it appeared that it had not been the practice of the plaintiff to sell its fixtures independently of its paper, and that they sold only to such parties as dealt in and used their paper. Purchasers were also required to buy a given quantity of paper to a given number of fixtures, to be sold only in connection with the paper, the rule being not 432] to sell more than *one fixture to one case of paper. The fixtures were also sold to hotels and other public buildings, with the understanding that their paper would be subsequently purchased of the plaintiff company. It appears to have been its invariable rule to refuse to sell fixtures except to persons also ordering paper.

So far as fixtures sold by defendants, which had been originally manufactured and sold by the patentee to other parties, are concerned, it is evident that, by such original sale by the patentee, they passed out of the limits of the monopoly, and might be used or sold by any one who had purchased them from the original vendees. The patentee having once received his royalty upon such device, he cannot treat the subsequent seller or user as an infringer. *Bloomer* v. *McQuewan*, 55 U. S. 14 How. 539 [14: 532]. As was said by *Mr. Justice* Clifford in *Chaffee* v. *Boston Belting Co.* 68 U. S. 22 How. 217, 223 [16: 240, 242]: "When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person authorized to convey it, the machine is no longer within the limits of the monopoly. . . . By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated." See also *Bloomer* v. *Millinger*, 68 U. S. 1 Wall. 340 [17: 581]; *Paper Bag Machine Co.* v. *Nixon* ("*Paper Bag Cases*") 105 U. S. 766 (26: 959). In this latter case one Morgan had purchased a machine for making paper bags of the patentee, and it was held that, having the absolute ownership of the machine, he had the right either to use it during the existence of these letters patent, to transfer such ownership and right to another. It was said that "the power to sell the machine and transfer the accompanying right of use is an incident of unrestricted ownership." *Birdsell* v. *Shaliol*, 112 U. S. 485 [28: 768]; *Woodworth* v. *Curtis*, 2 Woodb. & M. 524; *Goodyear* v. *Beverly Rubber Co.* 1 Cliff. 348.

The real question in this case is, whether, conceding the combination of the oval roll with the fixture to be a valid combination, the sale of one element of such combination, *with [433 the intent that it shall be used with the other element, is an infringement. We are of opinion that it is not. There are doubtless many cases to the effect that the manufacture and sale of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement. *Saxe* v. *Hammond*, Holmes, 456; *Wallace* v. *Holmes*, 9 Blatchf. 65; *Barnes* v. *Straus*, 9 Blatchf. 553; *Schneider* v. *Pountney*, 21 Fed. Rep. 399. But we think these cases have no application to one where the element made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism to deliver, and which must be renewed periodically, whenever the device is put to use. Of course, if the product itself is the subject of a valid patent, it would be an infringement of that patent to purchase such product of another than the patentee; but if the product be unpatentable, it is giving to the patentee of the machine the benefit of a patent upon the product, by requiring such product to be bought of him. To repeat an illustration already put: If a log were an element of a patentable mechanism for sawing such log, it would, upon the construction claimed by the plaintiff, require the purchaser of the sawing device to buy his logs of the patentee of the mechanism, or subject himself to a charge of infringement. This exhibits not only the impossibility of this construction of the patent, but the difficulty of treating the paper as an element of the combination at all. In this view, the distinction between repair and reconstruction becomes of no value, since the renewal of the paper is in a proper sense neither the one nor the other.

The case of the *Cotton Tie Co.* v. *Simmons*, 106 U. S. 89 [27: 79], presents no difficulty whatever. In that case the owner of a patent for a metallic cotton bale tie, each tie consist-

ing of a buckle and band, granted no licenses to manufacture the ties, but supplied the market with them, and stamped upon the metal of each buckle the words: "Licensed to use once only." After the bands had been once used and severed, defendants, who had bought the bands and buckles as scrap iron, rolled and straightened the pieces of the bands, and 434]riveted together *their ends. They then cut them into proper lengths, and sold them with the buckles, to be used as ties, nothing having been done to the buckles. It was held that they thereby infringed the patent. The gist of the decision is that the use of a tie once, and its subsequent severance, were intended to operate as a destruction of it, and that the defendants had no right to put the same parts together for use a second time. Says *Mr. Justice* Blatchford: "Whatever rights the defendants could acquire to the use of the old buckle, they required no right to combine it with a substantially new band to make a cotton bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or tie in any proper sense. The band was voluntarily severed by the consumer at the cotton mill, because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed."

It is evident that the use of the tie was intended to be as complete a destruction of it as would be the explosion of a patented torpedo. In either case, the repair of the band or the refilling of the shell would be a practical reconstruction of the device. In this case, however, the purchaser of the new roll does precisely what the patentee intended he should do; he replaces that which is in its nature perishable, and without the replacement of which the remainder of the device is of no value. The replacement is of a product which it is the object of the mechanism to deliver. The case is more nearly analogous to that of *Wilson* v. *Simpson*, 50 U. S. 9 How. 109 [13: 66], in which the invention involved was a planing machine, and the patent sued upon covered the combination with the cutting knives or planes of a pressure roller to effect the planing of the planks. It was proved that one of the machines would last in use for several years, but that its cutting knives would wear out, and must be replaced at least every sixty or ninety days. It was said by *Mr. Justice* Wayne, on p. 125 [73] that "the right to replace them was a part of the invention transferred to the assignee 435] for the *time he bought it, without which his purchase would be useless to him, except for sixty or ninety days after a machine had been put in use. It has not been contended, nor can it be, that such can be a limitation of the assignee's right in the use of the invention. . . . If, then, the use of the machine depends upon the replacement of the knives, . . . frequently replacing them, according to the intention of the inventor, is not a reconstruction of the invention, but the use only of so much of it as is absolutely necessary to identify the machine with what it was in the beginning of its use, or before that part of it had been worn out. The right of the assignee to replace the cutter knives is not because they are perishable materials, but because the inventor of the machine has so arranged them as a part of his combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been of little use to the inventor or to others."

The true distinction is stated by *Mr. Justice* Clifford in *Aiken* v. *Manchester Print Works*, 2 Cliff. 435, where the invention was of a knitting machine, with which the vendor was accustomed to send a package of the needles used in the machine, which needles were the subject of a separate patent. It was held that the purchase of the knitting machine, and the needles accompanying the same, did not confer upon the purchaser any right, after the needles were worn out and became useless, to manufacture other needles, and use the same in the knitting machine so sold and purchased. The case of *Wilson* v. *Simpson* was distinguished from this in the fact that the cutters and knives in that case were not subject to a patent, and of course the respondent had a right to use them as materials to repair his machine; "but," says the court, "unfortunately for the defendants in this case, the needle is subject to a patent, and in making and using it they have infringed the right of the plaintiff." As we have already held that the paper roll in this case was not the subject of a valid patent, it follows that the defendants cannot be held as infringers for the manufacture and sale of such roll.

Considerable stress is laid by plaintiff upon the fact that Mr. Wheeler, *president of[436 the defendant corporation, in February, 1885, and before the first patent was issued, bought one of the plaintiff's fixtures, known as the Oval King fixture, together with some of its paper, and dispatched them to England with instructions to his agents to file an application for a patent there, which patent was subsequently issued. That, before a patent was issued, Hicks himself applied for protection in England, and learning of the filing of the application there by Wheeler, filed a protest against the issuance of a patent to the latter, who thereupon, to thwart his obtaining a patent, made an affidavit that he did not obtain the knowledge of the invention from Hicks or any other person, but by seeing it in public use in the United States. Wheeler's own testimony in this case indicates that this affidavit contained a *suppressio veri* if not a *suggestio falsi*. But, however reprehensible his conduct may have been in this connection, it does not affect the issue between the parties here. It does not show that the Hicks patent upon the roll is a valid patent, or that the conduct of the defendants in making and selling such roll is an infringement upon the combination patents.

The decree of the court below is, therefore, affirmed.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

UNITED STATES, *Appt.*, *v.* THOMAS P. BASHAW.

(See S. C. Reporter's ed. 436-443.)

Fees of district attorney.

Where the pay which the United States district attorney is entitled to receive for his services in investigating alleged violations of the United States internal revenue laws is by statute left to be determined by the Secretary of the Treasury, as he may deem reasonable and just, the courts cannot control the exercise of his discretion; and if the exercise of such discretion has not been properly invoked by the claimant for such services, he has no right to ask the court to substitute its judgment for the judgment of the Secretary, and cannot recover for them.

[No. 779.]

Submitted Jan. 8, 1894. Decided March 19, 1894.

APPEAL from a judgment of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a judgment of the United States Circuit Court for the Eastern District of Missouri, in favor of Thomas P. Bashaw, plaintiff, against the United States, defendant, for certain services rendered by him, as district attorney for the United States in that district. Judgment of the Circuit Court of Appeals and judgment of the Circuit Court reversed, and cause remanded for further proceedings.

See same case below, 4 U. S. App. 360.

Statement by *Mr. Chief Justice* **Fuller:**

[437] *Thomas P. Bashaw brought an action against the United States in the Circuit Court for the Eastern District of Missouri to recover compensation for certain services rendered by him during the years 1887 and 1888 in the capacity of district attorney for the United States in that district. The petition contained five counts, of which the second and third were based upon services for investigating certain alleged violations of the internal revenue laws of the United States, which had been referred to him for examination by the collector for the district, under section 838 of the Revised Statutes. The claim under the second count was for $825, being for the examination of 165 cases at $5 for each case, in which the district attorney had decided that proceedings could not probably be sustained or that the ends of justice did not require them to be instituted. The claim under the third count was for $235 for similar services in respect of 47 cases. In each count it was alleged that plaintiff had made out and submitted his claim to the district judge of the eastern district of Missouri, and that the same had been duly allowed and certified by him, and that afterwards plaintiff presented the claim for payment "to defendant in its department of the Treasury, to the accounting officers of the Treasury, whereupon said defendant, by its said department, wrongfully neglected and refused to pay the same."

The circuit court found in favor of the United States as to the first and third counts, and in favor of plaintiff on the second, third, and fifth counts, and gave judgment for $1070, which included the sum of $10 under the fifth count, as to which no question is raised. The court made certain findings of fact and conclusions of law.

The second finding of fact was as follows:

"2. The court further finds the facts to be as stated in the second and third counts of the petition, that is to say, the court finds that between the 28th day of January, 1887, and 1st day of July, 1888, the collector of internal revenue for *the first collection district of Mis- [438] souri reported to the plaintiff herein (who was then United States district attorney for the eastern district of Missouri) divers and sundry cases of alleged violations of the internal revenue laws of the United States, to the number of 165; that the plaintiff inquired into and examined each of said cases, and that upon such inquiry and examination decided that proceedings therein could not probably be sustained, and that the ends of justice did not require that such proceedings should be prosecuted, and that he thereupon made a report of the facts in such cases to the Commissioner of Internal Revenue for his direction. The court finds that the plaintiff's services were reasonably worth the sum of five dollars in each of said cases, to wit, total sum of eight hundred and twenty-five ($825.00) dollars.

"That between the first day of July, 1888, and the 31st day of December, 1888, he made like examination and report in forty seven other cases of alleged violations of the internal revenue laws which were reported to him by said collector of internal revenue; that the plaintiff's services in each of the said forty-seven cases was likewise reasonably worth the sum of $5.00 per case, or the total sum of two hundred and thirty-five ($235.00) dollars."

The record did not show that the accounts were allowed and certified by any judge, but it appeared from letters of the Assistant Secretary of the Treasury, in evidence, that the claim for $825 was rejected in these terms: "In accordance with the rulings of this department and the opinion of the Attorney General, his account cannot be allowed because the cases were not tried or disposed of before a judge;" and that for $235, in the same language, with these words added: "And consequently no judge can give the certificate which the law requires and which is necessary as the basis of the Secretary's allowance."

Judgment having been rendered, the case was carried by appeal to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment was by that court affirmed. The opinion is reported in 4 U. S. App. 360. An appeal was then taken to this court.

*By the seventh section of the Act of [439] Congress of July 18, 1866, entitled "An Act Further to Prevent Smuggling and for Other Purposes," (14 Stat. at L. 178, 179, chap. 101) it was made the duty of the district attorney, upon the report of the collector of customs thereby required, to "cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such cases provided, unless upon inquiry and examination he shall decide that a

NOTE.—*As to extra pay or compensation to officers,* see note to United States v. Macdaniel, 8: 587.

conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution should be instituted, in which case he shall report the facts to the Secretary of the Treasury for his direction; and for expenses incurred and services rendered in prosecutions for such fines and personal penalties, the district attorney shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had," etc.

By Act of Congress of March 3, 1873 (17 Stat. at L. 580, chap. 244) the 7th section of the former Act was amended and the same provisions in substance extended to internal revenue cases; and it was made the duty of the district attorney on report of the collector of customs or the collector of internal revenue, as the case might be, "to cause the proper proceedings to be commenced and prosecuted without delay for the fines, penalties, and forfeitures by law in such case provided, unless, upon inquiry and examination he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that proceedings should be instituted, in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction; and for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable upon the certificate of the judge before whom such cases are tried or disposed of; *Provided*, That the annual compensation of such district attorney shall not exceed the maximum amount now prescribed by law," etc.

440] *These proceedings were carried forward into the Revised Statutes as section 838, under title 13, "The Judiciary," and section 3085, under title 34, "Collection of Duties." These sections are as follows:

"Sec. 838. It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: *Provided*, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment."

"Sec. 3085. District attorneys, upon receiving the report of a collector, shall cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such case provided, unless upon inquiry and examination they shall decide that a conviction cannot probably be obtained, or that the ends of public justice do not require that a suit or prosecution shall be instituted, in which case they shall report the facts to the Secretary of the Treasury for his direction. For expenses incurred and services rendered in prosecutions for such fines and personal penalties, they shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon the *cer-[441 tificate of the judge before whom such prosecution was had."

Messrs. **J. E. Dodge,** *Assistant Atty. Gen.*, and *James H. Nixon* for appellant.

Messrs. **Lewis E. Stanton, C. C. Lancaster** and *J. W. Emerson* for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The circuit court of appeals held that the words, in respect of payment for expenses and services, "in all such cases," in section 838, referred to the cases previously mentioned in the section, namely, the cases reported by the collector to the district attorney for examination; that, therefore, the attorney would be entitled to be paid for expenses and services in all cases reported to him and examined, regardless of the results of such examination; that it ought not to be supposed that Congress, while intending to protect the individual citizen, as well as the United States, against the institution of proceedings not called for in the furtherance of justice, at the same time placed the government in the attitude of making the question of compensation depend upon a conclusion reached in its favor; that, as the phraseology of the 7th section of the Act of July 18, 1866, was changed by the Act of March 3, 1873, by striking out the words "in prosecutions for such fines and personal penalties," and inserting "in all such cases," the presumption was that a change of meaning was intended; and that section 838, embodying the Act of 1873, should not be narrowed to conform to the Act of 1866, but no reference was made to the carrying forward of the latter into section 3085. It was conceded that the basis for the action of the Secretary of the Treasury was the certificate of the proper judge, but considered that the giving of such certificate was not necessarily limited to the judge before whom the cases were "tried and disposed of," and that where, on examination, no prosecution was had, the judge who was *competent to try "such cases" [442 was competent to grant the certificate. The court held that the question of payment or no payment was not left to the discretion of the Secretary, and that: "the right to compensation is acquired by the rendition of services in the examination of cases reported to the attorney for examination by the collectors of customs and of revenue. The amount to be paid

is to be ascertained by proving the facts before the proper judge, obtaining his certificate, and the approval of the Secretary of the Treasury."

Certain considerations, however, confront us at the threshold, which are fatal to the judgment and render any determination of the principal question discussed uncalled for.

The findings of the circuit court do not show, nor is it anywhere disclosed by the record, that, prior to the presentation of the claims to the Secretary, the facts were proven before any judge and the amounts claimed certified by him; and it affirmatively appeared that the Secretary had not determined what sum he deemed just and reasonable to be paid.

The rejection of the claims was placed it is true, upon the ground that they could not be allowed for want of certificate, in accordance with the rulings of the department and the opinion of the Attorney General; but the facts remain that the Secretary had made no allowance, and that this record fails to show that the exercise of his discretion in that regard, even from plaintiff's standpoint, had been properly invoked.

And in this connection it is proper to observe that our attention is called, by the brief of counsel for the government, to rulings of Secretary Bristow, August 29, and December 9, 1874; of Secretary Folger, February 26 and 28, 1884; and of Secretary Fairchild, of December 18, 1886; that the Secretary of the Treasury can make no allowance for services where legal proceedings were not commenced, because he could not do so unless there was a judge's certificate, and such certificate could not be given except in cases that were tried or disposed of before the judge so certifying, and the practice under the Act of 1873 and the Revised Statutes seems to have been uniformly in accordance with these rulings. The department held, in short, that the statute did not apply to cases not tried and disposed of. 443] The *opinion of Attorney General Brewster, of March 2, 1885 (18 Ops. Atty. Gen. 126) and of Attorney General Garland, in a letter to the Secretary of the Treasury, of November 17, 1885 (31 Int. Rev. Rec. 382) are to the same effect. The latter was of opinion that sections 838 and 3085 should be read together, and that so construed the established practice of the department was maintained. This was the view taken by *Judge* Shipman in *Stanton* v. *United States*, 37 Fed. Rep. 252, who held that it was not the intention of Congress to authorize payment for such services, "unless prosecutions had been commenced." It was otherwise ruled by *Judge* Treat, in *Re District Attorney*, 23 Fed. Rep. 26, followed by his successor, *Judge* Thayer, in this case, *Bashaw* v. *United States*, 47 Fed. Rep. 40; and a like opinion was expressed by the Solicitor of the Treasury on April 30, 1885.

But, without further remark on this branch of the case, it must be admitted that, even if the rulings of the department were erroneous and its practice not controlling, upon which we express no opinion, whatever sum was to be paid was left to be determined by the Secretary of the Treasury as he should deem reasonable and just, and this involved the exercise of judgment and discretion on his part. The courts cannot control, though in proper cases they may direct, the exercise of judgment or discretion in an executive officer. In this case, as we have said, the exercise of discretion was not properly invoked, and the party had no right to ask the court to substitute its judgment for the judgment of the Secretary.

The judgment of the Circuit Court of Appeals for the Eight Circuit is reversed; the judgment of the Circuit Court of the United States for the Eastern District of Missouri is also reversed, and the cause remanded to that court for further proceedings in conformity with this opinion.

Mr. Justice **White** was not a member of the court when this case was considered, and took no part in its decision.

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*BARTHOLD SCHLESINGER ET AL., *Appts.*, [444
v.
THE KANSAS CITY & SOUTHERN RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 444-454.)

Breach of condition in grant—reclamation of the estate forfeited.

1. In the case of a public grant, the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made.
2. In the case of a private grant, an entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required.
3. Where the roadbed etc. of a railroad was conveyed to a construction company on condition that the company should build a certain portion of the road within a certain time or the property should revert to the grantor, a subsequent judgment creditor of the construction company cannot subject to the payment of his judgment the said property, after such company had forfeited all interest in the property by its failure to perform such condition, and the property had reverted to the grantor.

[No. 243.]

Argued and Submitted Feb. 1, 1894. Decided March 5, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri, to review a decree, dismissing for want of equity a suit brought by the appellants to subject, in satisfaction of their demand against the Kansas City & Southern Construction Company, certain railroad property in the possession of and claimed by the Kansas City & Southern Railway company. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

This is an appeal from a decree dismissing, for want of equity, a bill brought by the appellants to subject, in satisfaction of their de-

NOTE.—*As to land grants to railroads*, see note to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 28: 704.

mand against the Kansas City & Southern Construction Company, certain railroad property in the possession of and claimed by the Kansas City & Southern Railway Company.

The facts, so far as it is necessary to state them, are as follows: On the 11th day of January, 1877, the roadbed, masonry, rights of way, and appurtenances of the Kansas City, Memphis & Mobile Railroad Company, a Missouri corporation, were sold at public auction under the order of the District Court of the United States for the Western District of Missouri, sitting in bankruptcy—John D. Bancroft, of Kansas City becoming the purchaser at the price of $15,025 in cash paid. And a deed was made to the purchaser on the 25th day of April, 1877.

Bancroft, by deed of April 27, 1877, conveyed to Thomas K. Hanna, Benjamin McLean, and himself, as trustees for sundry residents of Kansas City who had contributed the purchase money, and in whose behalf the property was purchased.

By deed executed January 13, 1880, Hanna, McLean and Bancroft, trustees, in considera-[445] tion of $19,156.87, cash in hand *paid, conveyed to James I. Brooks all the property and rights so purchased, upon the following terms and conditions:

"Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1,1881, so as to be ready for use as a railroad, and also to build said railroad to the coal fields of Bates county to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid; and if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property hereby sold as aforesaid shall revert to said first party and reinvest in them the same as they now hold the same: *Provided, however*, That as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a roadbed for said railroad, commencing at Kansas City and running southwardly, then the said provision shall become null and void and of no effect whatever, and upon said expenditure being made in the building of said railroad as aforesaid, by said second party, of said sum of fifty thousand dollars, then said trustees are to execute to said second party or his assigns an instrument in writing acknowledging the waiver and extinguishment of said forfeiture. In the event of a disagreement between the said trustees and said second party as to the expenditure in fact by said second party of said fifty thousand dollars, as aforesaid, as said second party may hereafter claim, said trustees and said second party shall each select an arbitrator, and they, in case of disagreement between them, shall select a third arbitrator, and in case either party refuses to select an arbitrator, then the arbitrator chosen by the other party shall select two additional arbitrators, and the arbitrators selected in any of the above mentioned modes shall determine whether such expenditure has been made by said second party, and such determination of said arbitrators shall be binding on both parties and may be enforced by judgment as provided by the laws of this state. Said first party covenants and warrants to and with said second party that they, the said trustees, have not in anywise encumbered the said property, and that the same is free from all encumbrances done or suffered by them."

*By a declaration in writing, executed [446] February 27, 1880, Brooks acknowledged that the property conveyed to him was held in trust for the benefit of the Kansas City & Southern Construction Company, and covenanted that he would, by a sufficient quit-claim deed, transfer it to that company or their assigns, as they might direct and require. And by deed of April 1, 1880, he conveyed the property by quit-claim deed to the Construction Company.

On the 2d day of March, 1880, the Construction Company made a written contract with the appellants, under the name of Naylor & Co., for the furnishing of steel rails to be used in completing the railroad. But, on the 18th of May, 1880, Naylor & Co. were notified by the Construction Company that it was unable to carry out its contract with them, and they were authorized to sell the rails for account of that company, but without prejudice to any rights or claims of Naylor & Co. for damages.

The Construction Company, by deed of May 24, 1880, conveyed the property to the Kansas City & Southern Railroad Company, the consideration recited being $300,000 of the capital stock of the railroad company, for which certificates were to be issued, and $300,000 of its first mortgage bonds to be secured by mortgage upon the property. But, in fact, there was at that time no such corporation. Brooks, the president of the Construction Company, contemplated the organization of a railroad company to be named the Kansas City & Southern Railroad Company, but he failed to effect such an organization.

By deed of September 18, 1880, the Construction Company conveyed to the Kansas City & Southern Railway Company, a corporation of Missouri, the Kansas City, Memphis & Mobile Railroad, running from Kansas City in the direction of Memphis and Mobile, together with all its rights of way, roadbed, masonry, property, rights of property, and appurtenanances, etc. This deed was executed in the name of the grantor company by Henry Ashley, agent, and is attested by its corporate seal which, the acknowledgment of Ashley states, was affixed thereto by order of the board of directors. The consideration recited was $250,000 cash in hand paid.

*Hanna, McLean, and Bancroft, as trus-[447] tees, made, December 15, 1880, a written contract with the Kansas City & Southern Railway Company, as follows: "Whereas the Kansas City, Memphis & Mobile Railroad Company, with all its roadbed, rights of way, and appurtenances and property and rights of property whatsoever connected with the said railroad, with all the franchises of the Kansas City, Memphis & Mobile Railroad Company, were, by deed dated January 13, A. D. 1880, sold and conveyed by the undersigned trustees to one James I. Brooks on certain conditions contained and specified in said deed, and whereas the title to said property subject to the conditions has by sundry mesne conveyances passed to and vested in and is now owned and held by the Kansas City & Southern Railway

Company; and whereas said last named company has not been able to comply with and perform said conditions within the time specified in said first named deed for their performance, but is now willing to deposit and has deposited with the said trustees the sum of $25,000 as a guaranty by said last named company of the good faith of its purpose to build a railroad southeasterly from Kansas City, Missouri, through the coal fields of Henry county, Missouri, and the iron fields of St. Clair county, Missouri, the receipt of which sum of twenty-five thousand dollars by said trustees is hereby acknowledged, and whereas, since the making of said deed to said James I. Brooks, various sums of money have been expended for rights of way, for engineering, and other necessary expenses connected with the enterprise of building said railroad, in addition to the purchase price paid to said trustees on the execution of the said first named deed by them; and whereas the owners of more than two thirds of the money and shares furnished by the persons and firms in the deed of said property to said trustees, dated April 27, 1877, have directed the undersigned trustees to execute and deliver this instrument to said Kansas City & Southern Railway Company: Now, therefore, in consideration of the premises and the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, it is agreed, stipulated, and covenanted by and be-[448] tween said trustees, for themselves *and their said beneficiaries and said Kansas City & Southern Railroad Company, as follows: 1st. The conditions provided and expressed in said deed of said trustees to said James I. Brooks are hereby annulled, extinguished, and the said Kansas City & Southern Railway Company are hereby forever released and discharged from the performance of the same or any part hereof, and in lieu the following conditions are hereby provided, that is to say, said trustees or a majority of them shall, as said railroad from Kansas City, Mo., southeasterly through the coal fields of Henry county, Missouri, and the coal fields of St. Clair county, Missouri, shall be constructed pay out said $25,000 on the estimates and orders made and given in the building of said road by the chief engineer of said K. C. & S. R. W. Co., and as soon as said $25,000 is so paid out and the additional sum of fifteen thousand dollars is expended by said last named company in the building of said road the last named company shall hold said property so conveyed free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries, or any of them. 2d. It is further provided and covenanted that if said last named company shall not expend the full sum of $25,000 in the building of said railroad before July 1, 1881, then so much of said $25,000 so deposited as shall on the last day aforesaid be unexpended shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries. 3d. It is further provided and covenanted that as soon as said $25,000 so deposited shall be paid out, and as soon as the chief engineer of said last named company shall make the certificate of expenditure by said last named company of said $15,000 shall be expended before October 1, 1880, then said trustees shall deliver to said last named company an instrument in writing, duly executed and acknowledged, evincing the full compliance with and performance of all the conditions herein contained by said last named company, and if the sum of forty thousand (40 M) dollars shall not as above provided be expended by said company before October 1, 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided."

*This agreement was executed by the [449] trustees Hanna, McLean and Bancroft, with the consent in writing of the requisite number of those whom they represented.

On the 11th day of May, 1881, the Construction Company, by James I. Brooks, its president, in consideration of one dollar and other good and valuable considerations, and "by virtue of a vote of the directors of said corporation," conveyed this property to said Brooks, in trust to secure "the payment to him of all indebtedness of whatsoever nature, whether in cash or stock or bonds due said Brooks under the vote whereby the property herein conveyed was deeded by said Brooks to the Kansas City & Southern Construction Company to the date of this conveyance," and after the execution of these trusts to hold the same for the benefit of whom it might concern.

On the 7th day of October, 1881, the present appellants— claiming that the Construction Company was largely indebted to them on the contract of March 2d, 1880, for steel rails—instituted an action at law in the circuit court of Jackson county, Missouri, against that company, on said alleged liability. Upon affidavit and bond for attachments, writs of attachment and summons issued to the counties of Jackson, Cass, Henry and St. Clair, Missouri, and were levied by the sheriffs of those counties, respectively, on the 7th, 11th, and 12th days of October, 1881, upon all the right, title, interest, and property of the Construction Company, in the Kansas City, Memphis & Mobile Railroad, in such counties with its right of way, roadbed, masonry, property, rights of property, and appurtenances—the same property described in the deeds of May 24, 1880, and September 18, 1880,—to the Kansas City & Southern Railway Company. The Construction Company answered, and denied all the material allegations of the petititon. In that action, which was removed into the Circuit Court of the United States for the Western District of Missouri in April, 1882, the Kansas City & Southern Railway Company, after such removal, filed their interplea asserting their ownership, prior and subsequent to the attachment suit, of all the property attempted to be levied on as the property of the *Construc-[450] tion Company. In that action, a verdict was returned against the Construction Company, for $49,448.11, for which a judgment was rendered October 20, 1885, on which execution was allowed "to be levied on the property and effects attached, and other property of the defendant." Subsequently (a motion for a new trial having been made) the plaintiffs remitted $13,546.72 of the verdict. Thereupon the former judgment was set aside, and it was adjudged, February 1, 1886, that the plaintiff recover of the Construction Company $35,901-

.89 and their costs, "and that they have thereof execution, and that the judgment and execution thereon hold not only the property attached heretofore in this case, but the other property of the defendant; but execution shall not issue, without special leave of court, until after final decree in chancery in case No. 401, in the case of *Schlesinger* v. *Kansas City & Southern R. Co.*"

The equity case here referred to is the present suit which was brought, November 10th, 1881, by Barthold Schlesinger and Sebastian B. Schlesinger, doing business as Naylor & Co., against the Kansas City & Southern Railway Company, the Kansas City & Southern Construction Company, the Farmers' Loan & Trust Company, and James I. Brooks. The Farmers' Loan & Trust Company was made a defendant because it was the trustee in a mortgage, given by the railway company, January 1, 1883, to secure $6,500,000 of its first mortgage bonds, which mortgage covered all of the property and income of the mortgagor, and warranted the title to the property. The relief sought was a decree adjudging the deeds of May 24, 1880, and September 18, 1880, to the Kansas City & Southern Railway Company, and the deed to the Farmers' Loan & Trust Company, to be voluntary, fraudulent, and void as against the demands of the plaintiffs, and that the property and rights of the Construction Company, attempted to be conveyed by said deeds, and levied upon and attached as aforesaid, be subjected, charged, and sold for those demands and the costs of the attachment proceedings; and that, in the meantime, a receiver be appointed to take charge of [451] the *property, receiving the profits thereof, and paying all taxes and assessments against it.

Some time after the institution of this suit, and before it was determined in the court below, the appellants sold their claim to one Sargent of Boston for $4000.

Messrs. **Frank Hagerman,** *Jefferson Brumback* and *Wallace Pratt* for appellants.
Mr. **Charles O. Tichenor** for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

No question is made as to the validity of Bancroft's purchase of the property in dispute at the sale made under the order of the Circuit Court of the United States for the Western District of Missouri, sitting in bankruptcy. Indeed, all parties to the present controversy claim title under him.

We have seen that the title passed from him to Hanna, McLean and himself, as trustees for those furnishing the money used in the purchase at the bankruptcy sale, and that those trustees conveyed to Brooks, January 13, 1880, upon certain express conditions. One of those conditions was that Brooks should build the railroad from Kansas City to Harrisonville or Bolton, on or before January 1, 1881, and also to the coal fields of Bates county, to a point south of Butler, on or before July 1, 1881. Another condition was that if Brooks failed to build the railroad to the coal fields mentioned, as stipulated in the deed to him, then the property should revert to the trustees, and reinvest in them, "the same as they now hold the same." This condition of forfeiture was, by the terms of the conveyance to Brooks, to become void and extinguished only in the event Brooks expended $50,000 in the construction of a roadbed for said railroad commencing at Kansas City and running southwardly.

The Kansas City & Southern Construction Company took the property under the two deeds to it from Brooks, dated, respectively, February 27, 1880, and April 1, 1880. But, of *course, it took subject to the con- [452] ditions upon which he received the property from the trustees. Neither of those conditions was performed. The road was not built from Kansas City to Harrisonville by the 1st day of January, nor to the coal fields of Bates county by July 1, 1881. Nor was $50,000 or any sum expended by Brooks or by his grantee in the construction of a roadbed for the railroad. Indeed, as early as the 18th of May, 1880, the Construction Company gave formal notice to Naylor & Co. that they were unable to comply with their contract relating to steel rails; and, consequently, the enterprise was abandoned by it.

It results that when the 1st of July, 1881, came, the property had reverted to the trustees under their agreement with Brooks, subject to which agreement the Construction Company took the title. But, on that day, the Kansas City & Southern Railway Company were in possession under the agreement between it and the trustees of December 15, 1880, to say nothing of the deed of the Construction Company to the railway company of September 18, 1880. If it be said that the trustees had no right, under their agreement with Brooks, to treat the property as having reverted to them until after the expiration of the time limited for the building of the railroad to the coal fields, namely, until after July 1, 1881, the answer is: 1. That the Construction Company had by its formal notice to Naylor & Co. of May 18, 1880, indicated that it had no purpose, as the grantee of Brooks, to meet the conditions upon which he was to hold the property; 2. If the provision in the agreement of December 15, 1880, between the trustees and the railway company, annulling and rescinding the conditions imposed by the deed to Brooks, and prescribing other conditions as between the trustees and the railway company, was, at that time, of no effect, in law, as against Brooks or the Construction Company, it became valid and binding after July 1, 1881, when, beyond all question, the trustees were entitled to treat the property as having reverted to them, to do with it as to them seemed best. So that if we disregard altogether the deed of May 24, 1880, from the Construction Company to the Kansas City & Southern Railroad *Company as a nul- [453] lity, no such corporation or company being in existence, and if we disregard, also, the deed of September 15, 1881, to the railway company, because it was not executed by any officer of the Construction Company, the fact appears that on and after July 1, 1881, the railway company were in actual possession of the property, under their contract with the trustees Hanna, McLean and Bancroft, who had elected, as they had a clear right to do, to treat it as having reverted to them. This was before Naylor & Co. had instituted their action

at law and sued out their attachments against the Construction Company. When that attachment issued the Construction Company had no interest whatever in the property attached. The interest it originally had was acquired subject to certain conditions, upon the non-performance of which the property, at the election of Hanna, McLean and Bancroft, trustees, reinvested in them.

It was not necessary to the reacquisition of title by the trustees that they should invoke the aid of the courts. In the case of a public grant, the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made. But judicial proceedings to that end are not absolutely necessary, unless they are prescribed by the grant itself; for where land and franchises are held upon conditions to be subsequently performed, "any public assertion by legislative act of the ownership of the estate after default of the grantee—such as an act resuming control of them and appropriating them to particular uses or granting them to others to carry out the original object—will be equally effectual and operative." *Farnsworth* v. *Minnesota & P. R. Co.* 92 U. S. 63 [23:535]; *New Orleans Par. R. Co.* v. *United States*, 124 U. S. 131 [31:386]. In the case of a private grant, an entry by the grantor, or any act equivalent thereto, showing a purpose to take advantage of the breach of condition subsequent, and to reclaim the estate forfeited by such breach, is all that is required. What was done by the trustees Hanna, McLean and Bancroft evinced, 454] in the clearest possible manner, their *purpose to reclaim the property and rights granted to Brooks, because of the failure to perform the condition upon which he, or any one claiming under him, was entitled to hold the property.

Under the view we have expressed, it becomes unnecessary to consider other questions discussed by counsel; and it results, and we so adjudge, that the plaintiffs are not entitled to have the property in question or any part thereof sold in satisfaction of their judgment for $35,901.30 against the Kansas City & Southern Construction Company.

The decree below is affirmed.

THE STATE OF TENNESSEE and the COUNTY OF SHELBY, *Appts.*,
v.
THE UNION & PLANTERS' BANK ET AL.

THE STATE OF TENNESSEE and the COUNTY OF SHELBY, *Appts.*,
v.
THE BANK OF COMMERCE ET AL.

THE STATE OF TENNESSEE, for use of the CITY OF MEMPHIS, and the CITY OF MEMPHIS, *Appts.*,
v.
THE BANK OF COMMERCE ET AL.

(See S. C. Reporter's ed. 454-472.)

Removal of cause — Federal question — where stated—plaintiff's pleading.

1. A cause cannot be removed from a state court simply because, in the process of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States.
2. Where the original jurisdiction of the United States circuit court is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character.
3. A suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws.
4. No statement in the petition for removal, or in the demurrer, of the defendant can supply the want of allegation of a Federal question by the plaintiff in his pleading.
5. Where the circuit court is without jurisdiction, on reversal in this court the costs are to be borne by the party who brought into that court a case not within its jurisdiction.

[Nos. 1020, 1021, 761.]

Argued Jan. 12, 15, 1894. Decided March 19, 1894.

APPEALS from decrees of the Circuit Court of the United States for the Western District of Tennessee, dismissing the above entitled cases. The first case, was a suit in equity brought by the state of Tennessee and the county of Shelby in that state, against the Union & Planters' Bank, a corporation of that state *et al.*, to recover taxes alleged to be due to the state and county, and was dismissed on the ground that the capital stock of said bank, was exempt from taxation. The second case, was a like suit in equity, brought by the same plaintiffs against the Bank of Commerce, a corporation of Tennessee *et al.*, and was dismissed on demurrer. The third case was a suit in equity by the state of Tennessee, and city of Memphis, against the Bank of Commerce *et al.* The case was removed into the United States circuit court upon the petition of the defendant corporation upon the ground that, by reason of

NOTE.—*As to removal of causes, under Act of 1875; citizenship*, see note to Meyer v. Delaware R. Const. Co. 25: 563.

As to removal by one of two or more defendants; separable controversies, see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see note to Gaines v. Fuentes, 23: 824, and to Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, Act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied, see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers; Rev. Stat. § 643, see note to Davis v. South Carolina, 27: 574.

As to removal of causes; right to remove; grounds of removal; citizenship; prejudice or local influence; Federal question; parties, see note to Butler v. National Home for Disabled Volunteer Soldiers, 39: 346.

the exemption in its charter, the tax act of Tennessee on which the plaintiffs relied, was repugnant to the provision of the United States Constitution, that no state shall pass any law impairing the obligations of a contract. In the United States circuit court, a demurrer on same grounds was sustained and the suit dismissed. Decrees in the first and second cases, reversed, and the cases remanded to the United States circuit court with directions to dismiss the suits for want of jurisdiction. Decree in the third case reversed, and case remanded to the United States circuit court with directions to remand it to the state court.

See the third case below, 53 Fed. Rep. 735.

Statement by *Mr. Justice* **Gray:**

The first case was a bill in equity, filed January 26, 1893, in the Circuit Court of the United States for the Western District of Tennessee, by the state of Tennessee and the county of Shelby in that state, against the Union & Planters' Bank of Memphis, a corporation organized under the laws of Tennessee, and having its place of business at Memphis in Shelby county, and against S. P. Read and W. A. Williamson, citizens of the state of Tennessee, 455] to recover taxes alleged to be due to *the state and county for the years 1887-1891, under the general tax act of the state of 1887, chap. 2.

The bill, after alleging that the original charter of the defendant corporation, granted by the state of Tennessee in 1858, provided "that said company shall pay to the state of Tennessee an annual tax of one half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes;" and stating the provisions of the tax act of 1887, relied on by the plaintiffs, made the following allegations:

"The defendant bank claims that both its capital stock and the shares of stock in the hands of its stockholders are exempt from taxation by virtue of its charter. Complainants, however, are advised and submit that the exemption contained in said charter applies to the shares of stock only and not to the capital stock of said institution, and that the latter in any event is subject to the taxing power of the state."

"It may be, however, that complainants are mistaken in the foregoing construction of the charter, and that the shares of stock are taxable and the capital stock of said institution exempt. The question is one of law, and is submitted to the court for determination."

In view of the latter alternative, the bill alleged that the corporation had each year refused, on demand of the assessing officers of the state, to give them a list of its stockholders; made Williamson, a stockholder, and Read, the cashier of the bank, defendants; and required the latter to disclose on oath the names of the other stockholders and the number of their shares, in order that they might be made defendants and proper relief be had against them.

The bill also set forth the amounts of taxes due from the corporation in one alternative, or from the stockholders in the other, amounting on either view to more than $5000; and concluded as follows:

"Complainants further state and show that defendant claims that under and by virtue of the terms of its charter both its shares of stock and its capital stock are exempt from taxation, excepting only the one half of one per cent prescribed by the charter; and that the revenue law of the state, *undertaking to tax the one [456 or the other, is void because in violation of the clause of the Constitution of the United States which forbids the state to pass any law impairing the obligation of a contract. It claims immunity from taxation upon that ground, and upon none other. The case is therefore one arising under the Constitution of the United States and within the jurisdiction of this court, this bill being brought to obtain an adjudication of the question of the exemption of the shares of stock, or of the capital stock, or both, of the defendant bank. Complainants aver that by the statute laws of the state of Tennessee they respectively have liens upon the capital stock of said bank, and upon any property in which the same may be invested, for the payment of any sums that may be adjudged due from the defendant bank on account of taxes laid on said capital stock, and liens upon the shares of stock in said bank for any taxes upon said shares that may be adjudged due thereon.

"Premises considered, complainants pray that the parties named as such in the caption be made defendants hereto; that subpœna and copy issue, returnable to the next proper rule day, according to the practice of the court, requiring them to appear and answer the allegations of this bill, the defendant G. P. Read answering under oath and making discovery as asked in the body of the bill, that the court will construe the charter of defendant company, and pass upon the claim of immunity from taxation set up by defendant company and its stockholders, adjudging the liability of the one or the other, or both, to taxation, determining upon which the taxes are laid for the several years mentioned in the bill, rendering judgment accordingly, and enforcing the liens given by the statute laws of the state; and that the court will grant such further relief, general and special, as complainants in equity ought to have."

The defendants filed an answer, admitting most of the facts alleged in the bill, and that the defendant corporation "claims that under and by virtue of the terms of its charter, both its shares of stock and its capital stock are exempt from taxation, excepting only the one half of one per cent prescribed by the charter, and that the revenue law of a state, undertaking to *tax the one or the other, is void, be [457 cause in violation of that clause of the Constitution of the United States which forbids the state to pass any law impairing the obligation of a contract;" stating that "it does claim immunity from taxation upon that ground, but not, as alleged in the bill, upon none other;" and setting up, as additional grounds of defense, that the exemption of the corporation and its stockholders from taxation, except as provided in its charter, had been adjudicated and established by the decision of this court in *Farrington* v. *Tennessee*, 95 U. S. 679 [24: 558] and by the decision of the supreme court of Tennessee in *Memphis* v. *Union & P. Bank*, 91 Tenn. 546; and also that they were so exempt from taxation under the constitution and laws of

Tennessee; and insisting that the case was not one arising under the Constitution and laws of the United States, nor within the jurisdiction of the circuit court of the United States.

The plaintiffs filed a general replication; and the court entered this decree: "This cause came on for final hearing on the pleadings and proofs, and having been argued by counsel and considered by the court, the court is of the opinion as follows, to wit: First, that the objection to the jurisdiction of the court set up in the answer of the defendants is not well taken; that the jurisdiction of the court should be sustained, and the cause determined on its merits; second, that by the charter of the defendant bank both the capital stock of the said bank and the shares of stock therein are exempt from taxation; third, that the defense of *res judicata* set up in the answer need not, therefore, be passed upon. It is therefore, ordered, adjudged and decreed that the bill of complaint herein be, and is hereby, dismissed at the cost of complainants." The plaintiffs appealed to this court.

The *second case* was a like bill in equity, filed at the same time by the state of Tennessee and the county of Shelby against the Bank of Commerce, a corporation of Tennessee and established at Memphis, and against its cashier, and one of its stockholders, both citizens of Tennessee; and was dismissed on demurrer; and the plaintiffs appealed to this court.

458] *The *third case* was a bill in equity, filed October 22, 1891, in the chancery court of Shelby county, by the state of Tennessee and the city of Memphis against the Bank of Commerce and its cashier; and was substantially similar to the bills in the other cases, except in omitting the last paragraph but one, relating to the Constitution of the United States, the jurisdiction of the circuit court of the United States, and the lien of the plaintiffs. The case was removed into the circuit court of the United States upon the petition of the defendant corporation, upon the ground that, by reason of the exemption in its charter, the tax act of Tennessee, on which the plaintiffs relied, was repugnant to the provision of the Constitution of the United States that no state shall pass any law impairing the obligation of a contract. In the circuit court of the United States, a demurrer to the bill, on the same ground, was filed and sustained, and a final decree entered, dismissing the bill. *Tennessee* v. *Bank of Commerce*, 53 Fed. Rep. 735. The plaintiffs appealed to this court.

Messrs. **S. P. Walker** and *C. W. Metcalf* for appellants.

Messrs. **Julius A. Taylor, Thomas B. Turley, William H. Carroll** and *Henry Craft* for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

We find it unnecessary to consider other objections to the maintenance of these three bills, or of any one of them, because we are clearly of opinion that each suit is not one arising under the Constitution and laws of the United States, of which the circuit court of the United States, has jurisdiction, either original, or by removal from a state court, under the Act of March 3, 1887, chap. 373, as corrected by the Act of August 13, 1888, chap. 866 (25 Stat. at L. 434).

*The 3d Article of the Constitution, [459 said *Chief Justice* Marshall, "enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States." And "when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." But "the right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 819, 823, 824 [6: 204, 223, 224]. In this last clause as the context shows, the word "then" (though printed between commas) means "at that time," that is to say, "when the action is brought."

The earliest Act of Congress, which conferred on the circuit courts of the United States general jurisdiction of suits of a civil nature, at common law or in equity, "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," was the Act of March 3, 1875, chap. 137. 18 Stat. at L. 470. Under section 1 of that Act, providing that those courts should have original cognizance of such suits when the matter in dispute exceeded the sum or value of $500, their jurisdiction was exercised in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the Constitution or laws of the United States. *Feibelman* v. *Packard*, 109 U. S. 421 [27: 984]; *Kansas Pac. R. Co.* v. *Atchison, T. & S. F. R. Co.* 112 U. S. 414 [28: 794]; **New Orleans* v. *Houston*, 119 [460 U. S. 265 [30: 411]; *Backrack* v. *Norton*, 132 U. S. 337 [33: 377]; *Cooke* v. *Avery*, 147 U. S. 375 [37: 209]. And under section 2 of that Act, which provided that any suit of a civil nature, at law or in equity, brought in any state court, "and arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority," might be removed by either party into the circuit court of the United States, it was held sufficient to justify a removal by the defendant that the record at the time of the removal showed that either party claimed a right under the Constitution or laws of the United States. *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 U. S. 135 [26: 96]; *Ames* v. *Kansas*, 111

U. S. 449, 462 [28: 482, 487]; *Brown* v. *Houston*, 114 U. S. 622 [29: 257]; *Provident Sav. L. Assur. Society* v. *Ford*, 114 U. S. 635, 642 [29: 261, 264]; *Pacific R. Removal Cases*, 115 U. S. 1 [29: 319]; *Tennessee* v. *Whitworth*, 117 U. S. 129, 139 [29: 830, 833]; *Southern Pac. R. Co.* v. *California*, 118 U. S. 109 [30: 103]; *Bock* v. *Perkins*, 139 U. S. 628 [35: 314].

But, as has been decided under that Act, "the suit must be one in which some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction;" *Carson* v. *Dunham*, 121 U. S. 421, 427 [30: 992, 994]; "a cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States;" *Little York Gold Wash. & W. Co.* v. *Keyes*, 96 U. S. 199, 203 [24: 656, 658]; and "the question whether a party claims a right under the Constitution or laws of the United States is to ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party." *Central R. Co. of N. J.* v. *Mills*, 113 U. S. 249, 257 [28: 949, 951].

Even under the Act of 1875, the jurisdiction of the circuit court of the United States could not be sustained over a suit originally brought in that court, upon the ground that the suit was one arising under the Constitution, laws or treaties of the United States, unless that appeared in the plaintiff's statement of his own claim. This was distinctly adjudged, and the reasons clearly stated, in *Metcalf* v. *Watertown*, 461] 128 U. S. 586, 589 [32: 543, 544], *in which *Mr. Justice* Harlan, after pointing out that the cases, in which it had been held sufficient that the Federal question upon which the case depended was first presented by the answer or plea of the defendant, were cases of removal, in which, therefore, the requisite of jurisdiction appeared on the record at the time when the jurisdiction of the circuit court of the United States attached, said: "Where, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the circuit court, at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit; just as it would remand to the state court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction, at the commencement of the suit, is not cured by an answer or plea which may suggest a question of that kind." That view has been affirmed and acted on at the present term in *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 143 [37: 1030, 1032].

The same rule applies, more comprehensively, to the acts of 1887 and 1888. In section 1, as thereby amended, the words giving original cognizance to the circuit courts of the United States in this class of cases are the same as in the Act of 1875 (except that the jurisdictional amount is fixed at $2000) and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits "of which the circuit courts of the United States are given *original jurisdiction by the [462 preceding section," thus limiting the jurisdiction of a circuit court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section. 24 Stat. at L. 553; 25 Stat. at L. 434. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this court, to contract the jurisdiction of the circuit courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315, 320 [33: 635, 637]; *Ex parte Pennsylvania Co.* 137 U. S. 451, 454 [34: 738, 740]; *Fisk* v. *Henarie*, 142 U. S. 459, 467 [35: 1080, 1082]; *Ex parte Shaw* ("*Shaw* v. *Quincy Min. Co.*") 145 U. S. 444, 449 [36: 768, 771]; *Gerling* v. *Baltimore & O. R. Co. ante*, p. 311.

Congress, in making this change, may well have had in mind the reasons which so eminent a judge as *Mr. Justice* Miller invoked in support of his dissent from the original decision that a defense under the Constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the Act of 1875. "Looking," said he, "to the reasons which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the state, and when the Act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, that he in such case is not without remedy in a Federal court; for if he has pleaded and relied on such defense in the state court, and that court has decided against him in regard to it, he can remove the case into this court by writ of error, and have the question he has thus raised decided here." *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 U. S. 135, 144 [26: 96, 99].

The acts of 1887 and 1888, indeed, contain special provisions as to particular kinds of cases arising under the Constitution or laws of the United States. By section 3, every receiver or manager of property, appointed by a court of the United States, is permitted to be sued without the previous leave of that court, but the suit is subject to its general equity *ju- [463 risdiction so far as necessary to the ends of justice. By section 5, nothing in this Act is to repeal or affect any jurisdiction or right mentioned in sections 641, 642, 643, 722, or title 24

of the Revised Statutes, or the Act of March 1, 1875, chap. 114, all of which relate to suits concerning civil rights, and section 643 relates also to the removal of suits against officers or other persons acting or claiming under any revenue law of the United States; or in the Act of March 3, 1875, chap. 137, § 8, which relates to notice to absent defendants in suits to enforce or to remove liens. And section 6 expressly repeals section 640 of the Revised Statutes, which authorized any suit commenced in a state court against any corporation, other than a banking corporation, organized under a law of the United States, to be removed into the circuit court of the United States upon the petition of the defendant stating that it had a defense arising under or by virtue of the Constitution, or of any treaty or law of the United States. (24 Stat. at L. 554, 555; 25 Stat. at L. 436.) But those provisions have no application to the cases now before us, and contain, to say the least, nothing tending to show that it was intended that such a case as any of these might be removed into the circuit court of the United States for trial.

The difference between the Act of March 3, 1875, and the later acts is illustrated by the recent case of *Texas & P. R. Co.* v. *Cox*, in which receivers, appointed by a circuit court of the United States, of a railroad corporation deriving its corporate powers from acts of Congress, were sued in the same court, without previous leave of the court, after the Act of 1887 took effect. This court, speaking by the *Chief Justice*, after observing that the corporation would have been entitled, under the Act of 1875, to remove a suit brought against it in a state court, maintained the jurisdiction of the circuit court of the United States of the action against the receivers, under the Act of 1887, upon the ground that the right to sue, without the leave of the court which appointed them, receivers appointed by a court of the United States, was conferred by section 6 of that Act, and therefore the suit was one arising under the Constitution and laws of the United States. 145 U. S. 593, 601, 603 [36: 829, 832].

464] *In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. In the first and second bills, the only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs' claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws. In the third bill, no mention is made of the Constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal, or in the demurrer, of the defendant corporation, can supply that want, under the existing Act of Congress.

The result is that, in the first and second cases, the decrees must be reversed, at the cost of the plaintiffs, and the cases remanded to the circuit court of the United States with directions to dismiss the bills for want of jurisdiction; and that, in the third case, the decree must be reversed, at the cost of the defendants, and the case remanded to the circuit court of the United States with directions to remand it to the state court from which it was removed. The costs in each case are to be borne by the party who brought into the circuit court of the United States a case not within its jurisdiction. *Torrence* v. *Shedd*, 144 U. S. 527 [36: 528]; *Martin* v. *Snyder*, 148 U. S. 663 [37: 602].

Decrees reversed accordingly.

Mr. Justice **White**, not having been a member of the court when these cases were argued, took no part in their decision.

Mr. Justice **Harlan** dissenting:

I agree that the decrees in the first and second of the above cases must be reversed with directions to dismiss the bills for want of jurisdiction in the circuit court.

But I cannot assent to the proposition that the third case, which was originally brought in one of the courts of the state, *was not remov-[465 able to the circuit court of the United States upon the application of the defendant bank. In that case, as the opinion of the court shows, the state sought to enforce a lien for taxes alleged to have been given by a general statute of Tennessee upon the capital stock of the defendant. The bank defended upon the ground that its stock was exempt by the terms of its charter from such taxation, and that the statute under which the state brought its suit was, if applied to the defendant, repugnant to the provision of the Constitution of the United States forbidding the states from passing laws impairing the obligation of contracts.

The opinion of the court proceeds upon the general ground that, while a plaintiff, in his cause of action arises under the Constitution or laws of the United States, or under some treaty with a foreign power, may invoke the original jurisdiction of the circuit court of the United States, a *defendant* is not entitled, under the existing statutes, to remove from the state court into the circuit court of the United States any suit against him, in respect to which the original jurisdiction of the Federal court could not be invoked by the plaintiff, even where his defense goes to the whole cause of action set forth in the bill, declaration, or complaint, and is grounded *entirely upon the Constitution of the United States, or upon an Act of Congress, or upon a treaty between the United States and a foreign power.* Of course the cases excepted by the 5th section of the Act of 1887, 25 Stat. at L. 436, chap. 866, to be presently referred to, cannot be brought under this rule.

By the Judiciary Act of 1789, the original jurisdiction of the circuit courts of the United States, in suits of a civil nature, at common law or in equity, was restricted to those in which the value of the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and in which the United States were plaintiffs or petitioners, or an alien was a party, or the suit was between a citizen of the state in which it was brought and a citizen of another state. And the right of removal was given only to the defendant in a

suit commenced in a state court against an alien, or by a citizen of the state in which the 466] suit was brought against a *citizen of another state, and, under certain circumstances, to the party in an action in which the title to land was concerned who relied upon a grant from a state other than that in which the action was pending. 1 Stat. at L. 78, 79, chap. 20.

The Act of 1875 enlarged the original jurisdiction of the circuit courts of the United States so as to embrace all suits of a civil nature, at common law or in equity, in which the matter in dispute exceeded, exclusive of costs, the sum or value of five hundred dollars, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects." In respect to each of these cases that Act provided that "*either party* may remove said suit into the circuit court of the United States for the proper district." 18 Stat. at L. 470, chap. 137.

The Act of 1887, as amended in 1888, left the original jurisdiction of the circuit courts of the United States precisely as it was established by the Act of 1875, except that it increased the sum or value of the matter in dispute, necessary to give jurisdiction to two thousand dollars, exclusive of interest and costs. 25 Stat. at L. 434, chap. 866.

The Act of 1887 further provided as follows:

"Sec. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or 467] which *may hereafter be brought in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein being non-residents of that state; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

"Sec. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein."

By the 5th section of that Act it was declared that nothing in it should be "held, decreed, or construed to repeal or affect any jurisdiction or right mentioned either in section 641, or in 642, or in 643, or in 722, or in title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the Act of Congress of which this Act is an amendment, or in the Act of Congress approved March 1, 1875, entitled 'An Act to Protect all Citizens *in their [468 Civil and Legal Rights.'" Section 641 of the Revised Statutes relates to civil suits and criminal prosecutions commenced in state courts, and involving the equal civil rights of citizens of the United States. Section 642 prescribes what shall be done when the petitioner who seeks the removal is in the actual custody of the state court. Section 643 gives the right of removal to the defendant in any civil suit or criminal prosecution against an officer, or any person acting under him, for any act done under the authority of a revenue law of the United States. Section 722 relates to proceedings, civil and criminal, in vindication of civil rights. Title 24 of the Revised Statutes relates to civil rights. The 8th section of the Act of March 3, 1875, prescribes the mode in which absent defendants, in suits brought to enforce any legal or equitable lien upon or claim to property within the district may be brought before the court. The Act of March 1, 1875, has reference to the full and equal enjoyment of the accommodations, advantages, facilities of inns, public conveyances, theaters, and other places of public amusements.

There can be no question as to the import of the words "arising under the Constitution or laws of the United States," to be found in the Acts of 1875 and 1887. It has long been settled that a suit was of that class if it necessarily involved a title, right, privilege, or immunity asserted, *by either party*, under the Constitution or laws of the United States. If the defense was based upon the Constitution or laws of the United States, the suit was one arising under that Constitution or those laws, although the *plaintiff* may not have asserted, in *his* pleading, any claim whatever of a Federal nature. *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 U. S. 135, 140 [26: 96, 98]; *Fiebelman* v. *Packard*, 109 U. S. 421 [27: 984]; *Ames* v. *Kansas*, 111 U. S. 449, 462 [28: 482, 487]; *Pacific R. Removal Cases*, 115 U. S. 2 [29: 319]; *Starin* v. *New York*, 115 U. S. 248, 257

[29: 388, 390]; *Bachrack* v. *Norton*, 132 U. S. 337 [33. 377]; *Bock* v. *Perkins*, 139 U. S. 628, 630 [35: 314, 315]. But the court now holds that the effect of the words in the first clause of section 2 of the Act of 1887, "of which the circuit courts of the United States are given original jurisdiction by the preceding section," is to make the right of the *defendant* in a suit 469] *arising under the Constitution or laws of the United States, or under a treaty, to remove it from the state court, depend upon the inquiry whether the suit was one in respect of which the original jurisdiction of the circuit court could be invoked by the plaintiff. In my judgment, this is an erroneous interpretation of the statute. It is too narrow. No such interpretation was suggested at the bar, nor do I think it has ever been before suggested in any case.

The main purpose of the second section of the Act of 1887 was to restrict the right of removal to the defendant or defendants in suits of the kind mentioned in the first clause of that section, and to the defendant or defendants, "being non-residents" of the state, in all other suits mentioned in that section. It was not intended to deny to a defendant the right of removal where the suit, by reason of the nature of the defense, was one arising under the Constitution or laws of the United States, or treaties with foreign powers, while allowing the plaintiff, whose bill, declaration, or complaint made a suit of that kind, to invoke the original jurisdiction of the circuit court. What possible reason could there have been for denying to a defendant the right, by a removal of the suit, to invoke the jurisdiction of a circuit court of the United States for the protection of his rights under the Constitution or laws of the United States, while giving to the plaintiff the right to invoke the jurisdiction of the same court for the protection of similar rights under the Constitution and laws of the United States? One effect of the present decision is—except in the cases mentioned in the sections of the Revised Statutes and in the acts of Congress referred to in the 5th section of the Act of 1887—to prevent an officer of the United States, when sued in a state court on account of some act done by him, from removing the suit into the Federal court, although what he did is alleged to have been done in execution of some Act of Congress, or pursuant to an order of a court of the United States.

If it be said that this was the condition of things under the original Judiciary Act, my answer is that Congress did not, by the Act of 1887, evince a purpose to return to the policy indicated by the Act of 1789 in respect to the 470] concurrent *jurisdiction of the courts of the United States and the state courts. This is shown by the fact that, while under the Act of 1789, the circuit courts of the United States had no original jurisdiction of suits arising under the Constitution or laws of the United States, or under treaties with foreign powers, or of suits between citizens of the same state, claiming lands under grants of different states, or of controversies between citizens of a state and foreign states, citizens, or subjects, original jurisdiction in all such cases, as conferred by the Act of 1875, is preserved to those courts by the Act of 1887. It seems to me contrary to the general purpose of the latter Act to hold that a suit, which is made by the plaintiff's pleading one arising under the Constitution or laws of the United States or a treaty, can be brought in the proper circuit court of the United States, while a suit which is made by the defendant's answer one arising under the Constitution or laws of the United States or a treaty, cannot be removed to the Federal court for hearing or trial. The words in the first clause of the second section of the Act of 1887, "of which the circuit courts of the United States are given original jurisdiction by the preceding section," have, I think, been construed by the court with too much strictness. They were inserted in the Act, in part, for the purpose of indicating that the suits mentioned in the 2d section as suits "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," and which could be removed, were of the same nature as the suits of the same kind described in the same language in section 1, and not for the purpose of limiting the right of removal to those suits arising under the Constitution or laws of the United States, or under treaties, which could be brought by an original action in a circuit court of the United States. The court, by its construction, does what the Act of Congress does not do, and what it should not be supposed Congress intended to do, namely, it divides suits arising under the Constitution or laws of the United States and suits under treaties with foreign powers into two classes, and excludes one of those classes altogether from the original cognizance of the circuit courts *of the [471 United States. It thus—except in the cases saved by the 5th section of the Act of 1887—makes a discrimination against a defendant, whose defense rests entirely upon the Constitution or laws of the United States, or on a treaty, that is not justified either by the policy or the words of the Act of 1887.

The Judiciary Acts of 1789 and 1875 restricted the original jurisdiction of the circuit courts of the United States to suits, at law or in equity, in which the matter in dispute exceeded the sum or value of *five hundred dollars*, exclusive of costs. The Act of 1887 fixed this amount at *two thousand dollars, exclusive of interest* and costs. It may well be held—indeed, the natural and reasonable construction of the Act of 1887 is—that the words "of which the circuit courts of the United States are given original jurisdiction by the preceding section," were introduced for the purpose of making it clear that no suit, arising under the Constitution or the laws of the United States, or under any treaty, should be removed, unless the matter in dispute exceeded in value the sum of $2000, exclusive of interest and costs. But for the words in the second section of the Act of 1887, "of which the circuit courts of the United States are given original jurisdiction by the preceding section," *any* suit arising under the Constitution or laws of the United States, or under a treaty, however small the amount in dispute, could have been removed from the state court. Those words being in the second section, no suit of that class could be removed into the Federal court,

unless the value of the matter in dispute was such as is prescribed in "the preceding section," namely, $2000, exclusive of interest and costs.

Again, if, instead of suing to enforce the lien given by the statute the state had levied upon the property of the bank, the officer making the levy could have been enjoined, at the suit of the bank, upon the very ground now set forth in its answer, namely, that the statute under which that officer proceeded was repugnant to the contract clause of the Constitution of the United States. Such a suit would have been one arising under the Consti- 472 tution, and, therefore, cognizable by *the circuit court. *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 [29: 200]; *White* v. *Greenhow* ("*Virginia Coupon Cases*") 114 U. S. 307 [29: 199]; *Barry* v. *Edmunds*, 116 U. S. 550 [29: 729]. Yet, under the decision just rendered, the bank cannot, by removing the present suit, invoke the jurisdiction of the circuit court for the determination of the same question.

Further, it was held in *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 [36: 829], that, without reference to the citizenship of the plaintiff, a suit for damages can be brought in a circuit court of the United States against receivers appointed by a circuit court of the United States of a railroad corporation created by an Act of Congress, although the case involves no question of a Federal nature; this, upon the ground that the receivers, in executing their duties, were acting under judicial authority derived from the Constitution of the United States. Such a suit, if brought in a state court, could, I take it, be removed under the present decision, upon the ground simply that the plaintiff's suit was within the original cognizance of the circuit court. And yet, under the Act of 1887, as now interpreted, a suit against a citizen or against a corporation created by a state cannot be removed, even if the defense rests exclusively on the Constitution of the United States. I cannot believe that Congress contemplated any such result.

I am of opinion that, under the Act of 1887, a suit, involving the required amount, and "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority"—whether the suit becomes one of that kind by reason of the allegations in the bill, declaration, or complaint, or by reason of the answer or defense—may be removed, not, as under the Act of 1875, by either party, but by the defendant or defendants, of whatever state residents or citizens, in the mode and at the time prescribed by the Act of 1887.

Mr. Justice **Field** authorizes me to say that he concurs in this dissenting opinion.

THOMAS C. McKITTRICK, *Appt.*, [473
v.
THE ARKANSAS CENTRAL RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 473-499.)

Arkansas laws authorizing state bonds in aid of railroad—railroad company's guaranty of state bonds created no lien.

1. The Arkansas acts of July 21, 1868, and April 10, 1869, taken together, did not create any lien upon the property of a railroad company for whose benefit state bonds were issued.
2. The guaranty of the Arkansas Central Railway Company, of the payment of the state bonds delivered to it, indorsed on the bonds, gave no lien for their payment upon its property, and did not prevent the company from giving a mortgage on its property to secure bonds issued by it, a sale on the foreclosure of which gave title to the property.
3. Neither the state of Arkansas nor the holders of the bonds issued by the state to the Arkansas Central Railway Company, were necessary parties to the suit brought by the Union Trust Company to foreclose the mortgage on the property of that company.

[No. 248.]

Argued and Submitted Feb. 2, 1894. Decided March 19, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, sustaining a demurrer and dismissing a suit in equity, brought by Thomas C. McKittrick, plaintiff, against the Arkansas Central Railway Company *et al.*, defendants, on behalf of the plaintiff and all holders of bonds, issued to said company by the state of Arkansas; the object of the suit being the appointment of a receiver of the property of said company, and the application of its income to the payment of the coupons of said bonds, and that an account be stated of the revenues and incomes of said property, and that the amount thereof be paid to the plaintiff and other holders of said state bonds, and that the amount due plaintiff and other parties to the suit be decreed to be a lien on said property, etc. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

This appeal brings up the final decree of the Circuit Court of the United States for the Eastern District of Arkansas, sustaining a demurrer to a bill filed by the appellant, and dismissing such bill for want of equity.

The appellant, who was the plaintiff below, is a citizen of Great Britain. He sues on behalf of himself and all holders of bonds issued to the Arkansas Central Railway Company by the state of Arkansas, under the provisions of an act of the general assembly of that state, entitled "An Act to Aid in the Construction of Railroads," approved July 21, 1868. The defendants are the Arkansas Central Railway

NOTE.—*As to negotiability of railroad bonds*, see note to White v. Vermont & M. R. Co. 16: 221.

As to municipal bonds; power to issue; amount; in aid of railroads; ratifying; conditions of issue; rights of bona fide holder; recitals; effect of over-issue; validity, see note to Sutliff v. Lake County Comrs. 37: 145.

Company, a corporation of Arkansas; the Arkansas Midland Railroad Company, a corpora-
474] tion of the same state; and the *Union Trust Company of New York, a corporation of the state of New York.

The bill is of unusual length, and it is difficult to present the case properly without a full statement of its allegations. According to those allegations—which, upon demurrer, we must take to be true—the case made by the bill is as follows:

By section 6, article 10, of the constitution of Arkansas, in force in 1868, it was provided that "the credit of the state or counties shall never be loaned for any purpose without the consent of the people expressed through the ballot box." For the purpose of loaning the credit of the state, and in order to encourage the building of railroads within its limits, the general assembly of Arkansas passed the above act of July 21, 1868, by the first section of which act it was provided: "For the purpose of securing such lines of railroad in this state as the interest of the people may from time to time require, the faith and credit of the state of Arkansas are hereby irrevocably pledged, and the proper authorities of the state will and shall issue to each railroad company or corporation, which shall become entitled thereto, the bonds of this state, in the sum of one thousand dollars each, payable in thirty years from the date thereof, with coupons thereto attached for the payment of interest on the same in the city of New York, semi-annually, at seven per cent per annum, in the sum of fifteen thousand dollars in bonds for each mile of railroad which has not received a railroad land grant from the United States, and ten thousand dollars in bonds for each mile of railroad which has received a land grant from the United States, on account of which such bonds shall be due and issuable as provided." Ark. Acts of 1868, p. 148.

At an election held November 3d, 1868, under the provisions of this act, the people of the state voted upon the proposition submitted by it, and a majority of the votes cast at such election voted in favor of it, and "For Railroads."

By the 2d section of the act, it was made the duty of the board of railroad commissioners to
475] receive application from *railroad companies for the loan of the credit of the state, and to designate the companies entitled to such aid. The 4th section provided that any railroad company having existence under the laws of the state, and desiring to receive the aid referred to in the act might signify the same by application to the board of railroad commissioners, signed by its president and attested by the seal of the company, setting forth its character, organization, capital stock, a map of the line or lines of road proposed to be built, the progress made thereon, the financial condition and resources of the company, with such other information as the case required, and if the board of commissioners found such corporation to be organized according to law, with resources adequate to the purpose, and that the construction of the proposed line or lines of road would be of public benefit, and the board consented to approve and to grant such application, then and thereafter the company or corporation should be entitled to and have a right to ask for and receive the bonds of the state in the act mentioned.

The president of the Arkansas Central Railway Company (which had not received a land grant from the United States) applied to the railroad commissioners for a loan of the credit and bonds of the state, as provided in the act of 1868; and on the 25th of April, 1870, the board awarded to that corporation such aid for a distance of 150 miles and at the rate of $15,000 per mile. Of that action notice was given to the railway company.

The railway company was authorized by its charter to construct, maintain, and operate a railroad from Helena, in the county of Phillips, through the counties of Phillips, Monroe, Arkansas, Prairie, and Pulaski to Little Rock, all in the state, the line so located, exclusive of side tracks, being one hundred miles in length, and also a branch road from a point on its main line at or near Aberdeen to Pine Bluff, in the county of Jefferson.

On the date last mentioned, upon proof being duly made and filed in the proper office, the governor of Arkansas, on an award of the loan of the state's credit, caused to be issued and delivered to the Arkansas Central Railway Company 150 *bonds of $1000 each, num-[476
bered from 1 to 150, both inclusive. Subsequently, from time to time, at different dates between April 25, 1871, and July 12, 1873, inclusive, on similar proof, the board of railroad commissioners caused to be issued and delivered to the railway company other bonds, 1350 in number and of $1000 each.

Each of the bonds thus issued and delivered certified, by the governor and auditor, and attested by the secretary and treasurer, under the seal of the state, that the state of Arkansas was indebted "unto the Arkansas Central Railway Company or bearer in the sum of one thousand dollars, lawful money of the United States of America, redeemable, at the city of New York, thirty years from the date hereof, with interest at the rate of seven per cent per annum, payable semi-annually, at the city of New York, on the first day of April and October in each year, on the presentation of the proper coupons hereto annexed. The faith and credit of the state are hereby solemnly and irrevocably pledged for the payment of the interest and the redemption of the principal of this bond, issued in pursuance of an act of the general assembly of the state of Arkansas, approved July 21, 1868, entitled 'An act to aid in the construction of railroads,' the said act having been submitted to and duly ratified by the people of the state at the general election held on November 3, 1868."

Each of the bonds at the time of their issue had sixty interest coupons attached thereto, separately numbered, calling for the payment "to the bearer of thirty-five dollars, in the city of New York, on the first day of October, 1871, being semi-annual interest due on bond No. —."

The Arkansas Central Railway Company, on delivery of the bonds to it, caused and authorized its president to indorse officially upon each bond a special guaranty in the words following: "For a valuable consideration the Arkansas Central Railway company

hereby guarantee to the holder of the within bond the payment of the principal thereof when due, and of the interest thereon, as the same accrues, by the state of Arkansas; and on default of said state of Arkansas to pay such principal or interest, or either, as the same [477] shall become *due, the Arkansas Central Railway Company agree to pay the same to said holder upon delivery of the within bond, or of the coupon for the interest thereon, upon which a default of payment shall have been made."

Under the 7th section of the act referred to, it became the duty of the legislature from time to time to impose upon the railroad company, to which its bonds were issued, a tax equal to the amount of the annual interest on such bonds at the time outstanding and unpaid, and after the expiration of five years from the completion of the road to impose an additional special tax of 2½ per cent per annum upon the whole amount of the state aid granted to the company, such taxation to continue until the amount of bonds issued to any company with the interest thereon should be paid by it, in which case the railroad was entitled to be discharged from all claims or liens on the part of state.

The railway company had not, when this suit was brought, discharged said lien, nor had it been discharged by any one else for or on its behalf.

It was further provided by the 8th section of the act that in case a company should fail to pay the taxes imposed by the 7th section, when the same became due, and for sixty days thereafter, it should be the duty of the treasurer of the state, by a writ of sequestration, to seize and take possession of its income and revenues until the amount of its defaults was fully paid up and satisfied, with costs of sequestration, after which the treasurer was authorized to release any further revenue to its proper officers.

Before the award of the loan of the credit of the state and at the first meeting of the legislature after the election at which the act of 1868 was voted upon and ratified, and before any bonds were issued under it to said railway company, the general assembly of Arkansas passed an act to provide for the prompt payment of the interest upon the bonds which it might thereafter issue to railroad companies.

That act is entitled "An Act to Provide for Paying the Interest on the Bonds Issued to Aid in the Construction of Railroads," and was approved April 10, 1869. Ark. Laws, 1868, 1869, p. [478] 147. *In that act it was provided that the auditor of the state should, on or before the 1st of June in each year, certify to the state treasurer the amount of bonds issued to each company, with the amount of semi-annual interest to accrue thereon, that is to say, the amount of interest the state would have to pay on the 1st of October of that year on the bonds issued to each company, and the amount of tax required from each to pay the same, such tax to be due and payable on the 30th day of June of that year. The auditor was required in like manner, on or before the first day of December in each year, to certify to the treasurer of the state the amount of semi annual interest the state would have to pay on the bonds on the first day of April in the ensuing year, issued under the act of 1868, and the amount of the tax required from each company to pay the same, such tax to be due and payable December 31, of that year.

It was made the duty of the treasurer, upon receipt of the auditor's certificate, to cause notice to be served upon each railroad company on or before the 20th day of June and December of each year, specifying the amount of tax to be paid, which amount should be the interest on the bonds for that period, and demanding the payment of the same into the treasury upon the 30th day of June and the 31st day of December, respectively, in conformity with the provisions of the acts of July 21, 1868, and April 10, 1869.

If, at the expiration of sixty days after the tax became due and payable, the railroad company should fail to make payment, it became the duty of the treasurer, through the attorney general, to make and file a petition in the chancery court of Pulaski county, setting forth the amount due and the fact of default, praying the issue of the writ of sequestration contemplated in the act of 1868, and the appointment of a receiver to take the revenue and income of the company for the purpose specified in that act. The receiver, upon such writ being issued, was required to take possession of the incomes and revenues of the defaulting company, with authority to demand and receive all moneys coming to it from the operation of its road. The officers of the defaulting company were required *to pay over to the re- [479] ceiver all money coming into their possession as revenue and income, or from operating the railroad; and they were required to submit all necessary books and papers to the receiver for examination. All moneys received and all moneys coming into the hands of the receiver, after meeting proper operating expenses, were directed by the act to be applied to the payment and discharge of the tax due and unpaid. The receivership was to continue until the amounts in default were paid, with the reasonable costs of sequestration. When such payments had been made, the receiver was to be discharged and to withdraw from the management of the affairs of the company.

After the award to the Arkansas Central Railway Company of the loan of the state's credit, to wit, on the 3d day of July, 1871, that company executed a mortgage or deed of trust to the Union Trust Company of New York, as trustee, to secure the payment of $1,200,000, evidenced by coupon bonds bearing interest at the rate of seven per cent per annum. This mortgage embraced all the property and appurtenances of the railway company. It was not filed for record or recorded in the county of Pulaski until some time in 1871, nor was it filed for record in the other counties through which that railway was to be constructed, operated, and maintained until after that date. Under that mortgage or deed of trust one thousand bonds of $1000 each, and four hundred of $500 each, were executed and delivered to the trustee. It was provided in the mortgage or trust deed that none of said bonds should be deemed issued under the mortgage or otherwise entitled to the benefit or security thereof, or be in anywise obligatory upon the railway company as an evidence of debt, or

otherwise, unless or until there should be indorsed thereon a certificate signed by the Union Trust Company, through its proper officer or its successor in trust, authenticating them as being duly and lawfully issued and secured. Mortgage bonds were signed, certified, and issued by the Union Trust Company to the amount of $720,000.

In April, 1873, the railway company canceled and caused to be destroyed the remaining **480**] bonds unissued, to wit, 480 of *the denomination of $1000 each, and on the same day executed and delivered to the Union Trust Company its second mortgage or deed of trust on the same property and appurtenances to secure the payment of 960 bonds, each for the sum of $500, with interest coupons attached, representing the interest to become due thereon semi-annually at the rate of 7 per cent per annum. It was provided in the latter mortgage that none of the bonds should be deemed issued under it or entitled to the benefit or security thereof, or be in anywise obligatory on the railway company as an evidence of debt or otherwise, unless or until there should be indorsed thereon a certificate signed by the Trust Company through its proper officer, authenticating them as being duly and lawfully issued and secured. The second mortgage bonds issued, signed, and certified amounted to $480,000.

On the 6th of September, 1876, a suit in equity was instituted in the court below under the style of the *Union Trust Co. of New York* v. *Arkansas Cent. R. Co.* The bill in that contained, among other things, the following: "Twelth. Your orator further shows that the state of Arkansas has or pretends to have some claim or lien on said railway and the other proper of said Arkansas Central Railway Company so mortgaged to your orator as aforesaid, the particulars and nature of which are unknown to your orator, and therefore your orator cannot more particularly state the same." Its prayer was "that it may be ascertained and adjudged what, if any, estate or interest the state of Arkansas has in the said mortgaged property, and also whether the same is prior and superior to or subsequent and subject to the rights, estates, and interest of your orator under the two said several mortgages herein described."

Neither the state of Arkansas nor any of the holders of the bonds issued by the state to the Arkansas Central Railway Company, nor the holders of the coupons attached thereto, were represented in or were parties to that suit; nor was any decree therein rendered which in any manner determined the priority of said bonds or whether the lien of that state to and for the use and benefit of the holders of the state aid **481**] bonds *was subordinate in point of time or equity to that of the bonds issued under the mortgage as aforesaid. A copy of the decree is attached to the bill in this case. In that suit the railway company, being duly served with process, and neither appearing, answering, nor demurring to the bill of complaint, a decree *pro confesso* was taken and entered January 1, 1877. Subsequently, on March 17, 1877, a final decree was passed against the railway company. It was decreed, among other things, that the whole amount of bonds issued under said mortgage, with the interest thereon, was due; that unless the said defendant paid or caused to be paid to said complainant trust company, on or before a day certain named the sum thereof, being the said principal and interest, with costs of suit, the mortgages should be foreclosed, and the equity of redemption of the railway company henceforth barred from all equity of redemption under said mortgage, and in default of payment the mortgaged premises mentioned in the bill be sold.

The railway company having failed within the time limited to pay the amount of the decree referred to, the mortgaged property was sold July 26, 1877, by a master commissioner of the court, for the sum of $40,000, to S. H. Horner as trustee. Pending that foreclosure proceeding, a receiver was appointed to take charge of the railway, its property and appurtenances, and he did take such charge. By authority of the court betterments were placed upon the railway and property acquired to the extent of $25,000, or about that sum. At that time the railway was completed, equipped, and in operation for a distance of forty-eight miles, and was worth more than $400,000.

Before the sale, to wit, on the 28th of June, 1877, the Lombard Syndicate, Limited, a corporation of England, by and through which the railway company had sold or negotiated many or all of the state bonds issued to the Arkansas Central Railway Company, and which was then the holder of some of them, filed in court a notice and protest, which was in words as follows:

"We, the undersigned, having by public subscription offered *and allotted the bonds [**482** of the state of Arkansas given in aid of the Arkansas Central Railway and issued to this railway under the act of the state of 21st July, 1868, which issue was made on April 1, 1870, therefore prior to the so called first mortgage, bearing date July 3, 1871, and the above mentioned bonds being indorsed by the railway as follows: 'Special guarantee indorsed by the railway company on each bond: For a valuable consideration the Arkansas Central Railway Company hereby guarantee to the holder of the within bond the payment of the principal thereof when due and of the interest thereon as the same accrues by the state of Arkansas, and in default of said state of Arkansas to pay such principal or interest, or either, as the same shall become due, the Arkansas Central Railway Company agree to pay the same to said holder upon the delivery of the within bond or of the coupon for the interest thereon upon which a default in payment shall have been made.'

"We, on our own behalf and in behalf of the holders of these bonds, hereby solemnly protest against the sale of this railway, as ordered by the court, except due provisions are made for the priority of the above issue, and hereby give notice to all purchasers or intended purchasers that they will buy the road subject to the above claims. This protest has been executed in triplicate, one of which has been forwarded to the registrar of the court to bring it to the notice of the court, one to the

receiver, and the third to Messrs. Tappan and Horner, with a request to read it publicly at the time and place of sale."

This protest and notice came to the hands of the receiver and to said Horner before the foreclosure sale, and was read at and before the sale in the presence and in the hearing of said Horner and his alleged *cestui qui trusts*.

By the first section of an act of the general assembly, approved May 29, 1874, it was provided: "That an act entitled 'An act to provide for paying the interest of bonds issued to aid in the construction of railroads, approved April 10, 1869,' be, and the same is hereby repealed." After the passage of that act the officers, agents and attorneys of the state neg-[483] lected and *refused, and, at the commencement of the present suit, still refused, to take any steps towards enforcing the payment of the interest on the bonds issued to the Arkansas Central Railway Company.

The Arkansas Midland Railroad Company was incorporated by an act of the general assembly of Arkansas, approved January 20, 1855, with authority to construct a railroad from Helena to Little Rock. It was empowered by its charter to make a lawful contract for uniting its road with any other road having the same terminus or which might at any intermediate point approach its line. On the 8th of March, 1869, there was filed in the office of the secretary of state at Little Rock, under the general railroad incorporation law of the state, articles of association incorporating the Little Rock & Helena Railroad Company, the purpose of which was to construct a railroad from the city of Little Rock to Helena. By resolution of the board of directors of the Arkansas Midland Railroad Company, adopted August 31, 1870, that company was consolidated with the Little Rock & Helena Railroad Company under the name of the Arkansas Central Railway Company. This action of the board of directors of the Arkansas Midland Railroad Company, changing the name of its road to that of the Arkansas Central Railway Company, was confirmed at a meeting of the stockholders of the former company. At a meeting of the directors of the Little Rock & Helena Railway Company, held January 20, 1871, a resolution was passed declaring: "That we hereby agree to consolidate with said company under the name and style of the 'Arkansas Central Railway Company,' and do hereby authorize and empower W. H. Rogers, the president of this company, to convey unto said Arkansas Central Railway Company all the rights, privileges and immunities that we have or may have had or by any means may hereafter become entitled to under or by virtue of said organization and after said conveyance made this company shall utterly cease to exist."

The conveyance referred to in that resolution was, in fact, made, and the rights, privileges and immunities of both companies were as-[484] sumed, possessed, and controlled by *the Arkansas Central Railway Company, the president of the Arkansas Midland Railroad Company becoming president of the former company, which, formed and continued as aforesaid, is one of the defendants in this suit.

The bill further alleged that A. H. Johnson was the president of the Arkansas Central Railway Company for a long time and up to the date of the foreclosure aforesaid; that he "brought about" that foreclosure, and became the receiver of said road in that suit, acting as such for a long time; that he subsequently conspired with one W. W. Bailey and J. J. Horner to secure possession and control of said railroad, of which 48 miles had been completed and were in operation; that to that end he procured Bailey to be appointed receiver in his place and stead, all the while himself drawing the salary of receiver; that in pursuance of that confederation Bailey appointed Johnson superintendent of the railroad, for which the latter was separately paid, giving him certain contracts, whereby Johnson became the holder and owner of receiver's certificates to a large amount, such certificates becoming a charge upon the road superior to any of the mortgage bonds then being foreclosed; that J. J. Horner was, at that time, one of the attorneys of the Union Trust Company in the foreclosure suit and a party to the proceedings in that suit; that S. H. Horner is the brother of J. J. Horner, and pretends to have purchased the railroad at the foreclosure sale, as trustee for Johnson; that afterwards Johnson and J. J. Horner, pretending to be stockholders of the Arkansas Midland Railroad Company, and claiming that it was never consolidated in the manner stated, and was an independent corporation, met, and with others, whom they pretended to have qualified by issuing to them a few shares of stock in that company, assumed to elect themselves as directors; that as such pretended directors they again met, and by common consent elected from among themselves the officers of the company as follows: Johnson, president and general manager; John J. Horner, vice president and S. H. Horner, secretary.

S. H. Horner, who had purchased as aforesaid and then held the said railroad and appurtenances in his capacity as *trustee, [485] thereupon assigned, conveyed, set over, and delivered the same to the Arkansas Midland Railroad Company, the consideration expressed being $600,000, but, in fact, no part of that consideration was ever paid to or received by him as trustee or otherwise, directly or indirectly. A copy of that conveyance is attached to the bill in this case. J. J. Horner, without any consideration whatever, in pursuance of the scheme aforesaid, and as a reward for his services, had conveyed to him a third interest in the railway property, and to S. H. Horner, under like circumstances and for the same consideration, a sixth interest.

By reason of the refusal of the state, its officers, agents and attorneys, to take any step towards enforcing the payment of the interest on its bonds issued to the Arkansas Central Railway Company, the Arkansas Midland Railroad Company is daily receiving the income and revenue from the operation of the said railroad and are appropriating and have appropriated that income and revenues to its own use and to the use of Johnson and J. J. Horner, and no portion thereof to the payment of the past due interest on the bonds issued by the state to the said railway company.

The plaintiff McKittrick is the owner and holder for value before maturity of coupons

attached to five bonds of $1000 each, issued by the state to the Arkansas Central Railway Company, all of which are now due and payable, with interest from the maturity of each coupon until paid. These coupons aggregate more than $5000.

The Arkansas Central Railway Company is hopelessly insolvent, and by the foreclosure and sale heretofore referred to is left entirely without property of any kind from which income or revenue might or could be derived. The corporation is practically dissolved, its directory abandoned, and its property in the hands of the former president and vice president, who repudiate the liens that have heretofore existed on it.

The bill alleges that under the acts of July 21, 1868, and April 10, 1869, aforesaid, under which said bonds were issued by the state, it was not contemplated by said acts or the said 486 | *railway company or the state of Arkansas that the latter should pay the same or the interest thereon out of its own revenues; that as between said state of Arkansas and said railway company said bonds and coupons were accommodation paper, and, in point of fact and in equity, the obligation of said railway company; that the acts of July 21, 1868, and April 10, 1869, aforesaid, were printed and public acts of the state of Arkansas; that the only consideration received by the issuing of said bonds passed to and was received by the said railway company; that the only value the bonds possessed arose out of the fact that the income and revenue of the railway company were pledged for the ultimate redemption of the principal and interest thereof, and that the remedy by sequestration was provided to enforce the prompt payment of the same; and, further, that by virtue of the special guaranty, hereinbefore referred to, indorsed on the several bonds, the Arkansas Central Railway Company equitably appropriated and assigned its income and revenue, as contemplated by said acts, to the payment of the principal and interest thereof and there now exists in favor of the plaintiff and other holders of said bonds an equitable lien or charge upon said railroad property and its earnings to the extent necessary to discharge the interest due and unpaid, and that such equitable lien or charge continues to attach as the interest matures from time to time until the same, together with the principal amounts of said bonds, have been fully paid; that said special guaranty operated substantially and in effect to raise a trust that binds the railway property and its earnings, and the defendants, who took the same with notice thereof, are in equity obliged to fulfil said trust.

The plaintiff further alleged that Johnson and J. J. Horner, although well advised as officers and stockholders as to the condition and affairs of the Arkansas Central Railway Company, in order to obtain the issue to the company of said railroad aid bonds, made and caused to be made a statement under oath, conformably to the requirements of the Act aforesaid, on the 21st day of April, 1871, to the effect that the available resources of the railway com- 487 | pany in subscriptions of capital *stock, in moneys, lands, and other means, were sufficient to prepare one hundred consecutive miles of railroad for the iron rails, when, in truth and in fact—as said Johnson and Horner then well knew—the railway company did not possess the available resources aforesaid. He charged that said statement was made with the fraudulent intent to impose on and mislead the state authorities and to secure from the state of Arkansas, without legal right or authority, ostensibly for the railway company but really and in fact for themselves and for their own private gain and profit, the issuing of said railroad aid bonds; that by means of such false and fraudulent statement the bonds were awarded to and obtained by the railway company; that in and by said Act it was provided that, after the showing aforesaid as to available resources, the governor of the state should be authorized to issue to the president of the railway company the said aid bonds upon the completion and preparation for the iron rails of each succeeding ten miles or more of road until the entire line should be completed; and, further, the president of said railway company was required to file his official receipt for each issue of bonds, accompanied by the affidavit of himself and at least four directors that the bonds or the avails of them should be disposed of solely for the purpose of providing for the ironing, equipping, building and completing of said road. And the plaintiff alleged that notwithstanding the said defendants, as officers and stockholders as aforesaid, by means of false and fraudulent statements made and caused to be made by them as to the completion of consecutive sections of railroad ready for the iron rails, the state authorities were deceived, procured, without right or authority, into issuing to said railway company the whole amount of $1,850,000 of aid bonds as aforesaid, and that no part of said railroad was built or completed ready for the iron rails when the said bonds or any installments thereof were applied for and issued, and although the said railway company, by and through said defendants, solemnly obligated itself to devote the avails and proceeds thereof as above stated and required by said Act, the same were fraudulently diverted from such purpose and appropriated to the use and advantage *of said defendants, with the | 488 exception of the first forty-eight miles of road now in operation.

The bill further alleges that said railway company, by putting said state bonds on the market with the recitals therein contained—that they were issued under and in pursuance of an act of the general assembly of the state of Arkansas approved July 21, 1868, entitled "An act to aid in the construction of railroads, the said act having been submitted to and duly ratified by the people of the state at the general election held November 3, 1868," —and by the guarantee indorsed thereon as aforesaid, solemnly declared to all persons receiving said bonds that the remedies therein mentioned and the liens thereby created existed and could be enforced, and the same estops it, as well as all persons claiming under them or it whose claims are junior in time, from denying the validity of the acts aforesaid or the bonds issued thereunder; "that the said S. H. Horner, A. H. Johnson, J. J. Horner, and the said Arkansas Midland Railroad Company were well advised of the award of the state aid granted to said railroad company by the

said board of railroad commissioners, as aforesaid, before they or any of them acquired said railroad and appurtenances at said foreclosure sale, and that said J. J. Horner and A. H. Johnson were officers of said railway company, applied for and received said state aid, and they, and each of them and said Arkansas Midland Railroad Company, are, in law and equity, stopped from denying the validity of said acts of July 21, 1868, and April 10, 1869, and the bonds so issued by the state as aforesaid.

"Your orator submits that while it may be held that the act of July 21, 1868, is not sufficient to sustain the issue of the bonds therein described, and that while the same may be held to be unconditional, that the credit of the state being in jeopardy, it was competent for and within the powers of the general assembly of the said state to provide against any and all emergencies, and to create means for the payment of the bonds and the interest thereon, which were then issued or to be issued, and by said act of April 10, 1869, the general assembly did in fact provide by law means [489] to enforce payment of the *principal and interest on the bonds issued or to be issued under said act of July 21, 1868; that said act of April 10, 1869, was and is a public act, enacted before the granting of aid to said Arkansas Central Railway Company, and before the execution of the mortgage to the Union Trust Company aforesaid, and constituted a public and statutory notice of the matters and things therein contained, and of the liens, rights, and remedies therein provided for the enforcement of the payment of the interest and principal of said bonds, and that the said railroad and appurtenances, its income and revenue, were pledged for the payment of said state aid bonds, and was also notice to all persons holding bonds secured by said trust deed to said Union Trust Company of a prior right, lien, and equity, to that of persons claiming by, under or through said mortgage or trust deed. Your orator submits that the attempt made by the general assembly of the state of Arkansas to deprive him of the benefit and provisions of the act of April 10, 1869, aforesaid, by the passage of the act of May 29, 1874, is an attempt to impair the obligation of the contracts of his said bonds and deprive him of a valuable remedy for the enforcement thereof, and the same is therefore unconstitutional and void. Your orator shows that said Arkansas Midland Railroad is not worth exceeding two hundred and fifty thousand dollars, and that the Arkansas Midland Railroad Company has no other property, and by reason of the large issue of said state aid bonds as aforesaid, and of its other obligations, it is hopelessly insolvent, and that it has been and still is misappropriating its income and revenues."

The relief sought is the appointment of a receiver to take possession and custody of the property, income and revenue of the railroad property and appurtenances now in the possession of the Arkansas Midland Railroad Company, and which it acquired by or through the said S. H. Horner, purchaser at the foreclosure sale; and that such receiver continue in possession until he shall have received an amount of income and revenue to pay the costs and expenses of sequestration, and income and revenue sufficient to pay the amount of said coupons due and payable on the bonds issued by the state and *delivered to the Arkansas Central [490] Railway Company, and which may hereafter become due pending such receivership. The bill asks that an account be stated of revenues and incomes received by the defendant railroad company since it went into possession of the property of the Arkansas Central Railway Company down to the filing of the bill, and that the amount so found be directed to be paid to the plaintiff and such other persons, holders of state aid bonds as aforesaid, as may become parties to this suit. In default of such payment by a day named, the bill asks that the amount or so much as may be found due to the plaintiff and other parties to the bill be decreed a lien on the railroad appurtenances and property aforesaid, to be satisfied if necessary by a sale thereof. If it be held that the plaintiff have a lien junior to said mortgages and incumbrances, the relief asked is a decree that the plaintiffs and others holding such bonds may be decreed to have an equity of redemption in and to such railroad, its appurtenances and other property, and that such equity be declared, and the amount to be paid accurately ascertained. The bill also asks for such other relief as may seem meet in the premises and as equity and good conscience require.

Messrs. **M. M. Cohn** and *J. Erb*, for appellant:

The acts of 1868 and 1869 sufficiently indicate that the income and revenues of the companies obtaining the state aid were to stand pledged for the payment of such bonds.

Those acts have stronger force than a mere equitable mortgage.

White Water Valley Canal Co. v. *Vallette*, 62 U. S. 21 How. 414 (16: 154); *Beall* v. *White*, 94 U. S. 382 (24: 173); *Hauselt* v. *Harrison*, 105 U. S. 401 (26: 1075); *Gregory* v. *Morris*, 96 U. S. 619 (24: 740).

The mere fact that possession was provided for could not have been material in determining whether there was a charge under the statute.

A deed or conveyance conveying all the property a man has, wherever situated, will bind all persons with notice.

2 Devlin, Deeds, § 1013; *Wilson* v. *Royce*, 92 U. S. 320 (23: 608); *Ellis* v. *Martin*, 60 Ala. 394; *Varnum* v. *State*, 78 Ala. 28; *Smith* v. *Fields*, 79 Ala. 335; *Johnson* v. *Grisard*, 3 L. R. A. 795, 51 Ark. 410; *Henderson* v. *Gates*, 52 Ark. 371.

The agreement which creates a charge upon property of any description, which is capable of ascertainment, no matter how comprehensive in terms, is in equity an effectual lien, even as against future acquisition.

Pomeroy, Eq. Jur. §§ 167, 1235-1237; Jones, Chattel Mortg. § 173; *State* v. *Little Rock, M. R. & T. R. Co.* 31 Ark. 701.

The decision of the highest court of the state in reference to the constitutionality of a statute thereof is followed by this court.

Amoskeag Nat. Bank v. *Ottawa*, 105 U. S. 667 (26: 1204); *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359 (25: 185); *Leavenworth County Comrs.* v. *Barnes*, 94 U. S. 70 (24: 63); *South Ottawa* v. *Perkins*, 94 U. S. 260 (24: 154), *Gut*

v. *Minnesota*, 74 U. S. 9 Wall. 35 (19: 573); *Bank of Hamilton* v. *Dudley*, 27 U. S. 2 Pet. 492 (7: 496); *East Hartford* v. *Hartford Bridge Co.* 51 U. S. 10 How. 511 (13: 518); *Elmwood* v. *Marry*, 92 U. S. 289 (23: 710).

The views of the Arkansas supreme court regarding the unconstitutionality of the act of July 21, 1868, are sustained by numerous adjudged cases.

Shepardson v. *Milwaukee & B. R. Co.* 6 Wis. 605; *State* v. *Burton*, 11 Wis. 50; *Tims* v. *State*, 26 Ala. 165; *Sullivan* v. *Adams*, 8 Gray, 476; *Devoy* v. *New York*, 35 Barb. 264, 36 N. Y. 449; *Campau* v. *Detroit*, 14 Mich. 276; *Childs* v. *Shower*, 18 Iowa, 261; *State* v. *Blend*, 121 Ind. 514; *Re Rafferty*, 1 Wash. 382; *State* v. *Hallock*, 14 Nev. 202, 33 Am. Rep. 559; *Harbeck* v. *New York*, 10 Bosw. 366; Bishop, Written Laws, § 34; Cooley, Const. Lim. 186.

An unconstitutional amendment cannot have the effect of repealing by mere implication, the original act.

Ex parte Davis, 21 Fed. Rep. 396; *Alexander* v. *State*, 9 Ind. 337.

A repeal of all laws inconsistent with a statute does not affect laws inconsistent with such parts thereof as are themselves unconstitutional and void.

Devoy v. *New York*, 35 Barb. 264; *Harbeck* v. *New York*, 10 Bosw. 366; *Sullivan* v. *Adams*, 8 Gray, 476.

No repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force.

Payne v. *Conner*, 3 Bibb, 180; *Brown* v. *Barry*, 3 U. S. 3 Dall. 365 (1: 638); *Phillips* v. *Hopwood*, 10 Barn. & C. 39.

This court, the same as the supreme court of Arkansas, will take judicial notice of the journals of the two houses of the general assembly of the state of Arkansas.

South Ottawa v. *Perkins*, 94 U. S. 260 (24: 154); *Walnut* v. *Wade*, 103 U. S. 683 (26: 526); *Gardner* v. *Barney*, 73 U. S. 6 Wall. 499 (18: 890); *Amoskeag Nat. Bank* v. *Ottawa*, 105 U. S. 667 (26: 1204).

The act of March 18, 1867, was, therefore, in force when the bonds here in suit were issued. It is still in force.

Wbart. Cont. 668, 672; Elphinstone, Interpretation of Deeds, 157 *et seq.*; Devlin, Deeds, § 999; Endlich, Interpretation of Statutes, § 302.

A bond which contains enough upon its face to satisfy the statute, will not be avoided because there are other recitals which the law does not contemplate.

United States v. *Brown*, Gilp. 155; *Shunk* v. *Miller*, 5 Pa. 250; *Walker* v. *Chapman*, 22 Ala. 116; *Howie* v. *State*, 1 Ala. 113; *Hall* v. *Cushing*, 9 Pick. 395; *Harper* v. *Rowe*, 55 Cal. 132; Bishop, Cont. § 443.

The doctrine is as applicable to false references to statutes in negotiable bonds, as to other forms of contract.

Johnson County Comrs. v. *January*, 94 U. S. 202 (24: 110); *Anderson County Comrs.* v. *Beal*, 113 U. S. 227 (28: 966).

The insertion in a negotiable instrument of an illegal clause for attorney's fees, will not impair the negotiability of the instrument.

Myer v. *Hart*, 40 Mich. 517; *Bullock* v. *Taylor*, 39 Mich. 138, 33 Am. Rep. 356; *Gaar* v. *Louisville Bkg. Co.* 11 Bush, 182, 21 Am. Rep. 209; *Witherspoon* v. *Musselman*, 14 Bush, 214, 29 Am. Rep. 404; *Tompkins* v. *Little Rock & Ft. S. R. Co.* 125 U. S. 127 (31: 624).

The company, in virtue of its guaranty, was estopped to question the validity of these bonds.

Florida Cent. R. Co. v. *Schutte*, 103 U. S. 138 (26: 334).

The right to enforce security, given for the payment of negotiable paper, will pass to all holders of the said paper, pending maturity, even though not formally transferred or delivered.

Carpenter v. *Longan*, 83 U. S. 16 Wall. 271 (21: 313); *American File Co.* v. *Garrett*, 110 U. S. 288 (28: 149); *Pierce* v. *Faunce*, 47 Me. 507; *Sprague* v. *Graham*, 29 Me. 160; *Taylor* v. *Page*, 6 Allen, 86; *Breen* v. *Seward*, 11 Gray, 118; *Green* v. *Hart*, 1 Johns. 580; *Jackson* v. *Blodgett*, 5 Cow. 202; *Bloomer* v. *Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *Judge* v. *Vogel*, 38 Mich. 568; *Cornell* v. *Richens*, 11 Wis. 353; *Croft* v. *Bunster*, 9 Wis. 504; Sheldon, Subrogation, § 185.

The recital of an unconstitutional act in the bonds could of itself have no effect.

Lippincott v. *Pana*, 92 Ill. 34; *Independent School Dist.* v. *Stone*, 106 U. S. 183 (27: 90).

The state is not a necessary party.

United States v. *Peters*, 9 U. S. 5 Cranch, 115 (3: 53); *Florida Cent. R. Co.* v. *Schutte*, 103 U. S. 118 (26: 327); *Chicago, R. I. & P. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 392 (19: 117).

The present owners are answerable as trustees.

Drury v. *Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299 (19: 40); *Jackson* v. *Ludeling*, 88 U. S. 21 Wall. 616 (22: 492).

Where the directors of a company directly or indirectly, enter into a transaction for their own benefit at the expense of the corporation, it will not be enforced.

McGourkey v. *Toledo & O. Cent. R. Co.* 146 U. S. 536 (36: 1079); *Washburn* v. *Green* ("*Richardson* v. *Green*") 133 U. S. 30 (33: 516); *Chicago, R. I. & P. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 392 (19: 117); *Hoyle* v. *Plattsburg & M. R. Co.* 54 N. Y. 314, 13 Am. Rep. 595; *Jones* v. *Arkansas Mechanical & A. Co.* 38 Ark. 17; *San Francisco & N. P. R. Co.* v. *Bee*, 48 Cal. 398; *Butts* v. *Woods*, 37 N. Y. 317; *Ogden* v. *Murray*, 39 N. Y. 207; *Mason* v. *Pewabic Min. Co.* 25 Fed. Rep. 882; *Terry* v. *Tubman*, 92 U. S. 156 (23: 537); Cook, Stock & Stockholders, § 653.

Mr. **John J. Hornor**, for appellees:

The statutes under which these bonds were issued, the delivery of them to the railroad, and its acceptance thereof, created no lien upon the property of the Arkansas Central Railway Company.

Tompkins v. *Little Rock & Ft. S. R. Co.* 125 U. S. 109 (31: 615).

Mr. Justice **Harlan** delivered the opinion of the court:

1. The principal question in this case is whether the acts of July 21, 1868, and April 10, 1869, taken together, created any lien upon the property of a railroad company for whose benefit state bonds were issued. That question was determined in *Tompkins* v. *Little Rock & Ft. S. R. Co.* 125 U. S. 109, 126, 127 [31: 615, 623, 624].

493] *After observing that if the statutes in question, read in the light of the circumstances attending their passage, disclosed an intention to charge the road of any company to which bonds were issued with liability for the repayment of any loan to it, a court of equity should enforce that charge, *Chief Justice* Waite, delivering judgment in that case, said: "But after a careful consideration of the statutes, and construing them liberally in favor of the state, we have been unable to find that any such intention did in fact exist. There was a plain and simple way in which such a lien could be created, and that was by providing in express terms for it. That way had been adopted by the state in a statute passed March 18, 1867, and it was the way usually adopted by other states when granting similar aid to their own companies. The wide departure which Arkansas made in this statute from the accustomed form of proceeding, both at home and elsewhere, is strongly indicative of an intention to wave security any further than was embraced in the reserved power of sequestration. The constitution of the state gave authority to issue bonds in aid of such works of internal improvement if assented to by the people. If the people gave their consent, then the bonds when issued became the debt of the state, and there was power in the general assembly, under the constitution of 1868, to levy taxes for their payment if necessary. This disposes of the cases and renders it unnecessary to consider any of the other questions discussed at the bar or in the briefs. In our opinion the new company took the roads free from incumbrance in favor of the state, and neither the state nor its bondholders are entitled to a sequestration of the income and revenue arising therefrom in their hands."

An attempt is made to distinguish this case from *Tompkins* v. *Little Rock & Ft. S. R. Co.* upon the ground that the act of March 18, 1867, referred to in that case, and entitled "An Act **494]** Loaning the Faith and Credit of *the State in Aid of the Construction of Railroads," was in force when the bonds here in question were issued, and that the plaintiffs and those in whose behalf he sues could avail themselves of the lien given by that act for securing the payment of bonds issued by the state in aid of the construction of railroads. The section of the act of 1867 giving the lien referred to is in these words: "5. That the receipt of any railroad company for the bonds loaned to it by the state shall immediately operate as a lien upon the road, its rights, franchises, and all its property of every description, real and personal; and this lien shall be a mortgage on all the *property, rights, and credits* of the road, and shall have priority over any and all other debts, contracts, or liabilities of said road; and said mortgage shall continue until the entire amount loaned to the said road by the state shall have been paid off." Ark. Acts, 1866, 1867, No. 166, pp. 428, 430.

The suggestion that the act of 1867 was in force after the passage of that of 1868 is based upon the 12th section of the latter act, which provides: "At the next general election to be holden under the provisions of section 3 of article 15 of the constitution of this state, the proper officers having charge of such election shall, upon a poll, as in other cases, take and receive the ballots of the electors qualified to vote for officers at such election for and against this act, in compliance with section 6 of article 10 of the constitution; such ballot to contain the words 'For Railroads' or 'Against Railroads,' and if it appears that a majority so voting have voted 'For Railroads,' this act shall immediately become operative and have full force, and all laws heretofore passed for loaning the credit of this state in aid of railroads shall cease and be void, but if a majority shall be found to have voted 'Against Railroads,' this act shall be void and of no effect." In *State* v. *Little Rock, M. R. & T. R. Co.* 31 Ark. 701, 721, it was held that the election in 1868 at which the people of Arkansas voted "For Railroads" was a nullity, having been held before the act of 1868 took effect under the constitution of Arkansas, and, consequently any bonds based upon that election were void. The state court, in its opinion, also suggested reasons why the act of 1868 might be held void as not having been read the requisite number of times, on different days, as required by the state constitution. But it disclaimed any purpose to rest its decision *upon that ground, and **[495** placed it upon the one above stated, observing that "the bonds of the state of Arkansas, issued by the governor of the state, her agent, are void, even in the hands of innocent purchasers, because the authority to contract did not exist at the time the bonds were issued."

Upon basis of this decision of the state court it is contended that the act of 1867 was not repealed—the argument being that the laws in force at the date of the act of 1868 authorizing the credit of the state to be loaned in aid of the construction of railroads, were to "cease and be void" only when the act of 1868 became operative and in full force, which, according to the terms of that act, could not, it is claimed, occur until a majority of the qualified electors voting should, at a *valid* election, have voted "For Railroads."

This argument would be entitled to consideration if the act of 1867 was in force after the adoption of the state constitution of 1868, which provided that "the credit of the state or counties shall never be loaned for any purpose without the consent of the people thereof, expressed through the ballot-box." Art. 10, § 6. The state constitution of 1861, in force when the act of 1867 was passed, contained no such restriction upon legislation. As that act authorized the loaning of the credit of the state in aid of the construction of railroads, without first ascertaining by vote, the will of the people upon the subject, no bonds could be issued under it, after the adoption of the constitution

of 1868, without popular sanction given at a valid election. The express prohibition in that constitution against loaning the credit of the state for any purpose without the previous assent of the people, expressed at the polls, had the effect to withdraw all authority given in previous statutes to lend the credit of the state without first obtaining the consent of the people. *Aspinwall* v. *Daviess County Comrs.* 65 U. S. 22 How. 364 [16: 296]; *Wadsworth* v. *Eau Claire County Suprs.* 102 U. S. 534 [26: 221]. In this view, it is unnecessary to consider whether the act of 1868 was void as not having been passed in conformity with the constitutional provision declaring that "every bill and joint resolution shall be read three times, on different days, in each house, before the final passage thereof, unless two thirds of 496] the house where the *same is pending shall dispense with the rules." Ark. Const. art. 5, 21. Even if that act became a law, and if the election of 1868 was valid, still no lien was given by the act of 1868 upon the road of any company receiving bonds from the state. Such was the express decision in the Tompkins case, and we again so adjudge upon the authority of that case.

What has been said shows that the plaintiff cannot take anything on account of the act of April 10, 1869, which assumed to make provision for the payment of the interest on the bonds issued under the act of 1868, in case a company receiving bonds failed to meet such interest at maturity. That act authorized the treasurer of the state to obtain a writ of sequestration, and also the appointment of a receiver who should take the income and revenues of the defaulting company and all moneys arising from the operation of its road. Upon this point, it is quite sufficient to say that it was adjudged in the Tompkins case that the companies that subsequently took a road under foreclosure proceedings took it "free from incumbrance in favor of the state, and that neither the state nor its bondholders are entitled to a sequestration of the income and revenues arising therefrom in their hands."

2. Apart from any question of lien upon the road of the defendant, does the bill disclose any ground for the relief asked by the plaintiff? Undoubtedly the Arkansas Central Railway Company, to which the bonds were delivered, became liable under its guaranty, indorsed on each bond, of the payment by the state of the principal and interest as they respectively became due. But that only made each holder of bonds a general creditor of the company, without any lien for their security upon its property or revenues. The existence of this liability did not prevent the company from giving a mortgage upon its property to secure any bonds it might issue. The bill shows that the Arkansas Central Railway Company executed to the Union Trust Company in 1871 a mortgage or deed of trust, covering all of its property, to secure the payment of coupon bonds amounting to $1,200,000, and that that mortgage was foreclosed, and the property sold in 1877 in a 497] suit brought *by the mortgagee against the mortgagor. We find nothing in the bill impeaching the validity of that sale, or that would justify the court in holding that the title to the mortgaged property did not pass to the purchaser, S. H. Horner, trustee, free from any claims upon the part of the company's creditors.

It is true that the bill charges that Johnson was president of the railway company as well when the foreclosure proceedings were instituted as while they were pending, and that he "brought about" the foreclosure. By what means did he bring about such foreclosure? Upon that point the bill is silent. It is not suggested that the railway company was able to meet the interest on the bonds secured by the mortgage to the Union Trust Company, or that it was possible for Johnson, or any one else connected with the railway company, to have prevented a foreclosure and a sale of the mortgaged property. So that the charge that Johnson "brought about" the foreclosure does not necessarily impute to him any fraud of which the general creditors of the railway company could complain or which would affect the integrity of the purchase at the sale in the foreclosure suit. If, then, the purchase by S. H. Horner, trustee, could not be impeached by the holders of state bonds, the payment of which had been guaranteed by the railway company, it is of no consequence to those holders what the purchaser did with the property or to whom he sold it. So far as the bill discloses, the purchaser took title free from any claim upon it by any creditor of the railway company.

We attach no consequence to the allegation that S. H. Horner "pretended" to have purchased the road as trustee for Johnson. If the former, in fact, purchased for Johnson, and if that circumstance could have affected the validity of Horner's purchase, as against the creditors of the railway company, the allegation upon this subject should have been more direct and positive. Besides, if the sale of the road was not "brought about" by Johnson in violation of his duty as an officer of the company, his official relations to the company prior to the foreclosure, did not prevent him from bidding for the property, or being interested in its purchase by S. H. Horner, as trustee. So far as is disclosed by the bill, the sale, under *the decree in the suit brought [498 by the Union Trust company was fairly conducted, with full opportunity to all persons to become bidders.

Nor is the fact that Johnson was the holder of receiver's certificates, which became a charge upon the property superior to the mortgage bonds in suit, material in the present inquiry; for it does not appear that if there had been no such certificates in existence, that anything would have been left for the general creditors of the railway company after satisfying the holders of mortgage bonds. There is no suggestion in the bill that any receiver's certificates were issued that ought not to have been issued, or in respect to which the court was not fully informed. The mere fact that Johnson obtained receiver's certificates—even assuming that his ownership of them was inconsistent with the relations he held to the mortgaged property—does not affect the validity or integrity of the foreclosure proceedings and the sale of the property under the decree of the court.

Some stress is placed upon the fact that nei-

ther the state nor the holders of its bonds were parties to the suit brought by the Union Trust Company. The state could not have been made a party defendant without its consent. Besides, it had, as we have seen, no lien upon or interest in the property, and was under no liability in respect to the bonds issued under the act of 1868. Clearly the holders of bonds were not necessary parties. They had no lien upon the property, and, at most, were only creditors of the company in virtue of its guaranty indorsed upon the bonds. The only necessary parties were the mortgagee and mortgagor companies.

In respect to the charge that Johnson and J. J. Horner fraudulently procured the issuing by the state of the bonds in question, we do not perceive how such conduct upon their part can constitute a ground for the relief asked in this case. The wrong charged was a wrong to the state of which it could have complained, if the bonds, so fraudulently procured to be issued, had become valid obligations. But, as we have seen, the bonds were invalid as against the state. The fraud alleged to have been 499] practised in procuring the issuing *of them had no connection, in law, with the mortgage executed by the railway company to the Union Trust Company, under which the property was purchased by S. H. Horner at public sale ordered by the decree of a court that had full jurisdiction of the parties and the subject-matter.

Looking at all the allegations of the bill, we are of opinion that the plaintiffs were not entitled to the relief asked. *Decree affirmed.*

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

ROBERT P. MACLAY, Tutor of the Minor, MASON SNOWDEN, *Plff. in Err.*,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(See S. C. Reporter's ed. 499-505.)

Powers of guardian—authority to surrender a policy.

1. A guardian, unless his powers in this respect are restricted by statute, is authorized to sell his ward's personal property and reinvest the proceeds, and to collect or compromise and release debts due to the ward, subject to the liability to be called to account for his acts.

2. A guardian in Mississippi has authority without order of the court to surrender a policy on the life of another, payable to his ward, on receiving its surrender value, and to give a receipt in discharge thereof.

[No. 281.]

Argued and Submitted March 14, 1894. Decided March 26, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana, to review a judgment in favor of defendant, the Equitable Life Assurance Society, in a suit brought by Robert P. Maclay, tutor of the minor, Mason Snowden, plaintiff, to recover the amount of a life insurance policy, which had been surrendered by the guardian of said minor on the payment of the surrender value. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

This was an action, brought February 12, 1889, in the civil district court for the parish of Orleans in the state of Louisiana, by Robert P. Maclay, a citizen of Louisiana, and tutor of Mason Snowden, a minor child and sole issue of Samuel H. Snowden, and Mary Louisa, his wife, against the Equitable Life Assurance Society of the United States, a corporation of New York; and removed by the defendant into the Circuit Court of the United States for the Eastern District of Louisiana; to recover the sum of $10,000, with accrued dividends, less any amounts due for premiums, upon a policy, dated July 6, 1870, by which the defendant, in consideration of the sum of $67.70 paid by Mrs. Snowden, and of quarterly *pre- [500 miums of a like sum to be paid on the fifth days of October, January, April and July in every year during the continuance of the policy, insured "the life of the said Samuel H. Snowden, of New Orleans, in the parish of Orleans, state of Louisiana, for the sole use of the said wife in the amount of $10,000, for the term of his natural life;" and promised to pay that amount at its office in the city of New York to her, if living, and, if not living, to his children, "or their guardian, for their use," or, if there should be no such children surviving, then to his executors, administrators or assigns, in sixty days after due notice and satisfactory proof of his death during the continuance of

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NOTE.—*Guardians: appointment of; powers and duties of as to personal and real property of their wards.*

At common law there are three kinds of guardians, namely: guardians by nature, by nurture, and in socage. The two former belong exclusively to the parents; first to the father, and on his death to the mother; but such guardians have no control over the estate of the ward. Their authority is limited to the person of the ward, and they have no authority to control or meddle with the property, real or personal, of the ward. 2 Kent, Com. 220; Reeve, Domestic Relations, 315; Co. Litt. 88b; Fonda v. Van Horne, 15 Wend. 631, 30 Am. Dec. 77; Jackson v. Combs, 7 Cow. 36; Kline v. Beebe, 6 Conn. 494; Miles v. Boyden, 3 Pick. 213; Haynie v. Hall, 5 Humph. 290, 42 Am. Dec. 427; McKinney v. *Noble, 37 Tex.* 731; Kendall v. Miller, 9 Cal. 591; Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288; Matthewson v. Perry, 37 Conn. 435, 49 Am. Rep. 339.

The mother is the guardian by nature and nurture of her illegitimate child. Reeve, Domestic Relations, 314; Wright v. Wright, 2 Mass. 109; People v. Mitchell, 44 Barb. 245; Com. v. Fee, 6 Serg. & R. 255; Dalton v. State, 6 Blackf. 357.

The common law powers and duties of such guardians are usually considerably modified and regulated by statutes of the several states; and the guardianship by nurture is either merged in that by nature, or has become obsolete. 2 Kent, Com. 220; Macready v. Wilcox, 33 Conn. 321; Perkins v. Dyer, 6 Ga. 401.

A court of chancery may, for just cause, interfere with and control the discretion of the parent, in the care and education of his child. People v. Mercein, 8 Paige, 47, 3 Hill, 399, 38 Am. Dec. 644.

the policy, the balance of the year's premium, if any, being first deducted therefrom.

The policy declared that it was "issued and accepted by the assured upon the following special agreements and conditions, relative to tontine dividend policies:

"First. That this policy is issued under the tontine dividend plan, class A.

"Second. That the tontine dividend period for this policy shall be completed on the first day of June in the year eighteen hundred and eighty-six.

"Third. That no dividend shall be allowed or paid upon this policy, unless the person whose life is hereby assured shall survive until the completion of its tontine dividend period, and unless this policy shall then be in force.

"Fourth. That all surplus or profits derived from such policies, in any class on the tontine dividend plan, as shall cease to be in force before the completion of their respective tontine dividend periods, shall be apportioned equitably among such policies of the same class as shall complete their tontine dividend periods.

"Fifth. That the tontine dividend, when made, shall be applied only to the purchase of an annuity to reduce premiums during the whole subsequent continuance of this policy; and that the first payment of such annuity shall be due at the commencement of the assurance year of the policy immediately succeeding the year in which the tontine dividend period of this policy shall be completed; provided, that if in any year the *amount derived [501 from dividends on this policy shall exceed the amount of premiums due thereon, the excess shall be paid in cash to said Samuel H. Snowden or assigns.

"Sixth. That previous to the completion of its tontine dividend period this policy shall have no surrender value in cash or in a paid-up policy."

Mrs. Snowden died August 3, 1883, in the state of Mississippi. Under the laws of Mississippi, Samuel H. Snowden was appointed by the chancery court of Wilkinson county in that state on December 4, 1883, administrator of her personal estate, and gave bond as such, describing himself as of that county and state; and on March 4, 1884, was appointed by the same court guardian of the person, and of the estate, real and personal, of their child.

On July 19, 1886, the tontine period on the policy having been reached, and the policy having a surrender value, which was proved to have been $3170.40, Samuel H. Snowden, as such guardian, without any application to said chancery court for an order specially authorizing him to do so, requested of the defendant payment of this surrender value, and received the full amount thereof, and gave the defendant a receipt therefor, attaching to his receipt his letters of guardianship.

On March 9, 1888, Samuel H. Snowden died.

A guardian in socage as it existed at common law, like that of guardianship by nurture, is not adapted to our laws and institutions and has never existed in this country except in some greatly modified form. 2 Kent, Com. 224; Fonda v. Van Horne, 15 Wend. 631, 30 Am. Dec. 77; Beecher v. Crouse, 19 Wend. 306; Bryne v. Van Hoesen, 5 Johns. 66.

Testamentary guardians are those appointed by the deed, or the last will of the parent. They have control of the person and the real and personal estate of the child during minority. The father may, at common law, and generally under statutes, thus appoint a guardian for his children born or unborn. 2 Kent, Com. 225; Re Whitaker, 4 Johns. Ch. 378; Re Van Houten, 3 N. J. Eq. 220, 29 Am. Dec. 707; Balch v. Smith, 12 N. H. 441; Wardwell v. Wardwell, 9 Allen, 518; McKinney v. Noble, 37 Tex. 731; Kevan v. Waller, 11 Leigh, 414, 36 Am. Dec. 391; Reeve, Domestic Relations, 328.

Guardianship of all kinds is largely regulated by statutes in the various states, and the obligations, duties and liabilities of testamentary guardians are frequently thus regulated and prescribed. Kevan v. Waller, *supra*.

But where the appointment is by the father, it is held that it should clearly appear in order to take away the natural right of guardianship of the mother. Re Van Houten, 2 N. J. Eq. 220, 29 Am. Dec. 707; Corrigan v. Kiernan, 1 Bradf. 208; Bingham, Infancy & Coverture, 165.

A testamentary guardian can only be appointed by an instrument admitted to probate and naming the person intrusted with the care and nurture of the infant. Deariberes v. Wilmer, 69 Ala. 25, 44 Am. Rep. 501; Norris v. Harris, 15 Cal. 226; 2 Kent, Com. 225.

The father cannot appoint a testamentary guardian for his illegitimate children, nor for other children than his own, although he bequeaths or devises property to them. Sleeman v. Wilson, L. R. 13 Eq. 36, 1 Moak, Eng. Rep. 538; Brigham v. Wheeler, 8 Met. 127; People v. Mitchell, 44 Barb. 245; Reeve, Domestic Relations, 314.

Most guardians are appointed by courts having jurisdiction of such matters in the various states, and in pursuance of statutes on the subject, which regulate their powers and duties; and the court having power to appoint, may also remove them. 4 Field, Lawyer's Briefs, § 27; Stuart v. Bute, 9 H. L. Cas. 440; Byrne v. Van Hoesen, 5 Johns. 66; Beecher v. Crouse, 19 Wend. 306; Putnam v. Ritchie, 6 Paige, 390; Underhill v. Dennis, 9 Paige, 202; Foster v. Mott, 3 Bradf. 409; White v. Pomeroy, 7 Barb. 640; Week's App. 37 Conn. 363; Nelson v. Green, 22 Ark. 367; McPhillips v. McPhillips, 9 R. I. 536; Copp v. Copp, 20 N. H. 284; Sanderson v. Sanderson, 79 N. C. 369; Lord v. Hough, 37 Cal. 664; Story, Eq. Jur. § 339.

A court of equity may appoint guardians for infants, and supervise and control them as a branch of its general jurisdiction. 2 Story, Eq. Jur. § 1333; DeManneville v. DeManneville, 10 Ves. Jr. 52; Lynch v. Rotan, 30 Ill. 14; Wilcox v. Wilcox, 14 N. Y. 575; Durrett v. Davis, 24 Gratt. 302; Cowls v. Cowls, 8 Ill. 435.

The power to appoint and remove a general guardian is frequently conferred by statute upon surrogate's courts. Reeve, Domestic Relations, 317; 2 Kent, Com. 226; Schouler, Domestic Relations, 311, 419; Ex parte Dawson, 3 Bradf. 133; Berry v. Johnson, 53 Me. 402; People v. Mercien, 8 Paige, 47; Dormer v. Ogbourne, 16 Ala. 759; Herring v. Goodson, 43 Miss. 392.

The rights and powers of guardians are local or limited to the state where they are appointed. Hence they cannot by virtue of any right as guardians acquire or control the assets of wards in another state. Leonard v. Putnam, 51 N. H. 247, 12 Am. Rep. 106; Woodworth v. Spring, 4 Allen, 321; Morrell v. Dickey, 1 Johns. Ch. 153; Kraft v. Wickey, 4 Gill & J. 332, 23 Am. Dec. 569.

Unless restrained by statute a guardian may sell or exchange his ward's personal property without an order of the court therefor, though such order is required for a sale of real estate. Field v. Schieffelin, 7 Johns. Ch. 150, 11 Am. Dec. 441; White v. Parker, 8 Barb. 48; Humphrey v. Buisson, 19

On April 5, 1888, the plaintiff was appointed, and qualified, in Louisiana, tutor of the minor, and afterwards brought this action.

The question in controversy was whether the receipt of the surrender value of the policy by Samuel H. Snowden, as guardian of the minor, was a discharge of the policy.

Upon proof of the foregoing facts, the plaintiff requested the court to instruct the jury "that the receipt of the said amount and discharge of the policy was invalid, and did not bind the ward, and the said guardian, S. H. Snowden, in receiving it and in attempting to discharge the insurance policy, had no authority of the court or of a family meeting, or any other authority, excepting that which was vested in him as a guardian of the minor under the laws of Mississippi; that the transaction was either a compromise or a sale of a debt, 502] *and therefore was contrary to sections 2065, 2106 and 2110 of the Revised Statutes of Mississippi of 1880," which are copied in the margin.*

* Sec. 2065. The chancery court may, by decree, authorize any executor or administrator to sell or compromise any claims due the estate, which cannot be readily collected, if the executor or administrator shall petition for that purpose, and shall show that such sale or compromise will promote the interests of the estate. But no such order of sale shall be made until twelve months have elapsed from the grant of the letters. And if a sale be ordered, it shall be made at the court-house door for cash to the highest bidder; but the executor or administrator shall first give twenty days' notice of the time and place of such sale, by advertising the same in a newspaper printed in the county, if there be such, but if not, then in a newspaper published in some convenient county. And the executor or administrator shall make report in writing, of sales and compromises made according to the provisions of this section, to the next succeeding term of the court, which may then be confirmed, unless good cause be shown for setting the same aside.

Sec. 2106. The court may order a sale of personal property of a ward, whenever the interest of such ward will be promoted thereby, which sale shall be made as directed by the court.

Sec. 2110. Guardians may be empowered by the court to sell or compromise claims due their wards, on the same terms prescribed in reference to the sale or compromise of claims due estates of deceased persons.

The court refused to give each of the instructions requested; and instructed the jury "that the transaction on the part of the former guardian, by which he received the surrender value of the policy, was neither a compromise nor a sale of a debt, but, on the other hand, was the collection of a debt which was due in the alternative at the option of the guardian, and that the guardian had authority as a common law guardian under the laws of Mississippi to make such collection."

The plaintiff excepted to the refusal to give each of the instructions requested, as well as to the instructions given; and, after verdict and judgment for the defendant, tendered a bill of exceptions, and sued out this writ of error.

Mr. **Frank L. Richardson,** for plaintiff in error:

If a guardian sells the property of his ward, he must obtain authority from the probate court. A sale is a transmutation of property from one man to another in consideration of some price.

2 Bl. Com. 446; Story, Sales, § 1; 2 Schouler, Pers. Prop. (2d ed.) § 200; Newmark, Sales, § 2; *Creveling* v. *Wood*, 95 Pa. 158.

This was peculiarly a case where the law, enacted for the benefit of minors, should be enforced.

Hayes v. *Massachusetts Mut. L. Ins. Co.* 1 L. R. A. 303, 125 Ill. 626.

Mr. **Charles B. Alexander,** for defendant in error:

The guardian of Mason Snowden had a right to receive the surrender value of the policy, and the payment to him discharged the company.

Schouler, Domestic Relations (4th ed.) § 342; Perry, Tr. (4th ed.) § 482.

The policy has lapsed.

Roehner v. *Knickerbocker L. Ins. Co.* 63 N. Y. 160; *Bosworth* v. *Western Mut. Aid Soc.* 75 Iowa, 582; *Ashbrook* v. *Phœnix Mut. L. Ins. Co.* 94 Mo. 72.

Minn. 221; Sallee v. Arnold, 32 Mo. 532, 82 Am. Dec. 144; Shepherd v. Evans, 9 Ind. 270; Freeman v. Wilson, 74 N. C. 368.

It is the guardian's duty to sell the personal property of the ward where it is liable to waste or decay, and loss would occur by keeping it. Bank of Virginia v. Craig, 6 Leigh, 399.

It is his duty to take reasonable care of his ward's property and interests, and to bring an action to to recover any damage sustained thereto. Brown v. Brown, 5 Eng. L. & Eq. 567; Somes v. Skinner, 16 Mass. 348; Savage v. Dickson, 16 Ala. 257; Fuqua v. Hunt, 1 Ala. 197, 34 Am. Dec. 771; White v. Parker, 8 Barb. 48; Shepherd v. Evans, 9 Ind. 260.

A guardian may lease the land of his ward during his minority, but if the lease extends beyond this the ward may avoid it on coming of age. Putnam v. Ritchie, 6 Paige, 390; Johnson v. Carter, 16 Mass. 443; Snook v. Sutton, 10 N. J. L. 157; Richardson v. Richardson, 49 Mo. 29; Emerson v. Spicer, 46 N. Y. 594; Burr v. Wilson, 18 Tex. 367.

He may usually dispose of and manage the personalty as he pleases, without an order of the court; and if the same consists of money, he should put it at interest, or he may be chargeable for interest. Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 607; Brown v. Ricketts, 4 Johns. Ch. 305, 8 Am. Dec. 567; Utica Ins. Co. v. Lynch, 11 Paige, 523; Gillet v. v. Van Rensselaer, 15 N. Y. 400; Taylor v. Benham, 46 U. S. 5 How. 274 (12:149); Boynton v. Dyer, 18 Pick. 6.

Investments by a guardian of his ward's money should usually be made in public securities or on the security of real estate. Worrell's App. 9 Pa. 508; Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; May v. Duke, 61 Ala. 53; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; Horn v. Lockhart, 84 U. S. 17 Wall. 570 (21:657); Watson v. Stone, 40 Ala. 451, 91 Am. Dec. 484; Gary v. Cannon, 38 N. C. 64.

But, in some states, if reasonable prudence and good faith is used, investments may be made in corporate stocks or on personal security. French v. Currier, 47 N. H. 88; Clark v. Garfield, 8 Allen, 427; Lovell v. Minot, 20 Pick. 116, 32 Am. Dec. 208; Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Nyce's Estate, 5 Watts & S. 254, 40 Am. Dec. 506.

A guardian is usually entitled to the care and possession of the real estate of the minor, and may maintain an action to recover it for an injury thereto, or for the rents and profits of it. 1 Parsons, Cont. 114; 2 Bac. Abr. 688; Thacker v. Henderson, 63 Barb. 271; Holmes v. Seely, 17 Wend. 75; Van Doren v. Everitt, 5 N. J. L. 460, 8 Am. Dec. 615.

The relation to the company of the policy holder is that of creditor not of a *cestui que trust*.

Cohen v. *New York Mut. L. Ins. Co.* 50 N. Y. 624, 10 Am. Rep. 522; *People* v. *Security L. Ins. & A. Co.* 78 N. Y. 114, 34 Am. Rep. 522; *Rogardus* v. *New York L. Ins. Co.* 101 N. Y. 328; *Uhlman* v. *New York L. Ins. Co.* 109 N. Y. 421; *Avery* v. *Equitable L. Assur. Soc.* 117 N. Y. 451; *Pierce* v. *Equitable L. Assur. Soc.* 145 Mass. 56; *Grover & B. Sewing Mach. Co.* v. *Clinton*, 5 Biss. 324; *Fuller* v. *Metropolitan L. Ins. Co.* 37 Fed. Rep. 164.

Mere complicated accounts, especially if not mutual, are not the subject of an equity accounting.

Hipp v. *Babin*, 60 U. S. 19 How. 271 (15: 633); *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189 (26: 975); *Ellis* v. *Davis*, 109 U. S. 493 (27: 1008); *Moxon* v. *Bright*, L. R. 4 Ch. App. 292.

The accounts, where an accounting is ordered, must be mutual.

Phillips v. *Phillips*, 9 Hare, 471; *Hemings* v. *Pugh*, 4 Giff. 459; *Porter* v. *Spencer*, 2 Johns. Ch. 169; *Durant* v. *Einstein*, 5 Robt. 425; *Salter* v. *Ham*, 31 N. Y. 321; *Lynch* v. *Willard*, 6 Johns. Ch. 342; *Dinwiddie* v. *Bailey*, 6 Ves. Jr. 136; *Frue* v. *Loring*, 120 Mass. 507.

Where there is a legal remedy, equity will not interfere.

Marvin v. *Brooks*, 94 N. Y. 75; *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189 (26: 975).

503] *Mr. Justice* **Gray** delivered the opinion of the court:

By the terms of the policy sued on, the amount of the insurance upon the life of Samuel H. Snowden was payable, after notice and proof of his death, to his wife, if living, and if not living, to his children, or their guardian, for their use.

It was proved at the trial that the wife died in Mississippi; that the husband was thereupon appointed, under the laws of Mississippi and by the chancery court of the county of Wilkinson in that state, administrator of her estate, and guardian of the person and property of their only child; and that he described himself, in his administration bond, as of the same county and state. It may be assumed, therefore, that the domicil of himself and his ward at that time was in Mississippi; and it is not suggested that he was not lawfully appointed guardian.

A guardian, unless his powers in this respect are restricted by statute, is authorized, by virtue of his office, and without any order of court, to sell his ward's personal property and reinvest the proceeds, and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest. *Lamar* v. *Micou*, 112 U. S. 452, 475 [28: 751,759]; *Field* v. *Schieffelin*, 7 Johns. Ch. 150, 154; *Ellis* v. *Essex Merrimack Bridge Proprs.* 2 Pick. 243; *Ordinary* v. *Dean*, 44 N. J. L. 64, 67; *Pierson* v. *Shore*, West Ch. 711, 1 Atk. 480; *Inwood* v. *Twyne*, Ambl. 417, 419; 2 Eden, 148, 152.

In the case at bar, the validity of the receipt by the father, as such guardian, of the surrender value of the policy, in discharge of all further claim under it, is contested by the plaintiff (appointed in Louisiana, since the father's death, tutor or guardian of the minor) upon the ground that it was a compromise or sale of a debt due the ward, unauthorized by law of Mississippi, because the statutes of that state provide that the chancery court may empower a guardian to sell *personal prop [504 erty of his ward, or to sell or compromise claims due to the ward, as therein directed. Miss. Rev. Stat. of 1880, §§ 2065, 2106, 2110.

But those statutes, limiting the general power of disposition which executors and administrators, as well as guardians, had at common law have been strictly construed by the supreme court of Mississippi. *Bland* v. *Muncaster*, 24 Miss. 62, 65, 57 Am. Dec. 162. Sales of personal property by executors or administrators have been held by that conrt to be void, because of other provisions of the statutes, making an order of court essential to the validity of such sales, except in specified cases. See §§ 2032, 2033, 2035, 2038, 2077; Hutchinson's Code, chap. 49, § 109; *Cable* v. *Martin*, 1 How. (Miss.) 558, 561; *Worten* v. *Howard*, 2 Smedes & M. 527, 529, 41 Am. Dec. 607; *Gelstrop* v. *Moore*, 26 Miss. 206, 209, 59 Am. Dec. 254. But the statutes relied on, so far as they relate to guardians, would seem to be permissive and not restrictive, and only to provide a mode by which the guardian may obtain in advance a judicial approval of such a sale or compromise, and thereby, in the absence of fraud, establish that it is for the interest of the ward, instead of leaving that fact open to dispute at a future day.

However that may be, the guardian was certainly authorized to collect for the benefit of his ward any amount due under the policy, and had the right and the duty to elect, either to

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The power of a guardian to sell real estate of his minor is derived entirely from statute, and independently of it the court has no jurisdiction to authorize a sale of a ward's land by his guardian. Horton v. McCoy, 47 N. Y. 21; Rogers v. Dill, 6 Hill, 415; Williams' Case, 3 Bland, Ch. 186; Faulkner v. Davis, 18 Gratt. 651, 98 Am. Dec. 698; Thurston v. Thurston, 6 R. I. 296; Stewart v. Griffith, 33 Mo. 13, 82 Am. Dec. 148; Boon v. Bowers, 30 Miss. 246, 64 Am. Dec. 159; Estep v. Hutchman, 14 Serg. & R. 435.

Where the statutes prescribe the mode of procedure, which is generally the case, they must be strictly followed; otherwise the sale of the ward's real estate would be void and no title pass. Williams v. Reed, 5 Pick. 480; Palmer v. Oakley, 2 Dougl. (Mich.) 433, 47 Am. Dec. 41; Jenkins v. Fahey, 11 Hun, 351; Shanks v. Seamonds, 24 Iowa, 131, 92 Am. Dec. 465; Woodcock v. Bowman, 4 Met. (Ky.) 40; Gilmore v. Rodgers, 41 Pa. 120; Wade v. Carpenter, 4 Iowa, 361; Robert v. Casey, 25 Mo. 564; Myer v. McDougal, 47 Ill. 278; Iverson v. Loberg, 26 Ill. 179, 79 Am. Dec. 364; Pursley v. Hayes, 22 Iowa, 11, 92 Am. Dec. 350; Blackman v. Bauman, 22 Wis. 611; Thompson v. Tolmie, 27 U. S. 2 Pet. 157 (7: 381); Fitch v. Miller, 20 Cal. 352.

A guardian may use the interest and profits of his ward's estate to support and educate his ward. Frelick v. Turner, 26 Miss. 398; Gilbert v. McEachen, 38 Miss. 469; Villard v. Roberts, 2 Strobh. Eq. 40, 49 Am. Dec. 654; Davis v. Harkness, 6 Ill. 173, 41 Am. Dec. 184.

keep it in force by paying the premiums, or to surrender it in consideration of being paid at once its surrender value, whichever appeared to be most beneficial to the ward. *Cocke* v. *Rucks*, 34 Miss. 105, 108; *Martin* v. *Tarver*, 43 Miss. 517; *Berry* v. *Parkes*, 3 Smedes & M. 625; *Chapman* v. *Tibbits*, 33 N. Y. 289. The amount received was proved to be the surrender value of the policy: and there is nothing to show, or even to raise a suspicion, that the action of the guardian was not for the best interest of the ward, upon the state of facts then existing.

Under the circumstances of this case, therefore, it was rightly held by the court below, that the transaction in question was neither a compromise nor a sale of a debt, but was the collection of a debt due in the alternative at the 505] option of the *guardian, and was one which he had authority to make under the laws of Mississippi.

The case is quite different from *Hayes* v. *Massachusetts Mut. L. Ins. Co.* 1 L. R. A. 303, 125 Ill. 626, cited by the plaintiff, in which, after the death of the man whose life was insured, the guardian of his children gave up the policy in consideration of a payment of about half its amount.

Judgment affirmed.

MOSES MANUEL, *Plff. in Err.*, *v.* IVER WULFF.

(See S. C. Reporter's ed. 505-512.)

Mining claims—effect of location—alien's power to take title.

1. Mining claims are property and may be sold, transferred, mortgaged and inherited without infringing the title of the United States.
2. When a location of a mining claim is perfected it has the effect of a grant by the United States of the right of present and exclusive possession.
3. Where a citizen of the United States located a mining claim and conveyed the same to an alien, the naturalization of the latter, before a decision against him in favor of another claimant, removed his disability as an alien to take the title.

[No. 214.]

Submitted Jan. 17, 1894. Decided March 26, 1894.

IN ERROR to the Supreme Court of the State of Montana, to review a judgment of that court, affirming the judgment of the District Court for Lewis and Clarke county, of the territory of Montana, in favor of the plaintiff, Iver Wulff, against the defendant, Moses Manuel, in an action between those two claimants of a quartz lode mining claim on the land of the United States, to determine the right to proceed in the United States Land Office, for a patent therefor. *Reversed, with directions to reverse the judgment of the inferior court, and for further proceedings.*

See same case below, 9 Mont. 279.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action in the ordinary form of a contest between two claimants of a quartz lode mining claim upon the lands of the United States to determine the right to proceed in the United States Land Office for patents therefor. Moses Manuel, defendant below, made application in the land office at Helena, Montana, for a patent for the Marshal Ney lode mining claim, which application Iver Wulff, plaintiff below, adversely contested, basing his contest upon his right to the premises by virtue of their location and possession as the Columbia mining claim. This proceeding was thereupon commenced in the district court for Lewis and Clarke county of the territory of Montana, in accordance with section 2326 of the Revised Statutes.

The title of plaintiff was put in issue by the pleadings and the defendant filed a counter claim charging that the Columbia *lode [506 location was forfeited by reason of the want of required annual work and that the ground in controversy was unoccupied public domain at the time of the location of the Marshal Ney. This was denied by plaintiff in his replication.

Upon the trial it appeared that Henry Pflaume, who was a citizen of the United States, located the Columbia lode mining claim, July 1, 1882; that November 1, 1885, he conveyed the claim to Fred. Manuel by deed, and that November 30, 1887, Fred. Manuel conveyed the same property by deed to Iver Wulff, the plaintiff; that one Alfred Manuel, who was a citizen of the United States, located the same mining claim under the name of the "Marshal Ney" (claiming that the Columbia lode location had been abandoned and forfeited for the reason that no work was done thereon during the years 1883 and 1884) and conveyed to Moses Manuel, the defendant, a one third interest therein, October 12, 1885, and the remaining two thirds, October 15, 1887, by deeds duly executed and recorded.

It further appeared that Moses Manuel was born in Canada and came to this country when about eight years old with his father, whom he supposed had been naturalized and that he was thus a citizen of the United States. But the court held that he was not a citizen, whereupon he was naturalized, pending the trial, under the provisions of section 2167 of the Revised Statutes. The district court then nonsuited defendant upon his counterclaim, and did not permit him to proceed with his case, upon the ground that he was not a citizen at the time that Alfred Manuel executed to him the deeds of conveyance of the Marshal Ney lode mining claim and at the time the suit was commenced, holding that the attempt on the part of Alfred Manuel to convey the mining claim operated as an abandonment thereof. Defendant then moved that plaintiff be nonsuited, which motion was denied, but the question raised in respect thereof need not be examined here. Judgment was thereupon

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NOTE.—*As to ownership of mines; United States statutes as to; right of support of surface*, see note to United States v. Castillero, 17: 448.

As to title to water by appropriation; common law rule; rule of mining states, see note to Atchison v. Peterson, 22: 414.

As to alienage, effect of, as to title to real estate, see note to Governeur v. Robertson, 6: 488, and to Griffith v. Godey, 28: 934.

given in favor of Wulff, and defendant took the case by appeal to the supreme court of the state (which had been admitted into the Union in the meantime) by which the judgment was 507] affirmed. The opinion of the *court will be found reported in *Wulff* v. *Manuel*, 9 Mont. 279. The case was then brought to this court by writ of error.

Mr. **John B. Clayberg** for plaintiff in error.

No counsel for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The supreme court of Montana recognized the settled rule that an alien may take and hold land by purchase until office found, and that, if the alien become a citizen before his alienage has been adjudged, the act of naturalization takes effect by relation; but held that "possessory rights to mining claims on the public domain of the United States," although "endowed with the qualities of real estate to a high degree," did not come within that rule.

The argument was that as by statute mineral lands are not open to exploration, occupation, or purchase by aliens, but only by citizens of the United States and those who have declared their intention to become such, upon compliance with the laws and local mining rules and regulations as to location and possession, title and possessory rights to mining claims thus acquirable solely by virtue of the statute and in the manner prescribed thereby, must be regarded as passing as by operation of law, and not as by grant. Hence that mining claims are controlled by the rule which forbids the alien to take or hold real estate by descent, since it is the rule of law and not the act of the party that vests title in the heir, and it would be an idle thing to vest title by one act of law and then take it away by another. The court was of opinion that upon principle the analogy between an alien heir claiming by descent and an alien miner claiming under the mining laws was complete; and that as Moses Manuel was incapable of taking, the conveyance to him by Alfred Manuel, who was a citizen, amounted to an abandonment by the latter. We are unable to concur in this view. 508] We do not think that the *transfer of a mining claim by a qualified locator to an alien is to be treated as *ipso facto* an abandonment or that the analogy of such a case to the casting of descent upon an alien can be maintained.

Among the cases often referred to upon the general subject and cited by the Montana supreme court is *Doe* v. *Robertson*, 24 U. S. 11 Wheat. 332, 350, 354 [6: 488, 493]. That was an action of ejectment and the facts these: Plaintiff claimed under one Brantz, who, being an alien, obtained, October 11, 1784, two grants from the commonwealth of Virginia, of lands lying in Kentucky. He became naturalized in Maryland, November 8, 1784, and his title was confirmed to him and to his heirs and their grantees by the legislature of Kentucky in 1796 and 1799. Defendant claimed under a grant of Virginia made to a citizen in 1785.

This court, speaking by *Mr. Justice* Johnson, among other things, said:

"On this subject of relation, the authorities are so ancient, so uniform, and universal, that nothing can raise a doubt that it has a material bearing on this cause, but the question whether naturalization in Maryland was equivalent to naturalization in Kentucky. To this the articles of confederation furnish an affirmative answer, and the defendant has not made it a question. Nor, indeed, has he made a question on the subject of relation back; yet it is not easy to see how he could claim the benefit of an affirmative answer on the question he has raised, without first extricating his cause from the effects of the subsequent naturalization, upon the rights derived to Brantz through his patent. The question argued, and intended to be exclusively presented here, is, whether a patent for land to an alien, be not an absolute nullity.

"The argument is, that it was so at common law, and that the Virginia land laws, in some of their provisions, affirm the common law on this subject.

"We think the doctrine of the defendant is not to be sustained on either ground. . . .

"It is clear, therefore, that this doctrine has no sufficient sanction in authority; and it will be found equally unsupported by principle or analogy.

*"The general rule is positively against [509 it, for the books, old and new, uniformly represent the King as a competent grantor in all cases in which an individual may grant, and any person *in esse*, and not *civiliter mortuus*, as a competent grantee. Femes covert, infants, aliens, persons attainted of treason or felony, clerks, convicts, and many others, are expressly enumerated as competent grantees. Perkins Grant, 47, 48, 51, etc., Comyn, Dig. Grant, B. 1. It behooves those, therefore, who would except aliens, when the immediate object of the King's grant, to maintain the exception.

"It is argued, that there is an analogy between this case and that of the heir, or the widow, or the husband, alien; no one of whom can take, but the King shall enter upon them without office found. Whereas, an alien may take by purchase and hold until devested by office found. It is argued, that the reason usually assigned for this distinction, to wit, *nil frustra agit lex*, may with the same correctness, be applied to the case of a grant by the King to an alien, as to one taking by descent, dower, or curtesy: That the alien only takes from the King to return the subject of the grant back again to the King by escheat. But, this reasoning obviously assumes as law the very principle it is introduced to support; since, unless the grant be void, it cannot be predicated of it that it was executed in vain. It is also inconsistent with a known and familiar principle in law, and one lying at the very root of the distinction between taking by purchase and taking by descent. It implies, in fact, a repugnancy in language. Since the very reason of the distinction between aliens taking by purchase, and by descent, is, that one takes by deed, the other by act of law; whereas a grantee *ex vi termini*, takes by deed, and not by act of law. If there is any view of the subject in which an alien, taking under grant, may be considered as taking by operation of law, it is because the grant issues, and takes effect, under a law of the state. But this is by no means the sense of the rule, since attaching to it this

idea would be to declare the legislative power of the state incompetent to vest in an alien even a defeasible estate.

"That an alien can take by deed, and can 510] hold until office *found, must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary."

The objection here rests, however, on the assumption that Congress has not intended to confer any estate in respect of claims of this character because the right of purchase and the right of possession are indivisible, and the validity of the location is destroyed on the transfer of the claim to a person not authorized to keep the location alive. *Tibbitts* v. *Ah Tong*, 4 Mont. 536. Of course, the same qualification required in those who may purchase is required as to those who may possess, but that, in our judgment, does not render possessory rights any the less property susceptible of distinct ownership, nor involve the consequence that their transfer to unqualified persons would operate a forfeiture *eo instanti* as for a violation of a continuing condition precedent so that the removal of the disqualification would not cure the defect. If it could be properly held that the qualification of his grantee should be regarded as at all a condition annexed to the ownership of the qualified locator, such condition would be a condition subsequent, and governed by the rule laid down in *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 [22: 551].

Section 2319 of the Revised Statutes is as follows: "All valuable minerals deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by the citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

And by section 2322, it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, 511] and *inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes* v. *Gracey*, 94 U. S. 762 [24: 313]; *Belk* v. *Meagher*, 104 U. S. 279 [26: 735]; *Gwillim* v. *Donnellan*, 115 U. S. 45 [29: 348]; *Noyes* v. *Mantle*, 127 U. S. 348 [32: 168].

This being so, we are of opinion on this record that, as Alfred Manuel was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to *question by the* government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered.

In *Re Krogstad*, 4 U. S. Land Dec. 564, *Mr. Justice* Lamar, when Secretary of the Interior, ruled that an alien, having made homestead entry and subsequently filed his intention to become a citizen, the alienage at time of entry, in the absence of an adverse claim, would not defeat the right of purchase. *Jackson* v. *Beach*, 1 Johns. Cas. 399; *Doe* v. *Robertson*, 24 U. S. 11 Wheat. 332 [6: 488]; and *Osterman* v. *Baldwin*, 73 U. S. 6 Wall. 116 [18: 730], were cited to the point that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of title. This seems to have long been the settled rule in the Land Department, *Mann* v. *Huk*, 3 U. S. Land Dec. 452; *Lord* v. *Perrin*, 8 U. S. Land Dec. 536; so if there had been no adverse claim in the land office, Moses Manuel's application, which appears, in respect of this question, to have been made in good faith, would not have been rejected on the mere ground of alienage when he made it. And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the direction of a non-suit.

*The judgment of the supreme court of Montana is reversed, and the cause remanded with a direction to reverse the *judgment of the* [512 *court below and for further proceedings in conformity with this opinion.*

Mr. Justice **White** not having been a member of the court when this case was considered, took no part in its decision.

THE CITY NATIONAL BANK OF FORT WORTH, *Appt.*,
v.
R. D. HUNTER ET AL.

(See S. C. Reporter's ed. 512–516.

Appeal from decree of court below entered upon mandate of this court — mandamus — jurisdictional amount—costs—appeal.

1. If the decree of this court has been misunder-

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute*, see note to Schunk v. Moline M. & S. Co. 37: 256.

As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitution, see notes to Martin v. Hunter, 4: 97. Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution: to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 109.

As to when mandamus will issue, see note to M'Cluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion, see note to Ex parte Morgan, 29: 135.

stood or misconstrued by the court below, to the injury of either party, an appeal may be taken to this court in order to have the error corrected.

2. This court may enforce the execution of its own mandate in the court below, upon motion and by a mandamus.

3. While compliance with a mandate of this court which simply requires the execution of its decree, may be enforced by mandamus, without regard to the value of the matter in dispute, yet this court cannot entertain an appeal, if the value of the matter in dispute upon such an appeal is less than $5000.

4. If the sum in dispute on appeal is sufficient to give this court jurisdiction it can consider the question of costs involved, but where the appeal in respect to interest must be dismissed for want of jurisdiction, the appeal, in respect to costs, must also be dismissed.

5. No appeal lies from a mere decree for costs.

[No. 264.]

Submitted March 8, 1894. Decided March 19, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Texas, entered upon the mandate of this court. *Dismissed.*

See same case 129 U. S. 557, 579 (32: 752, 760.)

Statement by *Mr. Justice* **Harlan:**

In *City National Bank of Fort Worth* v. *Hunter*, 129 U. S. 557, 579 [32: 752, 760] will be found a full history of the litigation between the parties to the present appeal. The final decree was reversed, with costs, and the case was remanded with directions to proceed in conformity with the opinion of this court. After the mandate and opinion of this court had been filed in the court below, the cause was again heard, and it was, among other things, adjudged: "That said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, do have and recover of and from the defendants, the City National Bank of Fort Worth the sum of twelve thousand nine hundred and eighty four and $\frac{85}{100}$ ($12,984.85) dollars, together with interest thereon from this date at the rate of eight per cent per annum. It is further ordered, adjudged, and decreed that all costs accrued in this cause up to September 30, 1881, be, and the same are, hereby adjudged against said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, and for which let exe-
513]cution *issue; and, as the costs of the supreme court have been allowed against said complainants, all other costs incurred herein which have not been otherwise adjudged be, and the same are hereby, adjudged against said defendant, the City National Bank of Fort Worth."

From this decree the present appeal was prosecuted by the bank. The errors assigned are: 1. The court gave interest on the plaintiffs' portion of the fund to be divided. 2. Costs were awarded against the defendant bank.

Messrs. **A. H. Garland** and **H. J. May,** for appellant:

This case comes plainly under the ruling in *Perkins* v. *Fourniquet*, 55 U. S. 14 How. 328 (14: 441); and reconciles any apparent conflict there may be between the case *Re Washington & G. R. Co.* 140 U. S. 92 (35: 340) and the others of long standing.

Himely v. *Rose*, 9 U. S. 5 Cranch, 313 (3: 111); *The Santa Maria*, 23 U. S. 10 Wheat. 431 (6: 359); *Boyce* v. *Grundy*, 35 U. S. 9 Pet. 275 (9: 127).

This is now a controversy solely and alone with a national bank, and the question of amount as to jurisdiction, for or against, is of no importance or significance.

Spear, Federal Judiciary, 219, cl. 10, and cases there cited.

This fiscal agent, or financial instrument of the government, on the account of which this case went out of the state court to the United States court, cannot be hampered as to the amount in controversy.

The general law, regardless of the peculiarity of this deposit, would forbid any demand for interest of this mere general deposit.

Foley v. *Hill*, 2 H. L. Cas. 39, 40; *Haswell* v. *Farmers & M. Bank*, 26 Vt. 100; *Duncan* v. *Magette*, 25 Tex. 245; *First Nat. Bank of Carlisle* v. *Graham*, 100 U. S. 699 (25: 750); *National Bank of the Commonwealth* v. *Mechanics Nat. Bank*, 94 U. S. 437 (24: 176); Newmark, Bank Deposits, § 114, Boone, Corp. §§ 219, 220.

Mr. **H. M. Pollard,** for appellee:

The circuit court committed no error in awarding interest on plaintiffs' *pro rata* against the defendant bank; the bank was a trustee as to plaintiffs, of all funds received by it over and above its *pro rata*, from the Dawson note, and having used plaintiffs' share of said funds in its business, it is liable for interest.

Perry, Tr. §§ 429, 430; Lewin, Trusts & Trustees, 338-343; Hill, Trustees, 374; 7 Am. & Eng. Enc. Law, 395; *Kerr* v. *Laird*, 27 Miss. 544; *Lewis* v. *Bradford*, 8 Ala. 632.

After demand made by plaintiffs, it was the duty of the bank to pay the same, and its failure and refusal to do so made it liable for interest or damages as a trustee *de son tort*.

Under these circumstances it would have been liable for damages, the measure of which would be the legal rate of interest, for withholding the same from plaintiffs, in an action for money had and received to use of plaintiffs.

Close v. *Fields*, 13 Tex. 624; *Porter* v. *Nash*, 1 Ala. 452; *Pease* v. *Barber*, 3 Cal. 263; *Marvin* v. *McRae*, 1 Cheves L. 61.

Mr. Justice **Harlan** delivered the opinion of the court:

1. It is contended that the decree below, so far as it included interest in favor of the appellees, was not in conformity with the opinion of this court, and, for that reason, should be reversed. The claim is that such interest was "nearly or quite $4000." In that view, has this court jurisdiction, upon appeal, to review the last decree?

In support of our jurisdiction, counsel rely upon *Perkins* v. *Fourniquet*, 55 U. S. 14 How. 328 [14: 441]. In that case, it was claimed that the decree appealed from exceeded what was allowed upon a previous appeal, by a sum larger than was necessary to give this court jurisdiction. And the question arose whether the alleged error could be reached by an appeal from the last decree. *Chief Justice* Taney, speaking for this court, said: "This objection to the form of proceeding involves noth-

ing more than a question of practice. The mandate from this court left nothing to the judg-[515] ment and discretion of the *circuit court, but directed it to carry into execution the decree of this court, which was recited in the mandate. And if the decree of this court has been misunderstood or misconstrued by the court below, to the injury of either party, we see no valid objection to an appeal to this court in order to have the error corrected. The question is merely as to the form of proceeding which this court should adopt to enforce the execution of its own mandate in the court below. The subject might, without doubt, be brought before us upon motion, and a mandamus issued to compel its execution. But an appeal from the decision of the court below is equally convenient and suitable; and, perhaps, more so in some cases, as it gives the adverse party notice that the question will be brought before this court, and affords him the opportunity of being prepared to meet it at an early day of the term." This principle was affirmed in *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 440, 443 [17: 860, 861] and recognized in *Re Washington & G. R. Co.* 140 U. S. 92, 95 [35: 340, 341].

The case cited would sustain the present appeal as an appropriate mode for raising the question above stated, if the amount now in dispute was sufficient to give this court jurisdiction to review the last decree. Under the statutes regulating the jurisdiction of this court at the date of the decision in *Perkins* v. *Fourniquet*, the amount there in dispute was sufficient for an appeal. But that case does not sustain the broad proposition that, without reference to the value of the matter in dispute, an *appeal* will lie from a decree, simply upon the ground that it is in violation of or a departure from the mandate of this court. While compliance with a mandate of this court, which leaves nothing to the judgment or discretion of the court below, and simply requires the execution of our decree, may be enforced by mandamus, without regard to the value of the matter in dispute, we cannot entertain an appeal, if the value of the matter in dispute upon such appeal is less than $5000. *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 5 U. S. App. 97, 100.

2. If the sum in dispute on this appeal was sufficient to give us jurisdiction, we could con-[516] sider the question of costs *referred to in the second assignment of error. But as the appeal in respect to interest must be dismissed for want of jurisdiction, the appeal, in respect to costs, must also be dismissed. No appeal lies from a mere decree for costs. *Canter* v. *American Ins. Co.* 28 U. S. 3 Pet. 307, 319 [7: 688, 692]; *Wood* v. *Weimar*, 104 U. S. 786 [26: 779]; *Union Paper Bag Mach. Co.* v. *Nixon Paper Bag Cases*, 105 U. S. 766 [26: 959].

The appeal is dismissed.

Mr. Justice **White** not having been a member of the court when this case was argued, took no part in its decision.

JOSEPH B. SARGENT ET AL., *Appts.*,
v.
JAMES C. COVERT.

Invalid patent.

(See S. C. Reporter's ed. 516-520.)

1. The patent to James C. Covert, of April 6, 1875, No. 161,757, for an improvement in clasps or thimbles for hitching devices, is invalid, for want of invention.

[No. 298.]

Argued March 19, 1894. Decided April 2, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, in favor of James C. Covert, plaintiff, against Joseph B. and George H. Sargent, for infringement of letters patent No. 161,757, issued April 6, 1875, for an improvement in clasps or thimbles for hitching devices and for the recovery of damages and costs. *Reversed, with directions to dismiss the suit.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill filed by James C. Covert against Joseph B. and George H. Sargent in the Circuit Court of the United States for the Southern District of New York for infringement of letters patent No. 161,757, dated April 6, 1875, issued to complainant for "improvement in clasps or thimbles for hitching devices," upon which a final decree was entered adjudging the patent to be good and valid; that the defendants had infringed the same; and that complainant should recover of the defendant Joseph B. Sargent the sum of $750, and of the defendant George H. Sargent, $250, and costs. From this decree an appeal was taken to this court.

Mr. **John Kimberly Beach** for appellants.

Mr. **H. A. Toulmin** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court.

*The patent in suit was issued April 5, [517] 1875, and relates to a device upon rope halters. That device consists of a tube adapted to slip upon a rope, and having on one of its sides an enlargement with interior screw threads. A

NOTE.—*For what patents are granted: when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see note to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4:433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

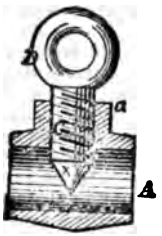
As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 894.

sharp pointed screw is fitted to pass through the projection at right angles to the bore of the tube so as to enter the rope and hold the tube fast in any given position upon it. This set screw is provided with an eye for the reception of a snap hook on the end of the hitching rope whereby a loop may be formed to pass around the neck or other part of the animal; the size of the loop being determined by the position of the thimble or tube on the rope.

The specification is accompanied by a drawing, in which figure one is a perspective view, and figure two, a longitudinal section, of the alleged invention, figure 2 being as follows:

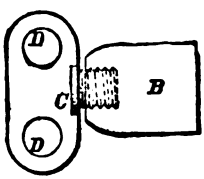


This is thus described in the specification: "A represents a thimble of any suitable dimensions provided on one side with a nut or enlargement, *a*, having a hole through it with female screw threads. The thimble A is fastened on the rope B at any desired place by means of a sharp pointed screw, C*x*, which passes through the thimble at the nut *a* and the rope. This screw is provided with a round eye, D, for the reception of a snap hook."

The claim is: "The combination of the tube A, having the projection *a*, with interior screw threads cast therewith, and the screw C, having the eye D and the sharp point *x*, for entering into the rope, all constructed as and for the purposes set forth."

The file wrapper and contents showed that 518 | the original *claim was: "The combination of the thimble A, rope B, and sharp pointed screw C, provided with the eye D, substantially as, and for the purposes herein set forth;" but the projection *a* in the claim allowed was not an essential qualification, and complainant insists that the words "cast therewith" do not refer to the "interior screw threads," and only appear to do so through erroneous punctuation. Defendants' screw threads were made with a tap in the ordinary way.

In support of the defense of invalidity, defendants introduced a patent issued to John Wiard, June 9, 1868, for an "improvement in cattle tie," in the drawings accompanying which, figure two represented "the adjustable socket of the halter," as follows:



This was described in the specification in these words: "B is a socket, constructed so as to pass freely over the rope, as in Fig. 1, and in one side of which is fitted a thumb screw, C, so that when the said thumb screw, is turned hard down upon the rope, the socket will be held firmly in that position, and may be adjusted to different positions on the rope by loosening the screw, and sliding the socket accordingly. The head of the thumb screw C is constructed with a hole, D, at each end, so as to form a means of attachment of the end of the rope thereto."

Comparing these two figures, it will be seen that they are alike except that the end of the screw in the patent sued on is sharpened and the screw has but one eye, whereas the end of the screw in the Wiard patent is blunt and it is provided with two eyes. And these are the particular differences pointed out by complainant's expert, who also testified on cross-examination that if the end of the screw in the Wiard socket were made substantially like the sharpened point *x* of the *Covert patent, that would be, in his [519 opinion, an infringement. According to his view, the most essential advantage of the invention in suit was that which resulted from having the end of the screw sharpened instead of flat, though, he added, "there are advantages in having a single eye to the screw, instead of a double one;" but, nevertheless, that he did not "think the use of a double eye instead of a single one would evade the charge of infringement."

The advantages resulting from sharpening the point of the screw were stated by him to be "a sharp pointed screw will enter the material of which the rope is composed and hold the thimble in a positive manner, and this is true even if the screw becomes slightly slackened; a flat ended screw simply holds by frictional contact, and if the screw is slightly slackened does not prevent the thimble from being slipped out of place."

It appeared that the Wiard socket as actually made and sold had a convex end; that conical pointed screws were in common use prior to the patent in suit; that complainant was acquainted with prior devices, including that of Wiard, and sought to improve upon them; and that the sales of his device were large.

Reference was made on the argument to testimony adduced on behalf of complainant tending to show an essential mechanical difference between the two devices in the use of one eye centrally located in the one, and the use of two eyes, each placed one side of the center, in the other, and it was contended that the former was superior in that the latter was more exposed to being struck and unscrewed, and also exposed to the liability of the attaching hook being snapped "into the wrong eye, especially at night and in the dark, which is constantly the case during the winter months, when much of the caring for stock is done after nightfall."

But be this as it may, the claim of the patent was not limited to the use of a single eye, and it is apparent that the only material difference between the patented thimble and the Wiard socket to be considered is that the screw of the one had a rounded end and the other a sharpened point, while the *difference of operation [520

is manifestly that a sharpened point will enter a material upon which it is directed, further than a rounded point. We cannot perceive in the recognition of the fact that facility of penetration is greater in a sharpened point than in a blunt one, any such evidence of invention as is sufficient to sustain this patent. Moreover, the Wiard screw, which is rounded at its end, is shown to enter the rope when screwed down hard, and in respect of the engagement between the rope and the socket or thimble to operate in the same way as the patented thimble. In other words it holds by something more than frictional contact. Each of these screws compresses the rope within the socket, but the Covert screw, being sharpened, penetrates further than the other. The change is in degree and not in function.

We think the evidence fails to show that the Wiard socket was not a practicable and successful article, and agree with the remark of *Judge* Wallace in his opinion overruling the exceptions to the master's report (*Covert* v. *Sargent*, 38 Fed. Rep. 237, 238) that: "The patented articles are not so superior to the other fastening devices as to give rise to any cogent presumption that those who purchased them of the defendants would have bought them of the plaintiff in preference to the other devices, and without reference to the difference in price, if they could not have bought them elsewhere."

We are of opinion upon this record that the alleged improvements was such a one as would have occurred to any one practically interested in the subject, and that it did not involve such an exercise of the inventive faculty as entitled it to protection.

The decree is reversed and the cause remanded with a direction to dismiss the bill.

Mr. Justice **Jackson** did not hear the argument, and took no part in the decision of this case.

521] HENRY HERRMAN ET AL., *Plffs. in Err.*,
v.
WILLIAM H. ROBERTSON, Collector of the Port of New York.

(See S. C. Reporter's ed. 521-526.)

Protest against illegal duties—sufficiency of.

1. A protest against the payment of illegal duties which fails to point out the provision of the Tariff Act which actually controls, but only raises the question which of two clauses should govern, is insufficient.
2. A protest against the payment of illegal duties must be so distinct and specific as to notify the collector of the nature of the objection to the duty imposed.

[No. 280.]

Argued March 14, 1894. Decided April 2, 1894.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to *Greely* v. Thompson, 13: 397.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for defendant William H. Robertson, Collector, in an action brought by Henry Herrman *et al.*, plaintiffs, for the recovery of duties paid under protest. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

Action to recover duties paid under protest. Trial by jury, and bill of exceptions as follows:

"This action was brought to recover the difference in duty between 35 per cent ad valorem and various higher rates of duty assessed and paid upon certain goods imported by plaintiffs at the port of New York in the year 1881.

"Duties were paid to defendant under protest as follows: Against defendant's liquidation claiming 'The goods in question are liquidated by you as being liable to a duty of 50 cents per pound and 35 per cent ad val.

"'We claim the goods are composed of hair and cotton only, and as such should pay a duty of 35 per cent ad val. as a nonenumerated article under the second half of section 2499, Rev. Stat., being the highest rate of duty which any of the component material pays.'

"Plaintiffs thereafter, in due time, appealed and brought this suit.

"Further to maintain the issues on their part, plaintiffs *introduced samples of the [522 goods in question and evidence tending to show from an analysis their component material to be calf hair and cotton exclusively. Among other evidence on this point a report as to these samples from Prof. Torrey, an expert witness, was verified by him, and on this point was as follows:

"'The sample marked 'C 886' by the Republic, August 12, 1887, found to contain 87.4 calf hair and 12.6 cotton by weight.

"'The next sample, '292,' Arizona, Aug. 20, 1887, 86.6 calf hair and 13.4 cotton.

"'Sample 760, Alaska, Dec., 1887, 88.5 calf hair and 11.5 cotton.

"'H. T. 2680, 85.6 calf hair and 14.4 cotton.

"'H. T. 2759, 86.1 calf hair and 13.9 cotton.

"'The above samples were all composed of calf hair and cotton, with no admixture of wool that could be detected by the aid of the microscope.

"'(Signed H. G. Torrey, government examiner of textile fabrics).'

"There was no admixture of wool in the goods.

"It further appeared that the goods in question were a low grade of calf hair goods. It further appeared that they cost less than forty cents per pound, the foreign value per running yard being from one shilling and ten pence to two pence.

"Plaintiffs having rested, counsel for defendant, without introducing any evidence, moved the court to direct a verdict for the defendant; which motion was granted and the counsel for the plaintiffs then and there duly excepted, and the exception was allowed."

The verdict having been returned as directed and judgment been entered thereon, plaintiffs brought the case to this court on writ of error.

Mr. **Edwin B. Smith,** for plaintiffs in error:

The burden of proving error in the collector's assessment is upon the protestant.

Arthur v. *Unkart*, 96 U. S. 118 (24: 768).

No suitor can set up an issue entirely outside his pleadings.

Codd v. *Rathbone*, 19 N. Y. 39.

The importers were bound only to state, as they did, that the duty was illegal, and why it was illegal.

Heinze v *Miller*, 144 U. S. 84 (36: 335).

If, under the pleadings, it was competent for the collector to claim that our goods were really dutiable at a less rate than we asked for them, this at least, threw upon him the burden of proving what he thus asserted.

Ross v. *Fuller*, 17 Fed. Rep. 224; *Kennedy* v. *Hartranft*, 9 Fed. Rep. 18; *Aspen Min. & S. Co.* v. *Billings*, 150 U. S. 38 (37: 989); *Arthur* v. *Herman*, 96 U. S. 141 (24: 812); *Herrman* v. *Miller*, 127 U. S. 365 (32: 187); *Re Rosenstein*, 56 Fed. Rep. 825.

Preponderance of weight has no tendency to establish preponderancy of value.

Miller v. *Butterfield*, 125 U. S. 70 (31: 643).

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error:

The collector's classification was presumptively correct.

Arthur v. *Unkart*, 96 U. S. 118 (24: 768).

The protest is not sufficient.

This action is a statutory one, and can be maintained only on complying with the statutory requirements.

Cary v. *Curtis*, 44 U. S. 3 How. 236 (11: 576); *Lawrence* v. *Caswell*, 54 U. S. 13 How. 488 (14: 235); *Nicholl* v. *United States*, 74 U. S. 7 Wall. 122 (19: 125); *Arnson* v. *Murphy*, 109 U. S. 238 (27: 920); *Warren* v. *Peaslee*, 2 Curt. 235; *Thomson* v *Maxwell*, 2 Blatchf. 392.

Unless the protest set forth distinctly and specifically the ground of the objection to the amount claimed, it fails to meet the requirement of the Act of Congress.

Davies v. *Arthur*, 13 Blatchf. 34; *Norcross* v. *Greely*, 1 Curt. 120; *Chung Yune* v. *Kelly*, 8 Sawy. 415; *Re Austin*, 47 Fed. Rep. 873; *Arthur* v. *Dodge*, 101 U. S. 34 (25: 948); *Arthur* v. *Morgan*, 112 U. S. 495 (28: 825); *Schell* v. *Fauché*, 138 U. S. 562 (34: 1040); *Re Collector of Customs*, 55 Fed. Rep. 276.

Specifying an objection, although specification be unnecessary, restricts the scope of the objection by a quasi estoppel.

Evanston v. *Gunn*, 99 U. S. 660 (25. 306); *Belk* v *Meagher*, 104 U. S. 279 (26: 735).

Where there is no question of fact, verdicts can be directed upon the similitude clause as upon any other.

Fisk v. *Arthur*, 103 U. S. 431 (26: 520); *Stewart* v. *Maxwell*, 57 U. S. 16 How. 150 (14: 883); *Herrman* v. *Miller*, 127 U. S. 363 (32: 186).

523] **Mr. Chief Justice* **Fuller** delivered the opinion of the court:

The claim made by the protest was that these goods were dutiable, as nonenumerated, under the last clause of section 2499,* at thirty-five per cent ad valorem, as being composed of hair and cotton only, and the cotton chargeable at a higher rate than calf hair. The report of the case (41 Fed. Rep. 881) shows, and it is so asserted by the government, that the goods were classified under the first clause of that section as bearing a similitude to manufactures composed wholly or in part of "the hair of the alpaca, goat, or other like animals," as provided by the 12th paragraph of class three of Schedule L, section 2504, Revised Statutes (2d ed.) 471 and therefore dutiable at twenty, thirty, forty, or fifty cents per pound, according to value, in addition to thirty-five per centum ad valorem. According to the protest, the liquidation was at fifty cents per pound in addition to the thirty-five per cent; according to the bill of exceptions, at "various higher rates" than the thirty-five per cent; and, according to the case as reported, the exaction was at twenty cents per pound and thirty-five per cent ad valorem. What the classification actually was is not shown by the bill of exceptions, but if it were as reported, there is nothing in the record to overcome the presumption in favor of the correctness of the collector's action, and *Arthur* v. *Fox*, 108 U. S. 125 [27: 675], would be in point. But it is admitted that the circuit court held that the *decision in **[524** *Miller* v. *Butterfield*, 125 U. S 70 [31: 643], applied, and that the goods were manufactures of hair, and as such provided for by the clause in Schedule M, section 2504, Revised Statutes (2d ed.) 476, under the phrase "and all other manufactures of hair, not otherwise provided for, thirty per centum ad valorem," and therefore, being enumerated, were not within section 2499.

The ruling in *Miller* v. *Butterfield* was that "goat's hair goods," composed of eighty per cent of goat's hair and twenty per cent of cotton, came within the clause last above referred to, and that "in the absence of a settled designation of a cloth by merchants and importers, its designation as hair, silk, cotton, or woolen for the purposes of customs revenue depends upon the predominance of such article in its composition, and not upon the absence of any other material." Counsel for plaintiffs in error conceded in argument that that case would be applicable if these fabrics had been eighty per cent of hair in value, but insisted that there was no proof that the hair was the main element of value, and that it did not follow that the relative values accorded with the relative weights. But the bill of exceptions

*"SEC. 2499. There shall be levied, collected, and paid, on each and every nonenumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any nonenumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid, on such nonenumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable."

does not exclude the inference that there was evidence of relative value or that counsel assumed that goods consisting by weight of eighty five and one half to eighty-eight and one half per cent of calf's hair to eleven and one half to fourteen and one half per cent of cotton were to be taken as containing eighty per cent of hair in value as compared with the value of the cotton.

The case was disposed of below on the question of the sufficiency of the protest, and that is really the only question for consideration here.

The requisition of the statute (Rev. Stat. §§ 2931, 3011; Act Feb. 27, 1877, 19 Stat. at L. 240, chap. 69) as to the notice to be given the collector, in order to recover back an excess of duties paid, is thus expounded by *Mr. Justice* Clifford in *Davies* v. *Arthur*, 96 U. S. 148, 151 [24: 758, 759]:

"Protests of the kind must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; 525] *but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated. *Burgess* v. *Converse*, 2 Curt. 223.

"Two objects, says *Judge* Curtis, were intended to be accomplished by the provision in the Act of Congress requiring such a protest: 1. To apprise the collector of the objections entertained by the importer, before it should be too late to remove them, if capable of being removed. 2. To hold the importer to the objections which he then contemplated, and on which he really acted, and prevent him, or others in his behalf, from seeking out defects in the proceedings after the business should be closed, by the payment of the money into the Treasury. *Warren* v. *Peaslee*, 2 Curt. 235; *Thomson* v. *Maxwell*, 2 Blatchf. 392."

And this is reiterated in substance by *Mr. Justice* Blatchford in *Arthur* v. *Morgan*, 112 U. S. 495, 501 [28: 825, 827], where he said for the court: "A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure." That was the case of the importation of a carriage, claimed in the protest to be "personal effects" used by the owner "over a year" before importation, it being also stated that "personal effects in actual use" were free from duty, whereas the carriage came under the head "household effects in use abroad not less than one year." Personal effects in actual use and household effects if used abroad not less than one year were alike exempt from duty, and as the error was plainly clerical and could not have misled the collector, the protest was held sufficient.

In *Heinze* v. *Miller*, 144 U. S. 28, 34 [36: 833, 835], the goods were gloves made on frames and composed of cotton and *silk. [526 in which cotton was the component part of chief value, and were dutiable at thirty-five per cent ad valorem, less ten per cent, as gloves made on frames of whatever material composed. The collector rated them at sixty per cent ad valorem as "ready made clothing of silk, or of which silk shall be a component material of chief value," or "silk gloves."

The protest specifically stated that the goods were "partly cotton gloves mixed with silk," and "composed of cotton and silk, cotton, chief part, the duty of 60 per cent being only legal where silk is the chief part," and that the gloves were liable to a duty of only thirty-five per cent less ten per cent. The objection was that the protest did not state that the gloves were made on frames, and this court held, again speaking through *Mr. Justice* Blatchford; that: "It is entirely immaterial that the protest did not specify that the gloves were made on frames. It was sufficient to state that the gloves were composed of cotton and silk, and that the cotton was the component material or part of chief value, and the silk was not the component material of chief value. The importers were bound only to state, as they did, that the duty of sixty per cent was illegal, and why it was illegal."

In the case at bar, the goods were apparently classified under the similitude clause, but that was not correct because they were to be regarded as "manufactures of hair," and therefore enumerated.

But the importers also insisted that the goods were non-enumerated, and did not assert that they were not within the clause relied on by the collector, save as it was objected that they came under the last clause of section 2499, which was likewise incorrect. The protest failed to point out or suggest in any way the provision which actually controlled, and in effect only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable. We agree with the circuit court in holding the protest to have been insufficient.

Judgment affirmed.

Mr. Justice **Jackson** was not present when this case was argued, and took no part in its decision.

S. M. HUNTLEY ET AL., *Plf's. in Err.*, [527
v.
KINGMAN & CO.

(See S. C. Reporter's ed. 527-538.)

Preferences by insolvent debtor—chattel mortgages.

1. At common law a debtor in failing circumstances has the right to pay one creditor in pref-

NOTE.—*As to chattel mortgage allowing possession and sale of goods; whether void or not*, see note to Robinson v. Elliott, 22: 758.

As to necessity of filing chattel mortgages; against whom they need not be filed, see note to Herryford v. Davis, 26: 160.

erence to another, even where he is aware of his inability to pay all in full.

2. In cases of chattel mortgages, the reservation of a surplus to the mortgagor, is no evidence of a fraudulent intent.

[No. 256.]

Argued March 12, 1894. Decided April 2, 1894.

IN ERROR to the United States Court for the Indian Territory, to review a judgment in favor of plaintiff, Kingman & Co., a corporation, against S. M. Huntley *et al.*, interpleaders in an action brought by Kingman & Company, against one Duncan, in which an attachment was issued and levied upon a stock of goods as the property of Duncan, and in which the said interpleaders filed an interplea setting up that said Duncan had executed a deed of trust of such goods to save them harmless as sureties for said Duncan upon certain promissory notes and to pay said notes. The verdict and judgment were for the plaintiff sustaining the attachment and for the payment of plaintiff's judgment, and for the recovery of costs against the interpleaders. *Reversed, with directions to grant a new trial.*

Statement by *Mr. Justice* **Brown:**

This action was originally begun September 28, 1889, by Kingman & Co., a corporation organized under the laws of Illinois, against one Duncan, whose Christian name is not given, and whose surname is sometimes spelled Duncum and sometimes Duncan, a white man, a citizen of the United States, and a resident of the Indian territory, to recover the sum of $1994.42 with interest and exchange, being the amount of two promissory notes made by Duncan, payable to the order of the plaintiff, but not then due. The complaint contained an allegation that Duncan, the defendant, had disposed of his property, and had suffered it to sold, with intent to defraud his creditors, and to hinder and delay them in the collection of their debts, and also that he was about to remove his property, or a material part thereof, out of the Indian territory, with fraudulent intent, etc., and prayed for an attachment and for judgment. On the same day, a formal affidavit for an attachment was filed and a writ issued.

Pursuant to the attachment, the marshal seized a stock of goods as the property of Duncan, and plaintiffs in error filed an interplea, setting up that the interpleaders were sureties for the defendant Duncan, upon certain prom- [528] issory notes, two *of which were then overdue, and that on July 27, 1889, Duncan, for the purpose of saving his sureties harmless, executed and delivered to one Salters, whose Christian name is not given, as trustee, a deed of trust of his stock of goods. That immediately after the execution of such deed, Salters, at the instance of the beneficiaries, took absolute possession of the property named in the deed of trust, and began the discharge of his duties as trustee, advertised the property for sale, and had procured a buyer for the same at its full cash value, at the time the levy was made which stopped the sale; that, at the time of such levy, the trustee was in actual possession of the property; that the plaintiffs and the officers making the levy were notified of the fact; and that the notes, to secure which the deed of trust was given, were still unpaid and valid claims against Duncan and his sureties; that the deed of trust is a valid lien upon the property; that the property is not worth the amount of the lien, nor more than the sum of $2500; that a sale by the marshal would necessarily be attended with great loss, and that the trustee could sell the property at a much better advantage than the marshal. Wherefore the trustee and sureties prayed for an order restoring the property to the trustee, and for the execution of the trust.

The so-called deed of trust was as follows:

"State of Texas, }
County of Cooke, }

"Know all men by these presents, that I, W. H. Duncan, a resident of the Indian territory, for and in consideration of the sum of ten dollars paid by J. J. Salters, the receipt of which is hereby acknowledged, have sold, and by these presents do sell, transfer, convey, and confirm, unto the said J. J. Salters and to his successors in this trust the following described property, to wit: The storehouse now owned and occupied by the said W. H. Duncan, at Beef Creek, in the Indian territory, the fixtures therein, and all goods, wares, and merchandise contained in said house, and the books, notes, and accounts of said W. H. Duncan in said business, it being *intended [529] hereby to include all stock owned by said W. H. Duncan in his business as a general merchant at Beef Creek, I. T.; also all cattle and horses owned by him at said Beef Creek, together with all and singular the right and appurtenances to the same in any manner belonging or appertaining; to have and hold all and singular the property above described unto the said J. J. Salters or substitute forever. This conveyance is, however, intended as a trust for the better securing of S. M. Huntley, Samuel Paul, S. M. White, and James Rennie against the payment of three promissory notes on which I am principal, and which, as hereafter shown, they signed as sureties; which said notes are as follows."

[Here follow copies of three notes, one by Duncan, White and Rennie for $1550, one by Duncan, Paul and Rennie for $2500, and one by Duncan and Huntley for $5165. The first two were due August 1, 1889, the last June 1, 1890.]

"Upon payment of which said promissory notes according to their face and tenor, being well and truly made, then in such case this conveyance is to become null and void, and shall be released at cost of said W. H. Duncan; but in case of failure or default of payment of said notes when they shall respectively become due, or of either of them, then the other of said notes shall be deemed due and payable; and in such event the said J. J. Salters is, by these presents, fully authorized and empowered, and it is made his special duty upon request of either or all the aforesaid beneficiaries herein at any time made after default as aforesaid, to sell the above described property to the highest bidder for cash in hand —selling at public or private sale, in bulk or retail, with or without advertisement as may seem to said trustee or his substitute best; and after said sale shall make the necessary con-

veyance of the property so sold, and the proceeds of said sale shall pay to the aforesaid beneficiaries herein, in proportion to the respective amounts for which each may be surety at the time of said sale, as evidenced by the above notes, and the payments that may be made thereon, in which notes all signing are sureties, except W. H. Duncan, and shall pay the expenses of this trust, including a commis-
530] sion of 5 % to the trustee acting *hereunder, holding the remainder subject to the order of the said W. H. Duncan. It is hereby especially provided that should the trustee named herein from any cause whatever fail or refuse to act or become disqualified from acting as such trustee, then the beneficiaries aforesaid, S. M. Huntley, S. M. White, Samuel Paul, and James Rennie, shall have full power to appoint a substitute, in writing, who shall have the same power as trustee hereinbefore named, and I, by these presents, ratify and confirm any and all acts which said trustee or substitute may do hereunder.

"Witness my hand this 27th of July, 1889.
"W. H. Duncan."

Kingman & Co. subsequently filed an answer to this interplea, averring that the notes secured by the deed of trust were void for usury, and for want of consideration; denied that the interpleaders were accommodation indorsers or sureties, or that the trust deed was valid, or gave to the interpleaders any right of property, and alleged that the instrument was made by Duncan for the purpose of placing his property beyond the reach of his creditors, and for the purpose of hindering and delaying them in the collection of their debts; denied that Salters was acting for the beneficiaries named, and averred that he was a clerk of Duncan's and was assisting him in fraudulently disposing of his property, and that he took possession for the purpose of protecting the property from Duncan's creditors.

The case was tried upon the issue joined between Kingman & Co. and the interpleaders. Upon the trial, the court instructed the jury that the deed of trust under which the interpleaders claimed the property was fraudulent on its face; that the same was sufficient for plaintiff's attachment, and that the jury should return a verdict in its favor, which was accordingly done. The defendants in the proceeding sued out this writ of error.

Mr. **John J. Weed** for plaintiff in error.
No counsel for defendant in error.

531] *Mr. Justice* **Brown** delivered the opinion of the court:

This case turns upon the validity of the so-called deed of trust executed by Duncan to Salters to indemnify the plaintiffs in error for their signatures upon Duncan's notes.

The property conveyed consisted of a storehouse and its fixtures, together with all the goods, wares, and merchandise contained therein, and the books, notes, and accounts of Duncan in his business as a general merchant, as well as all cattle and horses owned by him at Beef Creek. The testimony indicated that the deed did not include all the property of Duncan, but that he also had a farm near Beef Creek, although the proof was not clear as to its size or value.

No brief was filed by the defendant in error, but in the court below the following clauses appear to have been relied upon as invalidating the deed:

1. The deed was to become null and void upon the payment of the notes secured by it, and there is an inference, though no express provision, that Duncan was to remain in possession until default.

2. Upon default in the payment of either of the notes it was made the duty of the trustee, upon the request of the beneficiaries, or either of them, to sell the property to the highest bidder for cash, either at public or private sale, with or without advertisement.

3. Upon such sale being made, the trustee was to pay to the beneficiaries in proportion to the amounts for which each might be surety at the time of the sale, *holding the remainder subject to Duncan's orders.*

The court instructed the jury that, by the reservation of the surplus, the deed was fraudulent upon its face, and was sufficient ground for the plaintiffs' attachment, and the jury were accordingly instructed to return a verdict for the plaintiffs.

The case must be determined by the application of the general principles of the common law to the questions involved. It is true, that, by Act of Congress of May 2, 1890 (26 Stat. at L. 81) certain general laws of the state of Arkansas, among *which was a chapter re- [532
lating to assignments for the benefit of creditors, were extended and put in force in the Indian territory, until Congress should further provide. But the instrument in question in this case was made July 27, 1889, before this statute was enacted, so that neither the statutes of Arkansas, nor the decisions of the supreme court of that state, construing those statutes, constituted at the time a rule of decision of the United States court in the Indian territory.

There is upon this record but little evidence of actual fraud in the execution of the instrument in question. The notes mentioned, the payment of which it was designed to secure, were given for money borrowed of Stevens & Henning, bankers of Gainesville, for the purchase of grain to feed certain cattle in which Stevens & Henning had an interest. The beneficiaries were joint makers with Duncan of the notes so given to Stevens & Henning. It is entirely well settled, both in England and America, that at common law a debtor in failing circumstances has a right to prefer certain creditors to whom he is under special obligations, though by such preference the fund for the payment of the other creditors be lessened or even absorbed. If, as must be conceded, he has the right to *pay* one creditor in preference to another, even where he is aware of his inability to pay all in full—in other words, where he is insolvent, there is no just reason why, in making provision for all, by way of assignment, he may not make special provision for some. *Marbury* v. *Brooks*, 20 U. S. 7 Wheat. 556, 577 [5: 522, 527]; *Brashear* v. *West*, 32 U. S. 7 Pet. 608 [8: 801]; *Clarke* v. *White*, 37 U. S. 12 Pet. 178 [9: 1046]; *Tomp-*

kins v. *Wheeler*, 41 U. S. 16 Pet. 106 [10:903]; *Grover* v. *Wakeman*, 11 Wend. 187, 194, 25 Am. Dec. 624; *Tillou* v. *Britton*, 9 N. J. L. 152; *Blakey's App.* 7 Pa. 449, 451; Burrill, Assignment, § 160; Jones, Chattel Mortg. § 356.

The tendency of courts in modern times has been, not to hold instruments of this character to be fraudulent and void upon their face, unless they contain provisions plainly inconsistent with an honest purpose, or the instrument indicates with reasonable certainty that it was executed, not to secure bona fide creditors, but to enable the debtor to continue to carry on his business under cover of another's name. **533]** So early *as 1805, it was held by this court in *United States* v. *Hooe*, 7 U. S. 3 Cranch, 73 [2: 370], that the mortgage of a part of his property, made by a collector of revenue to the surety upon his official bond, to indemnify him for his responsibility, and to secure him for indorsements at the bank, was valid against the United States, though it turned out that the mortgagor was unable to pay all his debts at the time the mortgage was given, and the mortgagee also knew at this time that he was largely indebted to the United States. It was contended that the mortgage was fraudulent upon its face, but the case was distinguished from Twyne's (3 Coke, 81) in the fact that in Twyne's case the deed was of *all* the property; was *secret;* was of *chattels*, and purported to be *absolute*, yet the vendor remained in possession and exercised ownership over them; while in the case then under consideration the deed was of a part of the property; was of record; was of lands, and purported to be a conveyance which left the property conveyed in the possession of the grantor. The case was also distinguished from *Hamilton* v. *Russell*, 5 U. S. 1 Cranch, 310 [2: 118], in which this court declared an absolute bill of sale of a personal chattel, of which the vendor retained possession, to be a fraud. In *Lukins* v. *Aird*, 73 U. S. 6 Wall. 78 [18: 750], an absolute deed of land, with a secret reservation to the grantor to possess and occupy it for a limited time, was held to lack the element of good faith, though made upon a valuable consideration; for while it purported to be an absolute conveyance on its face, there was a secret agreement between the parties inconsistent with its terms, securing a benefit to the grantor at the expense of those he owed. The deed was held to be void by reason of the trust thus secretly created. So in *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 513 [22: 758], a chattel mortgage, which provided that until default was made in the payment of the notes, the mortgagor might remain in possession of the goods, sell the same as theretofore and supply their places with other goods, which should become subjected to the lien of the mortgage, was held to be a fraud upon its face, although the mortgage was recorded according to law. The decision was put upon the ground that both the possession and the right of disposition were to remain with the mortgag- **534]** ors; "they are to *deal with the property as their own; sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the bona fide security of the debts then existing, and their payment at maturity, it is based upon the idea that they may be indefinitely prolonged. . . . It is very clear that the instrument was executed upon the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment." There was no ruling in this case, however, that a mere retention of possession would have avoided the mortgage. Upon the other hand, it was held in *Stewart* v. *Dunham*, 115 U. S. 61 [29: 329], that in the absence of fraud a transfer by a debtor in Mississippi of all his property to one of his creditors in satisfaction of his debt was valid. The case was disposed of as one of general law. And in *Estes* v. *Gunter*, 122 U. S. 450 [30: 1228], a deed by an insolvent debtor in Mississippi to secure sureties upon his note, though made in advance of, and in contemplation of, a general assignment for the benefit of creditors, was held to be valid under the laws of that state, though containing a provision that the creditor should remain in possession until the maturity of the note. In this case, also, the common law did not seem to have been affected by any local statute. So, too, in *Smith* v. *Craft*, 123 U. S. 436 [31: 267], a bill of sale of a stock of goods, by way of preference of a bona fide creditor, was held not to be fraudulent as matter of law, by reason of a stipulation that the purchaser should employ the debtor at a reasonable salary to wind up the business.

The latest expression of this court upon the subject is contained in the case of *Etheridge* v. *Sperry*, 139 U. S. 266 [35: 171], in which certain creditors of one Hamilton were secured by chattel mortgages upon a stock of goods levied upon by an execution creditor. There was no reservation of interest to the mortgagor, but an express provision that if he defaulted in payment, or attempted to remove from the county any part of the mortgaged property, the mortgagee might take *immediate **[535** possession, and before the maturity of the secured notes. The question presented was whether, as matter of law, a mortgage given by a merchant on his stock of goods to secure debts not yet due, which had no imperfections upon its face, contained no reservations for the benefit of the mortgagor, was apparently only for the security of the mortgagee, and gave him full power to take possession upon default of payment, was invalidated by a parol understanding at the time of its execution that the mortgagor might use the proceeds of his sales to support himself, and to keep up the stock by purchase, applying only the surplus to the payment of the mortgage debt; or whether such understanding was simply to be taken into consideration, with the other circumstances, as bearing upon the question of good faith. The cases of *Second Nat. Bank of Leavenworth* v. *Hunt*, 78 U. S. 11 Wall. 391 [20: 190]; *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 513 [22: 758]; and *Means* v. *Dowd*, 128 U. S. 273 [32: 429], were all reviewed and distinguished, and it was held that the chattel mortgage was not necessarily invalidated by the parol agreement that the mortgagor was to re-

tain possession with the right to sell goods at retail, the court placing its opinion largely upon the Iowa cases, which were regarded as resting upon sound principles. See also *Peoples Sav. Bank* v. *Bates*, 120 U. S. 556 [30: 754].

The principal reliance of the court below in this case was placed upon *Means* v. *Dowd*, 128 U. S. 273 [32: 429], which was a conveyance of all the goods and personal property of the assignor to provide for the payment of certain debts, and to indemnify the indorsers upon certain notes. The instrument was variously called a "deed of trust," an "assignment," and a "mortgage." It contained an express provision that the grantors were to remain in possession of the property and continue to sell the goods for cash only, and to collect, under the direction and control of the grantees, the proceeds to be deposited in bank weekly, and applied, under the direction of the grantees, to replenishing the stock by such small bills as might be agreed upon, and to the payment of the debts of the firm in a specified order; and in case of failure to make payments, or if for any other cause the grantees might so elect, it should be lawful for them to take possession [536] and dispose of the same *at public or private sale. This instrument was held to secure to the assignor an interest in, or an unlimited control over, the property conveyed, which had the effect of hindering or delaying creditors, and to be void as being a fraud. "In the case before us," said *Mr. Justice* Miller, "the whole face of the instrument has the obvious purpose of enabling the insolvent debtors who made it to continue in their business unmolested by judicial process, and to withdraw everything they had from the effect of a judgment against them; for it is shown that, except the goods in this place of business transferred by the conveyance, they had nothing of value but one or two pieces of real estate encumbered by mortgage for all they were worth. It specifically provides that the grantor shall remain in possession of the said property and choses in action, with the right to continue to sell the goods and collect the debts under the control and direction of the grantees." The instrument was treated as an artful scheme to enable insolvent debtors to continue in business, in connection with the preferred creditors, at the same time withdrawing their property from the claims of other creditors which might be asserted according to the usual forms of law; and that by the mere expedient of paying interest upon the indebtedness, they had it in their power to continue in business with a large stock of goods on their shelves, and defy the unprotected creditors. The authority to take possession was accompanied by no direction for immediate sale, or winding up the business; but, on the contrary, their discretion as to taking possession and selling seemed to be absolute, and intended to be controlled for their own benefit and that of the debtors, without regard to the unsecured creditors. While the case bears a strong analogy to the one under consideration, we think it is distinguishable in the fact that there was an express provision that the mortgagors should remain in possession and continue business at the will of the mortgagees, who were given such powers as would enable the mortgagors to continue in business for their benefit, and at the same time to bid defiance to the unsecured creditors. In this case there is not only no express reservation of possession to the mortgagor, but even if *there had been, in view [537] of the fact that such possession was immediately surrendered to the mortgagee, it is difficult to see how unsecured creditors could have been deceived or prejudiced by such reservation. In *Means* v. *Dowd*, the mortgage was not recorded, as required by law, for nearly three months after its execution, and the mortgagors were permitted for several months to control the goods and to deal with them as their own. Even when the trustees did in fact take possession, they made no change in the sign nor in the manner of conducting the business, but kept the same books by the same bookkeeper, and also employed the mortgagors to conduct the business upon a salary for them.

There can be no doubt upon this record that the deed of trust in question was made upon a valuable consideration, and for the protection of bona fide sureties. The clause most relied upon by the court below is the one which requires that, after payment to the beneficiaries and the expenses of the trust, the remainder should be held subject to the order of Duncan. But if it were not to be paid to Duncan, to whom should it be paid? Clearly the trustee was not entitled to retain any more for himself than was necessary for the payment of the trust and a reasonable compensation for his own services. If he had retained more than this, he might have been compelled by Duncan to account to him for such surplus. Clearly he had no right to pay it to certain of the creditors in preference to others. If he had been a general assignee for the benefit of all the creditors, he would have been obliged to pay them *pro rata;* but he was not. He was a trustee of a part—not necessarily of the whole of Duncan's property—for the benefit of certain creditors, and if any surplus were left after the payment of these creditors, it might properly be paid to the mortgagor for the benefit of the others.

Whatever may be the rule with regard to general assignments for the benefit of creditors, there can be no doubt that, in case of chattel mortgages (and the instrument in question, by whatever name it may be called, is in reality a chattel mortgage) the reservation of a surplus to the mortgagor is only an expression of what the law would imply without a reservation, *and is no evidence of a fraudulent [538] intent. This was the ruling of the court of appeals of New York in *Leitch* v. *Hollister*, 4 N. Y. 211, where the assignment was to the creditors themselves for the purpose of securing their demands. "A trust," said the court, "as to the surplus results from the nature of the security, and is not the object or one of the objects, of the assignment. Whether expressed in the instrument or left to implication, is immaterial. The assignee does not acquire the entire legal or equitable interest in the property conveyed, subject to the trust, but a specific lien upon it. The residuary interest of the assignor may, according to its nature, or that of the property, be reached by execution or by bill in equity." Cases in which reservations for the benefit

of the assignor have been held to invalidate the assignment have usually been those where the reservation was either secret, or was upon its face detrimental to the interest of the creditors, and a practical fraud upon them. But if the reservation be only of any surplus which may chance to remain after the debts are paid, it is difficult to see why it should invalidate the instrument, as the creditors obtain all they are entitled to, and the surplus is that which as matter of law properly belongs to the mortgagor. It so rarely happens that a surplus is realized after the payment of all the debts, that courts should not be too technical in holding that the reservation of such surplus invalidates the instrument, unless it appears to have been made with fraudulent intent. If a surplus had been realized in this case, it is difficult to see what could have been done with it, except to return it to the mortgagor, in view of the fact that the trustee was not a general assignee for the benefit of all the creditors. *Dunham* v. *Whitehead*, 21 N. Y. 131; *Curtis* v. *Leavitt*, 15 N. Y. 9, 204; *Beck* v. *Burdett*, 1 Paige, 305, 19 Am. Dec. 436; *Camp* v. *Thompson*, 25 Minn. 175; *Calloway* v. *People's Bank of Bellefontaine*, 54 Ga. 441; *Hoffman* v. *Mackall*, 5 Ohio St. 124, 64 Am. Dec. 637.

The judgment of the court below must, therefore, be reversed, and the case remanded with directions to set aside the verdict, and grant a new trial.

Mr. Chief Justice **Fuller** concurred in the result.

539] *MICHAEL DEALY, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 539-547.)

Nolle prosequi—verdict on all counts but one—indictment for conspiracy—defrauding government of public lands—overt act—where done.

1. A *nolle prosequi* as to some of the counts in an indictment, works no acquittal, but leaves the prosecution just as though such counts had never been inserted in the indictment.
2. Where defendant was found guilty of all but one count of the indictment which was not referred to in the verdict, the discharge of the jury is equivalent to a verdict of not guilty on that count.
3. An indictment for a conspiracy to defraud the United States of the title of large tracts of public lands is not defective because in stating the conspiracy there is no specification of the particular tract or tracts of land of which defendants conspired to defraud the United States.
4. In an indictment charging defendants with conspiring to defraud the government by means of false entries to lands under the homestead laws, the word "entries" means the complete transfers of title.
5. Charging in an indictment that the overt act was done according to and in pursuance of the conspiracy charged, in effect charges that it was done to effect the object of the conspiracy, and subsequently to the conspiracy.
6. If the conspiracy charged in an indictment, was entered into within the United States and the jurisdiction of the court, the crime of conspiracy was then complete, and the subsequent overt act in pursuance thereof, may have been done anywhere, and it is not necessary that it be charged to have been done within the jurisdiction of the court.

[No. 1035.]

Argued March 20, 1894. Decided April 2, 1894.

IN ERROR to the District Court of the United States for the District of North Dakota, to review a judgment of conviction of Michael Dealy and others of the crime of conspiracy to defraud the United States, as denounced in U. S. Rev. Stat. § 5440, and sentence of Dealy to fine and imprisonment. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On December 16, 1892, an indictment was returned by the grand jury in the District Court of the United States for the District of North Dakota, charging this plaintiff in error, together with others, with the crime of conspiracy to defraud the United States as denounced in section 5440, Revised Statutes, which reads:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten *thousand dollars, and to imprison- [540 ment not more than two years."

The indictment was in seventeen counts. The first was as follows:

"That on the first day of April, in the year of our Lord one thousand eight hundred and ninety one, in the county of Rolette, state of North Dakota, and within the jurisdiction of this court, one William W. Allen, one Michael Dealy, one Edward Laberge, one Peter Thibert, and one H. H. Fritz, and others to the grand jury unknown did commit the crime of conspiracy to defraud the United States, committed as follows:

"That at the time and place aforesaid the said William W. Allen, Michael Dealy, Edward Laberge, Peter Thibert, and H. H. Fritz, and others to the grand jury unknown did falsely, unlawfully, and wickedly conspire, combine, confederate, and agree together among themselves to defraud the United States of the title and possession of large tracts of land in said county of great value by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States, the said lands being then and there public lands of the United States, open to entry under said homestead laws at the local land office of the United States at Devil's Lake

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NOTE.—*As to indictment for murder; sufficiency of statement of time and place of death*, see note to Ball v. United States, 35: 377.

As to effect of general verdict, see note to Snyder United States, 28: 697.

As to when one or two persons jointly indicted may be a witness for the other or for the state against the other, see note to Benson v. United States, 36: 991.

City, in said state, and that according to and in pursuance of said conspiracy, combination, confederacy, and agreement among themselves had as aforesaid the said Allen did persuade and induce one Charles Pattnaude to make filing under said homestead laws and thereafter to make proof and final entry under said laws for the lands known and described as follows: The south half of the northeast quarter and lots one and two of section six, in township one hundred and sixty-three north, of range 70 west, of the fifth principal meridian, said lands lying and being in said county, on which said lands said Pattnaude, as said Allen then and there well knew, had never made settlement, improvement, or residence, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

541] *In the further counts the conspiracy was charged in substantially the same language, but with it in each a separate overt act, that in the third being stated as follows:

"According to and in pursuance of said conspiracy, combination, confederation, and agreement, the said Allen did fraudulently and unlawfully induce and persuade one Frank Premeau to appear as a witness for one Charles Pattnaude in making final proof under said laws before H. H. Fritz, clerk of the district court of the state of North Dakota in and for said county, being a court of record of said state, and as such witness before said Fritz to testify and make proof for said Pattnaude in effect that he had resided for more than five years immediately preceding the time of making said proof on the lands known and described as south half of the northeast quarter and lots one and two of section six, township one hundred and sixty-three, range seventy west, of fifth principal meridian, lying and being in said county, public lands of the United States and subject to entry under said laws of said land office, whereas, in fact, said Pattnaude, as said Allen well knew, had never resided on said land at any time within five years prior to making such proof, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States."

The overt acts stated in the other counts were of a similar character. Prior to the trial a *nolle* was entered as to the second, fourth, fifth, sixth, ninth, and seventeenth counts. The case being tried on the remaining counts, the defendants Allen, Dealy, and Laberge were found guilty on all but the sixteenth. A motion for a new trial and one in arrest of judgment having been overruled, the defendant Dealy was sentenced to imprisonment for the term of one year and one month, and to pay a fine of $1000. To reverse such judgment and sentence he sued out a writ of error from this court.

Mr. **A. S. Drake** for plaintiff in error.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error.

542] *Mr. Justice* **Brewer** delivered the opinion of the court:

The first proposition of counsel for defendant is that the acquittal on certain of the counts works an acquittal as to all. There was in terms no verdict of not guilty as to any count. A *nolle* was entered as to several, but a *nolle* works no acquittal, and leaves the prosecution just as though no such count had ever been inserted in the indictment. Of those remaining, one, the sixteenth count, was not referred to in the verdict. It may have been simply overlooked by the jury. Be that as it may, the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count. Upon this, defendant's counsel say that the only offense charged is conspiracy, that "the indictment amounts to but one count and one charge of conspiracy, with seventeen different overt acts," and that an acquittal on one count acquits him of the single offense charged in all the counts. But this is obviously a mistake. It is familiar law that separate counts are united in one indictment, either because entirely separate and distinct offenses are intended to be charged, or because the pleader, having in mind but a single offense, varies the statement in the several counts as to the manner or means of its commission in order to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proof. 1 Bishop, Crim. Proc. § 422. Yet, whatever the purpose may be, each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count. Take the case of an indictment for murder. Suppose in one count the homicide is charged to have been committed by means of a blow from a pick-axe, and in another by a shoot from a pistol. While from the name of the deceased and the time and place of the killing it may be inferred that the same homicide is in the mind of the pleader, yet such inference is not, as a matter of fact, conclusive, and, as a matter of law, is overthrown by the dissimilarity in the means of the homicide, and it certainly *would be a novelty in criminal prac- [543 tice to have a verdict returned upon such indictment, finding the defendant guilty under the one count and not guilty under the other adjudged a verdict of not guilty, as to both.

In the case at bar the section of the statute under which this indictment was found requires not merely a conspiracy, but some act to carry into effect its object. This act is only one of the means by which the conspiracy is sought to be carried into effect, just as in the illustration given, the blow of the pick axe and the shot from the pistol are means for the accomplishment of the homicide, and a verdict of not guilty as to any one of the counts in this indictment is not necessarily a finding against any conspiracy, but only that the conspiracy and the overt act therein stated did not both exist, while a verdict of guilty upon any other count finds both the conspiracy and the overt act named therein. There is no conflict between the findings, and no force to this objection.

Neither the testimony nor the instructions having been preserved in the record, the only other matter to which our consideration is directed is as to the sufficiency of the indictment. It is objected, in the first place, that

there is no specification of the particular tract or tracts of which the defendants conspired to defraud the United States. There is nothing more definite than this, large tracts of land in the county of Rolette, state of North Dakota, such lands being public lands of the United States, open to entry under the homestead laws at the local land office of the United at Devil's Lake City in said state. It is true, no tract is named by number of section, township, and range, and the language is broad enough to include any or all the public lands of the United States situate within that county, and subject to homestead entry at that land office. But manifestly the description in the indictment does not need to be any more definite and precise than the proof of the crime. In other words, if certain facts make out the crime, it is sufficient to charge those facts, and it is obviously unnecessary to state that which is not essential. Can it be doubted that if these defendants entered into a conspiracy to defraud the United States of public lands, sub-[544] ject *to homestead entry, at the given office in the named county, the crime of conspiracy was complete even if no particular tract or tracts were selected by the conspirators? It is enough that their purpose and their conspiracy had in view the acquiring of some of those lands, and it is not essential to the crime that in the minds of the conspirators the precise lands had already been identified.

In Dickinson's "Guide to the Quarter Sessions," p. 355, is given the form of an indictment for a like conspiracy which, as appears, was twice before the King's Bench. *Rex* v. *Cooke*, 2 Barn. & C. 615, 5 Barn. & C. 538. In that indictment the conspiracy is charged in these words: "Did conspire, combine, confederate, and agree together unlawfully and unjustly to disturb, molest, and disquiet Sir George Jerningham, Bart., in the peaceable and quiet possession, occupation, and enjoyment of certain manors, messuages, lands, and hereditaments and premises, situate and being in the said county of S., of which he, the said Sir George Jerningham, then was, and for a long time had been, peaceably and quietly posessed." In describing the overt act it is stated that defendant did "break and enter a certain messauge, called Stafford Castle, situate in the county aforesaid, whereof the said Sir George Jerningham had long been, and then was, in the peaceable and quiet possession." In other words, there, as here, the description in the conspiracy part of the indictment is broad enough to include any lands within the county belonging to and in the possession of the party against whom the conspiracy was formed, but when the overt act of the conspirators is stated then the particular tract in respect to which the act was committed is described.

It is further objected that the indictment is defective in its statement of the means by which the conspiracy was to be carried into effect. The language is by means of "false, feigned, illegal, and fictitious entries under the homestead laws of the United States." It is insisted that the word "entry" in homestead cases has a settled technical meaning, and refers simply to the initiation of the proceedings, and the language of *Mr. Justice* Lamar, speaking for this court in *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 363 [33:368, 366], *is [545] cited: "Under the homestead laws three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered."

The argument is that the word, "entry," having a technical meaning, must be taken with that meaning in this indictment; that, as thus understood, an entry in a homestead case being but a preliminary act, does not operate to divest the title of the government, and, as is said in the brief: "The charge that defendants conspired to defraud the government by means of false entries to lands under the homestead laws will thus be seen to be a charge of an innocent act."

But the popular understanding of the word is not thus limited. It is common to speak of an entry of land under the homestead law, meaning thereby not a mere preliminary application, but the proceedings as a whole, the complete transfer of title. Counsel concede that in cash purchase and pre-emption cases it is even technically used to describe the final proof or final purchase, but seek to draw a distinction between its use in those cases and under the homestead law. Even if it were conceded that such a distinction is recognized in the statutes and authorities, it would not change the significance of the popular use. Clearly, it is used in this indictment in its popular sense, for, when we turn to the description of the overt acts, we find matters subsequent to the original entry. Thus, in the first count, one of the defendants is charged to have induced "Charles Pattnaude to make filing under said homestead laws, and thereafter to make proof and final entry under said laws for the lands known," etc. Something of equal significance is found in each of the subsequent counts upon which conviction was had. It is one purpose of an indictment to inform the defendant of the crime of which he is charged, and there can be no doubt that this defendant understood the exact sense in which the word "entry" was *used in this indictment, [546] and was not misled into the belief that the only crime charged against him was of a conspiracy to acquire lands of the United States by means of wrongful preliminary proof.

It is also said that the indictment does not charge that the overt act was done "to effect the object of the conspiracy," as the statute expresses it, but is charged to have been done simply "according to and in pursuance of said conspiracy." But this is too great a refinement of construction. Something more is intended by the use of the words "according to and in pursuance of" than that the overt act was done after the formation of the conspiracy, or even that it was simply a result of the conspiracy. It implies that the act was one contemplated by the conspiracy, "according to," and was done in carrying it out, "in pursuance of," something which the conspiracy provided should be done.

something which when done should tend to accomplish the purpose of the conspiracy.

Again, it is objected that the time at which the overt act was done is not specifically stated, but the date of the conspiracy is alleged, and that the overt act was "according to and in pursuance of." Necessarily, therefore, it was subsequent to the conspiracy.

Still, again, it is urged that the overt acts, the inducing and persuading, are not charged to have been done within the limits of the United States. The conspiracy is charged to have been entered into in the state of North Dakota, and the proof necessary to make final entry at the land office named would have to be used in that state. While it is true there is no specific allegation that the act of inducing and persuading was done within the jurisdiction of the court, and while it may be possible, as counsel suggest, that so far as this record discloses all the solicitation and persuasion exercised by the defendant was done within the limits of Canada, and outside the jurisdiction of the trial court, yet the solicitation was to do a wrongful act within the state of North Dakota (*Pulliser v. United States*, 136 U. S. 257, 265 [34: 514, 517]) and that solicitation was not a part of the **547**] conspiracy, but subsequent to and *in furtherance of it. The gist of the offense is the conspiracy. As said by *Mr. Justice* Woods, speaking for this court, in *United States* v. *Britton*, 108 U. S. 199, 204 [27: 698, 700]: "This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in persuance thereof may have been done anywhere.

These are all the questions which we consider of importance. Several other matters are suggested by counsel. We have examined all of them, and deem it unnecessary to prolong this opinion by noticing them in detail.

We see no error in the record, and the judgment is affirmed.

Mr. Justice **Jackson** did not hear the argument or take part in the decision of this case.

ENGELBERT HARDT ET AL., *Appts.*, *v.* SIGISMUND HEIDWEYER ET AL.

(See S. C. Reporter's ed. 547-561.)

Preferring creditors—laches—what constitutes.

1. A failing debtor cannot under pretense of preferring certain creditors, pay to them sums largely in excess of their demands, and thus prevent his other creditors from receiving any payment.
2. A party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained.
3. Where a failing debtor appropriates all his property to the payment of a few of his creditors, another creditor who makes no inquiry as to the integrity of the transaction for nearly five years, is guilty of laches, which will prevent his setting aside the transaction on the ground that such creditors received more than was due them.

[No. 268.]

Submitted March 13, 1894. Decided April 2, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing on demurrer a suit in equity, brought by Engelbert Hardt *et al.*, plaintiffs, against Sigismund Heidweyer *et al.*, defendants, to set aside certain proceedings and transactions alleged to constitute a general assignment by defendants, on the ground of want of equity, the laches of plaintiffs, etc. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On April 13, 1889, the appellants as plaintiffs, citizens of the state of New York, filed their bill in the Circuit Court in the United States for the Northern District of Illinois, making as defendants the following persons, citizens of the state of Illinois: Sigismund Heidweyer, Norbert Stieglitz, the National Bank of Illinois, Siegmund Florsheim, Philip Florsheim, and Simon Florsheim. On January 15, 1890, they filed an amendment to their bill. To the bill, with its amendment, the defendants demurred on the several grounds of a want of equity in the bill, the laches of plaintiffs, a lack of jurisdiction, and a defect of parties. On May 5, 1890, this demurrer was sustained, and the bill dismissed. From the decree of dismissal the plaintiffs have appealed to this court.

The facts as stated in this bill and its amendment are as follows: The plaintiffs were judgment creditors of the defendants Heidweyer & Stieglitz, a firm doing business in Chicago from July, 1875, to October 15, 1884. As early as January 1, 1884, the latter were hopelessly insolvent, their liabilities exceeding even their nominal assets, as they well knew. By the assistance of friends, however, they were enabled to keep up the appearance of doing business until October. Early in September they ascertained and determined definitely that they must fail, make a general disposition of their property among their creditors, and go out of business. At that time their indebtedness amounted to about $240,000, their assets to about $150 000, of which $125,000 was the value of their merchandise, and $25,000 that of their bills receivable and open accounts. Among other creditors were the following parties to whom

NOTE.—*That judgment creditors may unite in a creditor's bill*, see note to Myers v. Fenn. 18: 604.

As to creditor's bill, when judgment at law and execution is necessary, before bringing, see note to Jones v. Green. 17: 553.

As to laches, when a good defense, see note to Felix v. Patrick, 36: 720.

Heidweyer & Stieglitz claimed was due at the time the sums set opposite to their names:

549]* "National Bank of Illinois..... $12,000 00
Siegmund Florsheim..... 2628 00
Julius Heimann..... 5000 00
Julius Heimann, administrator 5000 00
Florsheim Brothers..... 5000 00
Philip Florsheim..... 9000 00
Simon Florsheim..... 5000 00
Herman Hahlo..... 2500 00
Hahlo, Stieglitz & Co..... 2086 56"

In fact, the true amount due to such parties was much less than the sums so named. In addition to this the defendant Siegmund Florsheim was liable as they pretended, as indorser on their commercial paper for the sum of $22,925.

It was their duty—so the bill avers—in view of their financial condition, under the policy of the assignment law of Illinois, to make in due form a general assignment to some person of all their property for the benefit of their creditors, and without any preferences; but instead of doing this they consulted with counsel as to the best means to prefer the creditors above named. On September 16, by the advice of such counsel, they executed certain judgment notes, payable on demand to the parties, and for amounts as follows:

"National Bank of Illinois.... $12,000 00
Siegmund Florsheim..... 41,553 50
Florsheim Brothers..... 5 000 00
Philip Florsheim..... 9 000 00"

On the note in favor of Siegmund Florsheim, $16,000 was subsequently credited as paid. On October 13 they executed further judgment notes, payable on demand, as follows:

"Julius Heinmann, two notes, each..... $5 000 00
Simon Florsheim..... 5 000 00
H. Hahlo & Co..... 2 500 00
Hahlo, Stieglitz & Co..... 2 086 56"

On October 15 the counsel above referred to, 550] acting for both *the creditors and the debtors, caused judgments to be entered upon said notes in the superior court of Cook county, Illinois, in favor of the creditors for the amounts of principal and interest and attorneys' fees, the attorneys' fees amounting in all the cases to the sum of $3561.04. Immediately after the entry of such judgments executions were issued thereon to the sheriff of Cook county, who levied upon the stock of merchandise of said firm of Heidweyer & Steiglitz, being all the tangible property of which they were possessed, and of the value of $125,000. Of this merchandise about $8500 was replevied from the sheriff before the sale, and the remainder sold at great sacrifice, producing only $65,537 38, which sum was applied upon the executions, leaving a small balance due upon most of them. The only property of value which the said Heidweyer & Stieglitz, on October 15, possessed other than the stock of merchandise, were certain bills receivable, of the value of about $18,000, and certain accounts receivable, of the value of about $6000. It is charged "that as a part of the same scheme of preference said Heidweyer & Stieglitz assigned and delivered said bills and accounts receivable to the defendant Simon Florsheim in trust to collect the same for the benefit of said judgment creditors as to the amounts remaining unpaid on their aforesaid judgments, and for the benefit of himself as to a claim of thirteen hundred dollars due to him by said Norbert Stieglitz individually, the surplus, if any, to be returned to said Heidweyer & Stieglitz: so that, out of said accounts and bills receivable so assigned and out of said replevied goods subsequently surrendered or paid for, said defendant's judgment creditors as aforesaid have received the amounts of their judgments and interest and said attorneys' fees in full. Said defendant, Simon Florsheim, has received payment in full of his claim against the defendant Norbert Stieglitz, as aforesaid, and the entire scheme originally devised by and between said Heidweyer & Stieglitz and said judgment creditors has been successfully accomplished, and all the property of said defendants, Heidweyer & Stieglitz, has been appropriated to prefer said creditors to the exclusion of all others." And that all these "judgment notes, *judgments entered thereon, 551 executions issued, levies and sales thereunder, transfers, assignments, and other dispositions of all their property, . . . are in effect but one instrument and one transaction, and, taken together, constitute a general assignment for the benefit of creditors," and "were all entered into and consummated in pursuance of a conspiracy between the parties thereto to defraud the other creditors of said Heidweyer & Stieglitz."

It is further charged "that while it is true that all the transactions aforesaid constitute an assignment for the benefit of creditors, yet said assignment is fraudulent and void as to creditors, in this, that said judgment notes were purposely given for sums greater than was due the payees thereof respectively at the time they were so given; that the sum provided in said judgment notes for attorneys' fees, being thirty-five hundred and sixty four $\frac{1}{100}$ dollars, and which was included in said judgments confessed and thereafter collected thereon, was so inserted in said instruments with actual intent to hinder, delay, and defraud the creditors of said Heidweyer & Stieglitz, and actually has defrauded them, whereby said notes, judgments, and everything that was done under them became wholly fraudulent and void as to the creditors of said Heidweyer & Stieglitz, and in that all of said transactions constituting such assignment were conceived and executed from beginning to end with the sole and only purpose of defrauding the law and defrauding all the creditors not intended to be protected thereby, including your orators."

The amendment was intended to cover the objection of laches, and its allegations in respect thereto are as follows:

"And your orators further represent that at the time of the several transactions herein before mentioned they were and ever since have been residents of the city of New York and that the judgment creditors aforesaid, who defendants to this bill, were and now are residents of the city of Chicago; that immediately after the entry of the judgments aforesaid your orators caused an investigation to be made as to the genuineness of the indebtedness represented by said judgments and the good faith of the judgment creditors in having then

552]*entered and enforced in the manner set forth herein; that it was upon such investigation given out, represented, and stated to your orators by each of said judgment creditors, defendants herein, that their said judgments were for full value and were entered aggressively by them for the sole purpose of realizing the moneys due them respectively, and that they did so without the knowledge, privity, or procurement of the debtors themselves, and said debtors then stated that they had still a large amount of property remaining in their hands in the form of book accounts and bills receivable, applicable to the payment of their other debts, and that they propose to convert the same and apply the proceeds thereof to such payment as soon as possible.

"Relying upon which statements and believing the same to be true, your orators refrained for a considerable time to take legal measures to collect the large indebtedness due them in the belief also that the transactions as to said judgments were bona fide and having no knowledge or information of any fact tending to show that they constituted, constructively, an assignment for the equal benefit of all creditors.

"A long time afterwards and within, to wit, less than one month from the time of bringing this suit, your orators for the first time learned not only that said judgments covered and took all the tangible property of said Heidweyer & Stieglitz, but that the entry thereof was procured by them for the express purpose of preferring said judgment creditors, and that at the same time they transferrrd all their remaining property to a trustee for the benefit of creditors, as heretofore in this bill alleged, thereby creating an assignment, as herein alleged."

Messrs. **Daniel K. Tenny, Edward O. Brown, Charles E. Pope** and **Sydney Richmond Taber,** for appellants:

Appellants were not guilty of laches.

Kilbourn v. *Sunderland,* 130 U. S. 505, 518 (32: 1005, 1010); *Meader* v. *Norton,* 78 U. S. 11 Wall. 442, 458 (20: 184, 187); *Michoud* v. *Girod,* 45 U. S. 4 How. 503, 560 (11: 1076, 1101); *Sheldon* v. *Keokuk N. L. Packet Co.* 8 Fed. Rep. 769; *Le Gendre* v. *Byrnes,* 44 N. J. Eq. 372, 378; *Radcliff* v. *Rowley,* 2 Barb. Ch. 23, 32; *Waterman* v. *Sprague Mfg. Co.* 55 Conn. 554, 574.

The circuit court had jurisdiction.

Gorrell v. *Dickson,* 26 Fed. Rep. 454; *Putnam* v. *New Albany,* 4 Biss. 365; *Ogilvie* v. *Knox Ins Co.* 63 U. S. 22 How. 380 (16: 349); 2 Black, 539 (17:349); *Buck* v. *Colbath,* 70 U. S. 3 Wall. 334, 345 (18: 257, 261); *Shields* v. *Thomas,* 59 U. S. 18 How. 253 (15: 368); *Barber* v. *Barber,* 62 U. S. 21 How. 582, 599 (16: 226, 232).

There was no defect of parties.

Horn v. *Lockhart,* 84 U. S. 17 Wall. 570, 579 (21: 657, 660); *Omaha Hotel Co.* v. *Wade,* 97 U. S. 13, 21 (24: 917, 919).

The bill shows fraud sufficient to invoke and compel equitable relief.

Pickett v. *Pipkin,* 64 Ala. 520, 526; *Thomas* v. *Beck,* 39 Conn. 241; *Preston* v. *Spaulding,* 120 Ill. 208; *Farwell* v. *Nilsson,* 133 Ill. 45, 50; *Hulse* v. *Mershon,* 125 Ill. 52, 56.

The several instruments and transactions described in the bill constitute in effect a general assignment with preferences, which is consequently void, as being in contravention of the Illinois statute relating to voluntary assignments.

White v. *Cotzhausen,* 129 U. S. 329 (32: 677).

The recent construction of that statute by the supreme court of Illinois in *Farwell* v. *Nilsson, supra,* is not conclusive, because that case is distinguishable from the suit at bar.

Farwell v. *Cohen,* 18 L. R. A. 281, 138 Ill. 216, 227, 229, 234,238; *Weber* v. *Mick,* 131 Ill. 520, 533, 534; *Hanchett* v. *Waterbury,* 115 Ill. 220, 224, 228; *Preston* v. *Spaulding,* 120 Ill. 208, 216, 218; *Home Nat. Bank of Chicago* v. *Sanchez,* 131 Ill. 330; *Hanford Oil Co.* v. *First Nat. Bank of Chicago,* 126 Ill. 584, 598; *Hide & L. Nat. Bank* v. *Rehm,* 126, Ill. 461, 465; *Hanford* v. *Prouty,* 133 Ill. 339.

The recent construction placed upon that statute by the supreme court of Illinois is not the established law of that state.

Bucher v. *Cheshire R. Co.* 125 U. S. 555 (31:-795); *Scipio* v. *Wright,* 101 U. S. 665, 675 676 (25: 1037, 1039, 1040); *Louisville & N. R. Co.* v. *Palmes,* 109 U. S. 244 (27: 922); *Preston* v. *Spaulding,* 120 Ill. 208, 218; *Gelpcke* v. *Dubuque,* 68 U. S. 1 Wall. 175 (17: 520); *Pease* v. *Peck,* 59 U. S. 18 How. 595 (15: 518); *Farwell* v. *Cohen,* 18 L. R. A. 281, 138 Ill. 216-243.

This court is under no obligation to accept the inference that the Illinois court draws as to whether the particular instruments before this court are or are not "instruments of assignment."

Schroeder v. *Walsh,* 120 Ill. 403; *Fana* v. *Bowler,* 107 U. S. 529, 540 (27: 424, 428); *Swift* v. *Tyson,* 41 U. S. 16 Pet. 1, 18 (10: 865, 871); *Myrick* v. *Michigan Cent. R. Co.* 107 U. S. 102, 108 (27: 325, 327).

There is no obligation on the part of this court to follow the construction by a state court of a statute of that state in a suit in equity.

Bucher v. *Cheshire R. Co.* 125 U. S. 555 (31: 795); *Leffingwell* v. *Warren,* 67 U. S. 2 Black, 599 (17: 261); *Luther* v. *Borden,* 48 U. S. 7 How. 1,40 (12: 581, 598); *Post* v. *Kendall County Supvrs.* 105 U. S. 667 (26: 1204); *Johnston* v. *Western U. Teleg. Co.* 33 Fed. Rep. 362; *United States* v. *Reid,* 53 U. S. 12 How. 361 (13: 1023); *Neves* v. *Scott,* 54 U. S. 13 How. 268, 271 (14: 140, 142).

The construction of a state statute by a state court may not be invoked in the United States courts to determine rights that have arisen before the state court's decision.

East Alabama R. Co. v. *Doe,* 114 U. S. 340 (29: 136); *Farwell* v. *Cohen,* 18 L. R. A. 281, 138 Ill. 216, 241; *Buncombe County Comrs.* v. *Tommey,* 115 U. S. 122, 127 (29: 305, 306); *Rollins* v. *Lake County,* 34 Fed. Rep. 845; *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 361 (29: 633, 634); *Bolles* v. *Brimfield,* 120 U. S. 759 (30: 786); *Barnum* v. *Okolona,* 148 U. S. 393, 396 (37: 495, 497); *Knox County* v. *Ninth Nat. Bank of New York,* 147 U. S. 91, 99 (37: 93, 96); *Clark* v. *Bever,* 139 U. S. 96, 116 (35: 88, 96); *Union Trust Co.* v. *Trumbull,* 137 Ill. 146, 158.

The weight of authority, as well as princi-

ple, is in favor of this court's adopting its own construction of a state statute, notwithstanding a contrary construction by the highest court of that state. This the court has done—

Where there has been no decision by a Federal court before that of the state court.

Butz v. *Muscatine*, 75 U. S. 8 Wall. 575, 582 (19:490, 493); *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 666 (22: 227); *Lane* v. *Vick*, 44 U. S. 3 How. 464 (11: 681).

Where there has been a decision by one of the United States circuit courts before that by the state court.

Burgess v. *Seligman*, 107 U. S. 20, 33 (27: 359, 365).

Where there has been a decision by this court before that of the state court.

Rowan v. *Runnels*, 46 U. S. 5 How. 134 (12: 85); *Pease* v. *Peck*, 59 U. S. 18 How. 598 (15: 520); *Carroll County Suprs.* v. *Smith*, 111 U. S. 556 (28: 517).

As citizens of foreign states appellants are entitled to the independent judgment of the United States Supreme Court.

Watson v. *Tarpley*, 59 U. S. 18 How. 517, 520 (15: 509. 511); *Burgess* v. *Seligman*, and *Pease* v. *Peck*, *supra*; *New Orleans Water Works Co.* v. *McGinnis Oil & S. Works*, 36 Fed. Rep. 833, 835.

Mr. **Curtis H. Remy**, for appellees:

The preferences given by Heidweyer & Steiglitz are not void under the voluntary assignment act of Illinois, and do not under said act constitute a constructive assignment.

American Cutlery Co. v. *Joseph*, 44 Ill. App. 194; *First Nat. Bank of Chicago* v. *North Wisconsin Lumber Co.* 42 Ill. App. 383; *White* v. *Cotzhausen*, 129 U. S. 329 (32: 677); *Schroeder* v. *Walsh*, 120 Ill. 403; *Weber* v. *Mick*, 131 Ill. 533; *Woonsocket Rubber Co.* v. *Falley*, 30 Fed. Rep. 808; *Weil* v. *Polack*, 30 Fed. Rep. 813; *Coffin* v. *Day*, 34 Fed. Rep. 687.

Upon the proper construction of the voluntary assignment act of Illinois, the United States courts will follow the decisions of the supreme court of Illinois as authoritative declarations of what the law is.

Jenks v. *Quidnick Co.* 135 U. S. 457 (34: 200); *Bacon* v. *Northwestern Mut. L. Ins. Co.* 131 U. S. 258 (33: 128); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359); *Union Bank of Chicago* v. *Bank of Kansas City*, 136 U. S. 223 (34: 341).

The acts or preferences complained of do not constitute a fraudulent conveyance with intent to delay, hinder and defraud other creditors.

Jones, Chattel Mortg. § 352.

A debtor has a right to prefer certain creditors even to the entire exclusion of others, and such preferences are not fraudulent.

Stewart v. *Dunham*, 115 U. S. 61 (29: 329); *Micou* v. *First Nat. Bank of Montgomery*, 104 U. S. 530 (26: 834); *Smith* v. *Craft*, 123 U. S. 436 (31: 267); *Jewell* v. *Knight*, 123 U. S. 426 (31: 190).

The laches of the appellants in bringing this suit bars and precludes them from obtaining any relief in equity.

Speidel v. *Henrici*, 120 U. S. 377 (30: 718); *Lansdale* v. *Smith*, 106 U. S. 391 (27: 219); *Mercantile Nat. Bank* v. *Carpenter*, 101 U. S. 567 (25: 815); *Godden* v. *Kimmel*, 99 U. S. 201 (25: 431); *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 836); *Crosby* v. *Beale*, 84 U. S. 17 Wall. 336 (21: 602); *McKnight* v. *Taylor*, 42 U. S. 1 How. 161 (11: 86).

Courts of equity often treat a lapse of time less than that prescribed by the statute of limitations as a presumptive bar.

Hayward v. *Eliot Nat. Bank*, 96 U. S. 611 (24: 855); *McQuiddy* v. *Ware*, 87 U. S. 20 Wall. 14 (22: 311).

A court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances.

Brown v. *Buena Vista County*, 95 U. S. 157 (24: 422); *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 806 (24: 324).

Mr. Justice **Brewer** delivered the opinion of the court:

It will be perceived that nowhere in the bill is it alleged that the failing debtors, Heidweyer & Stieglitz, ever executed any formal written assignment for the benefit of creditors. It is charged that they gave to certain creditors judgment notes, and assigned and delivered their bills and accounts to one of the creditors in trust; that these judgment notes, with the proceedings had thereon, and the assignments of bills receivable and accounts, were in effect but one instrument and one transaction, and constituted a general assignment for the benefit of creditors; and this, as plaintiffs insist, brought the case within the ruling in *White* v. *Cotzhausen*, 129 U. S. 329, 342 [32: 677], in which this court, by *Mr. Justice* Harlan, said "that when an insolvent debtor recognizes the fact that he can no longer go on in business, and determines to yield the dominion of his entire estate, and in execution of that purpose, or with an intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors, in order to provide for them in preference to other creditors, the instrument or instruments by which such transfers are made and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred, who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, we think, is the necessary result of the decisions in the highest court of the state."

On the other hand, it is contended that the supreme court of the state has since that decision reached a different conclusion, and in support thereof reference is made to the opinion in *Young* v. *Clapp*, 147 Ill. 176, 184, where this language *is found: "The 13th section [557 of the assignment act does not prohibit preferences generally, but only preferences which are contained in written deeds of assignment voluntarily executed for the benefit of creditors. The language of the section is, that 'every provision in any assignment hereafter made in this state for the payment of one debt or liability in preference to another shall be void.' A preference, given by a debtor after he has made up his mind to execute a general assignment for the benefit of his creditors, has been held to be void upon the theory

that such a preference must be regarded as a part of the assignment. There is no such thing as a constructive consignment contemplated by the assignment act. That act does not take away the common law right of a debtor to prefer one or more of his creditors. A preference may be given by the execution of a judgment note resulting in the entry thereon of a judgment." See also *Schroeder* v. *Walsh*, 120 Ill. 403, 412; *Weber* v. *Mick*, 131 Ill. 520, 533; *First Nat. Bank of Chicago* v. *North Wisconsin Lumber Co.* 41 Ill. App. 383, and *American Cutlery Co.* v. *Joseph*, 44 Ill. App. 194; *Ross* v. *Walker*, decided November 27, 1893, by the Appellate Court of Illinois, and reported in 26 Chicago Legal News, 133.

It is insisted that this construction of the statute should be accepted by this court as controlling, and the case of *Union Bank of Chicago* v. *Bank of Kansas City*, 136 U. S 223, 235 [34: 341, 345] is cited, in which this court said:

"The question of the construction and effect of a statute of a state, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States.

But we deem it unnecessary to enter into any consideration of this question, or to determine whether there is any substantial difference between the views of the supreme court of Illinois and those of this court, or whether in case such difference be found to exist it becomes the duty of this court to defer to the opinions expressed by that, for there are questions nearer to the surface and controlling. Even if it be conceded 558] *that there is not disclosed by this bill that which is equivalent to a voluntary assignment within the scope of the statute, and that in the absence of restrictive statutes a failing debtor has the right to prefer certain creditors, even to the entire exclusion of others (*Jewell* v. *Knight*, 123 U. S. 426, 434 [31: 190, 193] and cases cited; *Smith* v. *Craft*, 123 U. S. 436 [31: 267]) yet such debtor cannot, under pretence of preferring certain creditors, pay to them sums largely in excess of their demands, and thus prevent his other creditors from receiving any payment. Here the charge distinctly is, that while Heidweyer & Stieglitz claimed to owe the preferred creditors certain sums for which they gave judgment notes, and which judgment notes were afterwards satisfied in full, yet the amounts in fact due to such creditors were much less than those so named and paid; and that is a wrong of which the creditors who receive no payment can justly complain. It is unnecessary, therefore, to inquire whether the transaction between Heidweyer & Stieglitz and these creditors was within the inhibition of the statute or not.

While this is so, we are constrained to hold that the plaintiffs have not shown due promptness in asserting their rights. It is said by counsel for defendants that it was the decision in *White* v. *Cotzhausen* which enabled the plaintiffs to perceive that they had been defrauded, and our attention is called to the fact that the opinion in that case was announced January 28, 1889, and this suit was commenced April 23, 1889. *Post hoc, propter hoc*, is not, however, sufficient, and the rule of causation implies some other sequence than that of time. Nevertheless, the plaintiffs waited nearly five years before commencing any proceedings to charge the preferred creditors, and no satisfactory excuse for the delay is shown. It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also when and how knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts. Thus, in *Stearns* v. *Page*, 1 Story, 204, 215, 217, *Mr. Judge* Story observed:

*"General allegations, that there has [559 been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches. . . . . But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time."

On appeal this decision was affirmed 48 U. S. 7 How. 819 [12: 928], and in delivering the opinion of this court, *Mr. Justice* Grier laid down the rule in this language:

"And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made."

Similar declarations may be found in several subsequent cases; *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 [17: 836] in which is found this quotation:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill."

Godden v. *Kimmell*, 99 U. S. 201, 211 [25: 431 434]; *Wood* v. *Carpenter*, 101 U. S. 135, 140 [25: 807, 808], in which this court said:

"A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not *made sooner." See also *Lansdale* v. [560 *Smith*, 106 U. S. 391, 394 [27:219]; *Hammond* v. *Hopkins*, 143 U. S. 224, 251 [36: 134, 145]; *Felix* v. *Patrick*, 145 U. S. 317, 332 [36: 719, 722]; *Foster* v. *Mansfield, C. & L. M. R. Co.* 146 U. S. 88 [36: 899]; *Fisher* v. *Boody*, 1 Curt.

206; *Carr* v. *Hilton*, 1 Curt. 390; *Moore* v. *Greene*, 2 Curt. 202.

Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed.

What were the wrongs complained of? So far as the mere preference is concerned, that was obvious. If the attorneys' fees were improper (*Young* v. *Clapp*, *supra*; *Hulse* v. *Mershon*, 125 Ill. 52) the fact that such attorneys' fees were specified in the notes and included in the judgments was a matter of record. That the stock of goods sold at sheriff's sale for less than its value does not, of itself, show wrong on the part of the parties thereto, plaintiffs or defendants. No act is shown tending to prevent a fair sale, and the result, that of realizing less than the value, is a common experience of such sales, and of itself proves nothing amiss. If these plaintiffs failed to attend such sales, they cannot complain of the result; and if they did attend, they should have seen to it that the property brought its value. At any rate, there is no pretense of a want of knowledge on the part of these plaintiffs. There remain, therefore, as the concealed wrongs, only these matters: First, that the judgment notes were in excess of the real demands; second, that Heidweyer & Stieglitz transferred their bills and accounts receivable in trust to Florsheim, and that that trust included an individual debt of one of the partners. That the plaintiffs knew of the existence of these bills and accounts is shown, and their alleged ignorance is only of the fact of their transfer in trust.

Now, it is a matter of common experience 561] that when there *is so pronounced a failure on the part of a firm carrying such a large stock, there is made by the creditors a thorough examination of the situation. That such an examination, if made, would disclose any substantial difference between the true indebtedness to these preferred creditors and the amount of the notes given to them seems reasonably certain, and if no such examination was made, it indicated indifference on the part of the other creditors. If the plaintiffs relied on the mere statements of these defendants, why did they cease to rely upon such statements, and how did they become advised of their untruth? So, with reference to the bills and accounts receivable; knowing what they were, they could easily have ascertained whether they were collected, and if so, by whom. If collected by other than their debtors, that fact certainly should have provoked inquiry. If collected by the debtors, why were the moneys received not appropriated in payment of other than the preferred claims?

These are matters in respect to which the bill fails to enlighten us. Indeed, so far as disclosed, it would seem that when the debtors failing, and failing for so large a sum, appropriated all their tangible property to the payment of a few of their creditors, the others, including these plaintiffs, accepted the situation, and made no inquiry or challenge of the integrity of the transaction for nearly five years. Such indifference and inattention must be adjudged laches. Upon this ground alone, and without reference to any other questions discussed by counsel in the briefs, the decree of the circuit court is affirmed.

SEABURY & JOHNSON, *Appts.*, v. CHARLES G. AM ENDE.

(See S. C. Reporter's ed. 561-570.)

Valid patent—specification—damages for infringement.

1. The patent to Charles G. Am Ende, of Aug. 15, 1876, No. 181,024, for an improvement in borated cotton, is valid.
2. A specification in letters patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates.
3. In measuring plaintiff's damages for the infringement of a patent by defendant's profits, in order to make an allowance in the latter's favor, of interest on the money invested in the plant, the evidence must enable the master to apportion the interest between the several kinds of business for which the plant is used.

[No. 285.]

Argued Mar. 14, 15, 1894. Decided April 2, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, in favor of Charles G. Am Ende, plaintiff, against Seabury & Johnson, a corporation, for infringement of his patent of August 15, 1876, for an improvement in borated cotton, restraining defendant from further infringement and awarding damages to plaintiff. *Affirmed.*

NOTE.—*For what patents are granted; when declared void*, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see note to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism; articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent, see note to Royer v. Coupe, 36: 1073.

Statement by *Mr. Justice* **Shiras:**

Charles G. Am Ende, a citizen of the state of New Jersey, filed a bill of complaint in the Circuit Court of the United States for the Southern District of New York, against Seabury & Johnson, a corporation of the state of New York, in which he alleged that he was the patentee and owner of letters patent of the United States, dated August 15, 1876, and numbered 181,024, for an improvement in borated cotton, and that the defendant corporation, in disregard of his rights, was engaged in making and vending borated cotton made in accordance with the method described in said letters patent. The defendant corporation, by its answer, raised the issues of novelty and patentability, which were determined in favor of the complainant, and the case resulted in a decree, restraining the defendant from further infringement, and awarding the complainant the sum of $2349 15 with costs; from which decree this appeal was taken.

Messrs. **Norman T. M. Melliss** and **Edwin H. Brown,** for appellant:

The burden is upon plaintiff by reliable and tangible proof, not estimate, conjecture, opinion or assertion, to distinguish and positively and affirmatively to prove, first, the profits; second, the amount of profits, and third, that they were due to the patented feature.

Robertson v. *Blake*, 94 U. S. 728 (24: 245); *Brady* v. *Atlantic Works*, 3 Bann. & Ard. 577; *Star Salt Caster Co.* v. *Crossman*, 4 Bann. & Ard. 566; *Garretson* v. *Clark*, 15 Blatchf. 70; *Sessions* v. *Romadka*, 145 U. S. 29 (36: 609); *Crosby Steam Gage & V. Co.* v. *Consolidated Safety Valve Co.* 141 U. S. 441 (35: 809); *McCreary* v. *Pennsylvania Canal Co.* 141 U. S. 459 (35: 817).

The patentee must separate what is due to the patented feature or show that the whole profit made by the infringer is due thereto; and if he fails to do so he cannot recover anything.

Schillinger v. *Gunther*, 15 Blatchf. 308-310; *Burdell* v. *Denig*, 92 U. S. 716 (23: 764); *Goulds Mfg. Co.* v. *Cowing*, 12 Blatchf. 243, 14 Blatchf. 315; *Black* v. *Munson*, 14 Blatchf. 265; *Faulks* v. *Kamp*, 10 Fed. Rep. 675; *Roemer* v. *Simon*, 31 Fed. Rep. 41; *Dobson* v. *Hartford Carpet Co.* 114 U. S. 439 (29: 177).

Where the infringer's books are vague and confusing, the patentee is not then relieved from the obligation of separating the profits due to the patented feature from those not due to it.

National Car Brake Shoe Co. v. *Terre Haute Car & Mfg Co.* 19 Fed. Rep. 514; *Garretson* v. *Clark*, 111 U. S. 121 (28: 371).

The value of the improvement is the rule, and the only difference that the use of the patented feature made in the manufacture of borated cotton by appellant, was to increase the cost thereof by the amount of the expense of the glycerine used in it.

Suffolk Mfg. Co. v. *Hayden*, 70 U. S. 3 Wall. 315 (18: 76); *Locomotive Safety Truck Co.* v. *Pennsylvania R. Co.* 2 Fed. Rep. 677; *Morry* v. *Whitney*, 81 U. S. 14 Wall. 650 (20: 865); *Black* v. *Thorne*, 111 U. S. 122 (28: 372).

Mr. **Arthur V. Briesen,** for appellee:

The specification is sufficiently full.

Webster Loom Co. v. *Higgins*, 105 U. S. 580 (26: 1179).

The description of a chemical invention is not addressed to persons ignorant of chemistry.

Allen v. *Hunter*, 6 McLean, 303; *Heath* v. *Unwin*, 10 Mees. & W. 684, 2 Webster Pat. Cas. 236.

The patent has not been anticipated, the dates of the publications are not proven.

Roberts v. *Buck*, 6 Fish. Pat. Cas. 325.

The patent being for a new entirety, a new composition of matter, any profit which defendant made from the sale of the infringing goods may be rightfully claimed by the complainant as part of his recovery in this suit.

Welling v. *La Bau*, 34 Fed. Rep. 40; *Elizabeth* v. *American Nicholson Pav. Co.* 97 U. S. 139 (24: 1006); *Keystone Mfg. Co.* v. *Adams*, *ante*, p. 103.

Mr. Justice **Shiras** delivered the opinion of the court:

The specification and claim of the patentee were in the following terms:

"This invention has for its objects to combine the various *advantages of cotton [565 fiber with those possessed by boracic acid and glycerine for preserving animal and vegetable matter from decay.

"Heretofore boracic acid has been used as a preservative agent in a fluid state, and also as a powder. In use, the matter to be preserved had to be immersed in the solution of boracic acid, or completely covered with the powder In either case a very large quantity of boracic acid was used.

"My present invention, which consists in saturating cotton fiber with boracic acid and glycerine in a manner hereinafter described, enables me to apply a very small proportion of boracic acid and glycerine to the cotton fiber with fully as good an effect as though the matter to be preserved were entirely imbedded in large quantities of the solution or powder. It enables me, at the same time, to utilize the germ-filtering properties of the cotton, and its elasticity as a superior material for packing or covering delicate tissue.

"I produce my improved borated cotton as follows: I first prepare a solution of boracic acid in the usual manner, and add thereto a small proportion of glycerine. For the preservation of tender substances, such as veal, I may also add from ten to forty per cent of soda or potash, never sufficient, however, to reach neutrality. The cotton, either in bulk or wadding, is next immersed in the solution until well impregnated therewith, and then pressed, to discharge all surplus solution, or so much thereof as may be required. The cotton is then dried and ready for use.

"When applied to the material to be preserved, either as a covering or as a wrapping or packing, the cotton will constitute a filter for keeping germs of putrefaction from passing through, and the boracic acid absorbed by the cotton will, at the same time, preserve the surfaces from decay, and counteract all injurious influences of germs, or other elements of destruction, already in contact with such surfaces.

"The glycerine is added to increase the pre-

serving power of the borated cotton. It renders the cotton slightly hygroscopic, thus aiding in the diffusion of the acid and in the preservative effect of the prepared cotton.

566] *"I have found that the impregnated fiber shows, even under a good microscope, no difference from a fiber not impregnated with boracic acid, and that, therefore, although a very thin film of acid may adhere to the exterior surface of the fiber, the main proportion of the acid is absorbed by and diffused within the fibers. In consequence, the acid can, in use, be but gradually released from the fiber, and will thus produce a constant and lasting effect.

"I claim—

"The borated cotton, being cotton fiber which is saturated with boracic acid and glycerine, substantially as herein shown and described."

The first ground of defense relied on is that the patentee has failed to describe his invention in such full, clear, and exact terms as to enable persons reading the description of the invention to construct and use it; and it is contended that the strength of the boracic acid solution is not prescribed, nor the precise proportion of glycerine. In considering this objection it must be remembered that the description is addressed to persons skilled in the art to which it relates. The solution of boracic acid is referred to, not as anything new, but as an article well known to druggists and physicians, and when the patentee says that he "prepares a solution of boracic acid in the usual manner," he means as it has formerly and customarily been prepared. When he directs that a small proportion of glycerine shall be added, it is obvious that the quantity of the glycerine is to vary with the amount of cotton and boracic acid used, but that the merits of the invention will not depend on whether, in a given case, a little more or less glycerine is used. Such general directions are common in the arts, as appears in some of the very publications introduced by the defendant to show anticipation. Thus in the Druggists' Circular & Chemical Gazette it is stated that Dr. Edmunds had used "a solution of boracic acid;" and in the Journal de Pharmacie it is said that, in making his dressing, Professor Gubler saturated his wadding with "a certain quantity of glycerine," and his formula is thus given: "It is only necessary to pour a small quantity of glycerine over the square sheet," etc.

567] *We, therefore, agree with the court below in thinking that "an intelligent chemist, setting out properly to combine the enumerated ingredients into which the cotton is to be immersed, and with which it is to be impregnated could hardly go astray." It is also to be observed that neither the defendant, in making the infringing article, nor the several witnesses of eminence in the medical profession, who testified to the practical value of the patented dressing, seem to have had any difficulty in understanding and applying the description contained in the patent.

In *Webster Loom Co.* v. *Higgins*, 105 U. S. 580 [26: 1177], where the sufficiency of a description was in question, it was held that a specification in letters patent is sufficiently clear and descriptive when expressed in terms intelligible to a person skilled in the art to which it relates.

The next contention is, that as the plaintiffs' patented dressing was composed of materials whose specific virtues and modes of operation were well known, there was no invention shown in combining them in the manner described. It is, indeed, true that the patentee did not claim to have been the first to suggest the use of cotton fiber as a means of excluding germs from wounds or from the article to be protected. Nor did he claim to have first discovered the antiseptic qualities of boracic acid or the hygroscopic property of glycerine. But the patentee was the first to perceive that by combining these articles, in the manner he pointed out, there would be formed a convenient and permanent dressing with the desirable qualities of the several constituents. The complainant's evidence satisfactorily shows that, in such a dressing, the cotton acts as a screen to exclude germs and as a vehicle to hold the other ingredients; that the boracic acid possesses marked antiseptic qualities, but is liable, if used alone, to dry on the cotton and to form crystals, which impair the antiseptic qualities of the acid, and which mechanically scratch or irritate the sensitive surface of a wound; and that the glycerine, owing to its property of absorbing moisture from the atmosphere, keeps the boracic acid from hardening or crystalizing, and besides adds somewhat to the healing and preservative power of the dressing.

*The merits of the complainant's in- [568 vention received immediate and wide-spread recognition, and the article came into use, not only to protect animal substances for alimentary purposes, but, and chiefly, to protect wounds from infection and suppuration. It was introduced into hospitals and into the private practice of physicians, and, in fact, has become a staple article for medicinal purposes.

But it is further contended that there was no novelty in complainant's invention, because it had been anticipated by others. To sustain this contention the defendant put in evidence an article published in the American Journal of Pharmacy for November, 1871, at page 516, where it is stated that Professor Gubler, at a recent meeting of the Academy of Medicine, had exhibited some specimens of wadding prepared by saturating it with a certain quantity of glycerine, which he had found to render it permeable to all medicinal liquids, without causing it to lose any of its suppleness and lightness. Also, an article in the same journal, for March, 1867, at page 149, wherein Dr. Adolphus stated that "applied to suppurating surfaces which are painful and produce an ichorous pus, glycerine dressings change the abnormal condition by arresting the degenerating process, through its antiseptic and astringent properties." The defendant likewise put in evidence a copy of The Druggists' Circular & Chemical Gazette, for June, 1875, wherein there is an account of treatment by Dr. Edmunds, in the case of an amputated thigh, by dressing of lint steeped in a hot solution of boracic acid, with most satisfactory results in preventing putrefactive discharge.

Undoubtedly this evidence shows that the specific qualities of glycerine and of boracic

acid were known, and that those articles had been successfully used in the instances narrated. But we agree with the court below in thinking that "this evidence does not disclose that any one prior to Am Ende accomplished what he has described and claimed; that the fact that others had done something quite similar, and had used separately, or in different combinations, the ingredients of his claim, should not affect his patent. All that is described in the prior publications the defendant may use with [569] perfect *immunity. They may use 'lint steeped in a hot saturated solution of boracic acid,' or 'wadding saturated with a certain quantity of glycerine,' or boracic acid dissolved in glycerine; but they should not be permitted to use cotton combined with a solution of boracic acid and glycerine in the manner described in the specification, for that belongs to Am Ende."

Errors are complained of in the action of the court below in overruling defendant's exceptions to the master's report. So far as those exceptions are based on the computations and findings of the master, under the evidence before him, as to the profits made by the defendant, we see no reason to differ with the court below in overruling them. The claim that appellants should be allowed, as part of the cost of the borated cotton during the period covered by the accounting, interest on plant, and capital invested, calls for more particular notice.

A similar claim was disallowed in the case of *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 804 [19: 571], but it is claimed that in *Goulds Mfg. Co.* v. *Cowing*, 105 U. S. 257 [26: 988], such an item was allowed. In the latter case, which this court styled an "exceptional one," it was said that, in charging the defendant with profits, he should be allowed for "the use of tools, machinery, power, and other facilities employed in the manufacture." It may be, as was observed by the court below in the present case, that it did not appear, in *Goulds Mfg. Co.* v. *Cowing*, but that the use of the tools, machinery, and power was a hired use. At any rate, in that case, the infringement consisted in making and selling a pump, which was the only one that could successfully compete with that controlled by the patent, and the machinery was used for no other purpose. In the present case, the defendant's plant and real estate were used for several other and wholly different kinds of manufacture than the patented article, and the evidence offered to distinguish between the profits derived from the use of the plant and real estate for making the borated cotton and those attributable to the other sources of profit, was not sufficient to enable the master to make a satisfactory apportionment or allowance for interest on the investment.

We do not wish to be understood as holding [570] that in no case *where the plaintiff's damages are measured by the defendant's profits, ought there to be an allowance, in the latter's favor, of interest on the money invested in the plant. Nor do we say that such an allowance may not be properly made, even where the use of the plant is not wholly restricted to making the infringing article. But the evidence, in such a case, should enable the master to satisfactorily apportion the interest between the several kinds of business.

The appellant further complains of the action of the master in disallowing the sum of $15,000 per annum for salary of the president of the defendant company. The defendant introduced evidence tending to show what would be reasonable compensation for such services as were performed by the president, but did not show what sum, or that any sum was actually paid him. To have allowed salaries, which had never been paid, would have been, as was said in *Providence Rubber Co.* v. *Goodyear*, to permit a dividend of profits under the guise of salaries.

Other exceptions that were taken to the master's report were satisfactorily disposed of by the court below, and did not call for further discussion.

The decree of the circuit court is accordingly affirmed.

R. SARLLS, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 570 577.)

Spirituous liquor, what is.

Lager beer is not a "spirituous liquor or wine" within the meaning of U. S. Rev. Stat. § 2139.

[No. 872.]

Submitted Nov. 15, 1893. Decided April 9, 1894.

IN ERROR to the District Court of the United States for the Western District of Arkansas, to review a judgment of conviction and sentence of R. Sarlls, for introducing into the Indian country, ten gallons of lager beer, alleged to be spirituous liquor. *Reversed, with directions to quash the indictment and discharge the defendant.*

The facts are stated in the opinion.

Mr. **A. H. Garland** for plaintiff in error.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice* **Shiras delivered the [571] opinion of the court:

At the May term, 1892, in the District Court of the United States for the Western District of Arkansas, the plaintiff in error was indicted and convicted of introducing, at the Choctaw Nation, in the Indian country, ten gallons of lager beer, which the indictment averred were "spirituous liquors," and the introduction of which into the Indian country was made an offense, punishable by fine and imprisonment, by section 2139, Revised Statutes of the United States.

That section is in the following terms:

"No ardent spirits shall be introduced under any pretense into the Indian country. Every person (except an Indian in the Indian country) who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or at-

NOTE.—*As to constitutionality of laws regulating sale of liquors*, see note to Foster v. Kansas, 39: 696.

tempts to introduce any spirituous liquor or wine into the Indian country shall be punishable by imprisonment for not more than two years and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

It appears that such a provision was originally enacted on the 9th of July, 1832, was amended by acts of 14th of March, 1834, and 27th of February, 1877, and was included in the Revised Statutes as said section 2139.

It was contended, on behalf of the defendant, in the court below, that lager beer is not "spirituous liquor or wine" within the meaning of those terms in the statute, and that, therefore, the defendant was wrongly convicted. The court below refused, on request, to so instruct the jury, and to this refusal and to the judgment of the court sentencing the defendant to pay a fine of two hundred and fifty dollars, and to be imprisoned for a term of three months, error is assigned.

It thus appears that the sole question pre-[572]sented for our consideration *by this record is whether "lager beer" is a "spirituous liquor or wine." The only evidence on this subject, disclosed by the record, was to the effect that lager beer is a malt liquor, and is intoxicating. To enable us to solve the question we must look to the popular signification of the terms used, and also to the phraseology of other statutes of the United States in which like terms appear. We are likewise entitled to any light that may be thrown on the subject by the decisions of respectable courts which have had to construe similar terms in penal statutes.

The Century Dictionary defines *spirituous liquors* as "containing much alcohol; distilled, whether pure or compounded, *as distinguished from fermented;* ardent: applied to a liquor for drinking." *Malt liquor* is defined by the same authority as "a general term for an alcoholic beverage produced merely by the fermentation of malt, as opposed to those obtained by distillation of malt or mash."

Webster defines the word "spirituous" as rum, whisky, brandy, and other distilled liquors, as distinguished from wine and malt liquors. Worcester says that "ardent spirits" is a term applied to liquors obtained by distillation, such as rum, whisky, brandy, and gin.

So far, therefore, as popular usage goes, according to the leading authorities, "lager beer," as a malt liquor made by fermentation, is not included in the term "spirituous liquor," the result of distillation.

Looking to other statutes of the United States, we find that the terms "spirituous liquors" or "distilled spirits," and "malt liquors," are not used as synonymous. On the contrary, they are treated as different substances, and in the system of revenue restrictions, in providing for their manufacture and sale, they are regarded as distinct. Thus, in section 3244, Revised Statutes, it is provided, "Wholesale dealers in malt liquors shall pay fifty dollars. Every person who sells or offers for sale malt liquors in larger quantities than five gallons at one time, but who does not deal in *spirituous liquors*, shall be regarded as a wholesale dealer in malt liquors." And in the same section it is enacted that "every person who manufactures fermented liquors of [573] any name or description for sale, from malt, wholly or in part, or from any substitute therefor, shall be deemed a brewer," and "shall pay one hundred dollars;" and "rectifiers of distilled spirits shall pay two hundred dollars;" "wholesale liquor dealers shall pay one hundred dollars," and "wholesale dealers in malt liquors shall pay fifty dollars."

Such provisions seem to plainly distinguish "malt liquors," the product of fermentation, from "spirituous liquors," the result of distillation.

Most of the decisions to which our attention has been directed are to the same effect.

A New Hampshire statute in terms declared that the words "spirituous liquors" shall be taken to include intoxicating liquors and all mixed liquors, any part of which is spirituous or intoxicating. But the supreme court, in *State* v. *Adams*, 51 N. H. 569, held that ale, porter, and cider were not within the statute; that the indictment charged the sale of "spirituous liquors" only; that fermented liquors are not in common parlance, spirituous liquors, and that the fact that ale contains from four to ten per cent of alcohol which can be separated from it by distillation does not bring it within the class of liquors called spirituous.

In *Com.* v. *Grey*, 2 Gray, 502, 61 Am. Dec. 476, Metcalf, *J.*, said: "All spirituous liquors are intoxicating, yet all intoxicating liquors are not spirituous. In common parlance, spirituous liquors mean distilled liquors. Fermented liquors, though intoxicating, are not spirituous."

In *Tinker* v. *State*, 90 Ala. 647, it was said: "Malt liquor has neither vinous or spirituous liquors as an ingredient. . . . Spirituous liquor, vinous liquor, and malt liquor, are not synonymous terms, but each refers to a liquor separate and distinct from each other. Lager beer is a malt liquor, and the courts take judicial notice of this fact. . . . The statute having prohibited the sale of spirituous and vinous liquors only, malt liquors are not included. It was error, therefore, to have charged the jury that a sale of lager beer was a violation of the local law."

*There are other cases in which the [574] terms were similarly construed by state courts, but which it is unnecessary here to cite.

In the District Court of the United States for the District of Montana (*Re McDonough*, 49 Fed. Rep. 360) it was held that beer is not a spirituous liquor, within the meaning of the statute before us; and we have been referred to a case to the same effect in the District Court of the United States for the Eastern District of Texas, but which case is not reported.

In *Hollender* v. *Magone*, 149 U. S. 586 [37: 860], this court reversed the Circuit Court of the United States for the Southern District of New York, for construing in section 2927, Revised Statutes, the word "liquors," as including beer, and it was said that "it may be laid down as a general proposition that where the term 'liquor' is used in a special sense,

spirituous and distilled beverages are intended, in contradistinction to fermented ones."

To the contrary of these definitions and decisions, the principal case is that of *State* v. *Gierach*, 98 N. C. 720, the reasoning and conclusion wherein were adopted by the court below. That was a case where a statute of North Carolina prohibited the introduction and sale of spirituous liquors, and the court held those terms to be generic, and to include all intoxicating liquors containing alcohol, whether distilled, fermented, or vinous.

The reasoning on which such a conclusion is reached excludes the common and popular signification of the words, and finds the meaning of the statute in the fact, true in a scientific sense, that alcohol is found in fermented, as well as in distilled liquors, and that the purpose of the statute is to prevent the mischief occasioned by the use of intoxicating drinks.

We cannot agree with this method of reading a penal statute. The purpose of such a statute is to notify the public of the legislative intent, not to furnish scientific definitions. That intent is, in most cases, to be found by giving to the words the meaning in which they are used in ordinary speech.

575] *Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by *Chief Justice* Marshal, when, in the case of *United States* v. *Wilberger*, 18 U. S. 5 Wheat. 96 [5: 42], he said: "To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

There is a difference, overlooked by the court below, between the language of the North Carolina statute and of section 2139, in that the former uses only the words "spirituous liquors," but in the latter the words are "spirituous liquors or wines."

That by the term "spirituous liquors," used alone in a statute, it may with some plausability be contended the legislature meant to signify all intoxicating drinks. But the case is quite different when "wines" are added to the articles prohibited. In that case it is evident that the legislature did not think that all intoxicating drinks were included in the terms "spirituous liquors," or they would not have named "wines." Under the construction put by the court below on the words "spirituous liquors," as including all liquors that are intoxicating, and hence as including lager beer, the word "wines" is useless in the statute.

If, then, lager beer is not reasonably within the terms of the statute as a "spirituous liquor," can it be said to be included in the term "wines?"

*Tacitus does, indeed, in his account of [576 the customs of the ancient Germans, speak of their using a liquor made from barley—"*corruptus in quendam similitudinem vini*," "fermented into a kind of resemblance to wine." This passage is one of the earliest references we have to malt liquor. That it was potent, we learn from the same author, who tells us that the German warriors would deliberate upon and form their designs when sober, and then get drunk, presumably on this barley wine, and carry their projects into effect.

But if beer is like wine, in its appearance and effects, it is plainly not wine, either in its popular or technical meaning.

In *State* v. *Moore*, 5 Blackf. 118, it was said: "This was an indictment for retailing port wine by small measure without license. The prosecution is founded on that part of the act relative to crime and punishment which forbids the sale of spirituous liquors by a less quantity than a quart at a time without license. That is a penal statute, and must be strictly construed. We are not at liberty to extend its meaning beyond its exact literal sense. Spirit is the name of an inflammable liquor produced by distillation. Wine is the fermented juice of grapes, produced by fermentation. We cannot so confound the signification of these general terms as to call wine a spirituous liquor. We think port wine is not within the provisions of the statute. If its omission is an evil, the courts have no power to remedy it."

The supreme court of Tennessee, in *Sanderlin* v. *State*, 2 Humph. 315, said: "The question for consideration is, whether wine is a spirituous liquor, within the meaning of the statute. We think it is not. Wine is a fermented liquor. Spirits are distilled liquors. This distinction exists, not only in common parlance, but is recognized by chemists and physiologists. We therefore think that the words 'spirituous liquors' embrace those which are produced by distillation, but not those produced by fermentation."

Since this cause was tried, an amendatory Act has been passed by Congress, approved July 23, 1892, *providing that the section shall [577 read as follows: "No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretence, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquors of any kind into the Indian country, shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense."

This would seem to show that Congress regarded the Act, as it previously stood, as not including ale and beer in its terms. At any

rate, the temptation to the courts to stretch the law to cover an acknowledged evil is now removed.

The judgment of the court below is reversed, and the cause remanded with directions to quash the indictment, and discharge the defendant. *Reversed.*

DAVID S. PRESSON, Collector of Customs for the Port of Gloucester, *Plff. in Err.*,
v.
EDWARD T. RUSSELL ET AL.

(See S. C. Reporter's ed. 577-581.)

Action to recover back duties.

An action to recover back duties illegally exacted cannot be maintained if the statutory requirements in respect of notice were not complied with as provided by U. S. Rev. Stat. §§ 2931, 3011.

[No. 315.]

Submitted March 22, 1894. Decided April 9, 1894.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment in favor of plaintiffs, Edward T. Russell *et al.*, against David S. Presson, Collector of Customs, for the recovery of duties illegally exacted on imported goods. *Reversed, with direction to enter judgment for defendant.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action to recover duties alleged to have been unlawfully assessed, and was tried by the circuit court, without a jury, upon the following agreed statements of facts:

578] *"The plaintiffs, on the nineteenth day of January, 1888, imported from Montreal, Can., into the port of St. Albans, Vt., one hundred barrels of dry salted codfish consigned to John S. Story, to be by him entered at the custom house at St. Albans, and thence to be immediately transported in bond to the port of Gloucester, Mass., consigned to the plaintiffs. The goods were entered at the custom house at St. Albans on the nineteenth day of January, 1888, by Story, as 'one hundred barrels pickled cod,' and were immediately transported in bond to Gloucester and entered by the plaintiffs at the custom house in Gloucester. The fish were imported in dry flour or sugar barrels, incapable of containing liquids, and had never been pickled, but had been cured with dry salt, and were not at the time of their importation what is known as 'pickled fish,' but were dry salted fish; each barrel contained two hundred and thirty eight pounds of fish. The defendant, then collector of customs for said port of Gloucester, demanded and collected upon each pound of said fish a duty of one cent, amounting in the whole to the sum of two hundred and thirty-eight dollars, a sum which the plaintiffs claimed was not due and payable as duties, and exacted payment of the same from the plaintiffs, who made payment thereof to the said defendant under protest and in order to obtain possession of said merchandise.

"The plaintiffs, being dissatisfied with the decision of the collector assessing the said duty upon the said fish, gave to him due and seasonable notice thereof in writing, setting forth therein distinctly and specifically the grounds of their objection thereto, and duly and seasonably appealed to the Secretary of the Treasury, who affirmed the said decision of the said collector, and the plaintiffs seasonably brought this suit to recover the said sum of one hundred and nineteen dollars, so exacted and paid to the said defendant for customs duty upon said fish.

"The writ and pleadings may be referred to, also annexed copy of protest, and copy of invoice also annexed.

"Upon the foregoing facts it is agreed that the court may enter such judgment as the law requires."

*The protest read thus: "We under- [579 stand that you have assessed duties at the rate of one cent per lb. as 'pickled fish,' whereas they are 'dry fish,' and the duty should be but one half cent per lb. We hereby protest against your assessment of one cent per lb.," etc.

The invoice stated the actual cost of the fish at $523.60.

The circuit court held that salt fish in barrels were not subject to duty under the Tariff Act of 1883, and gave judgment for the plaintiff in the sum of $238, to review which this writ of error was brought.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for plaintiff in error.

Mr. **Frederic Cunningham** for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Schedule G of the Act of March 3, 1883 (22 Stat. at L. 488, 503, 504, chap. 121) contained, under the heading, "Fish," these paragraphs:

"Salmon, pickled, one cent per pound; other fish, pickled, in barrels, one cent per pound.

"Foreign caught fish, imported otherwise than in barrels or half barrels, whether fresh, smoked, dried, salted or pickled, not specially enumerated or provided for in this Act, fifty cents per hundred pounds."

"Salmon, and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this Act, twenty-five per centum ad valorem."

These fish were entered as "pickled cod," and were in barrels, and the collector assessed them under the first of the above three paragraphs, but as it was admitted on the trial that the fish had never been pickled but had been cured with dry salt, this must be treated as erroneous; and, being in barrels, they were not within the second paragraph, which *ap [580 plied only to fish "imported otherwise than in barrels or half barrels."

As, however, the fish were preserved by being dry salted, we are of opinion that they came within the third paragraph, and were subject to the ad valorem duty there specified.

But the action cannot be maintained if the

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

statutory requirements in respect of notice were not complied with. Rev. Stat. §§ 2931, 2911. While such protest need not be technically precise, it must "definitely and specifically" set forth the grounds of the importer's objections, to the end that the collector may have a reasonable opportunity to remove them, and that the importer may not raise other objections than those on which he acted, after the business is closed and the money paid into the Treasury. *Herrman* v. *Robertson*, *ante*, p. 518.

This involves the designation in substance, though exact accuracy is not required, of the provision under which the importer insists the goods are dutiable, so as to comprehensively indicate the grounds of alleged error and afford the means of rectification. The importers assumed to do this here, and objected that the fish were not "pickled fish" liable to a duty of one cent per pound, but were "dry fish" dutiable at one half cent per pound; or, in other words, the inference from the duty specified was that the collector should have assessed them under the second paragraph above quoted and not under the first. The collector, who had classified the fish in accordance with the entry, was thus notified that he should have classified them under a clause which was in terms inapplicable. It was only from the connection of the words "dry fish" with the rate named, that the collector could have inferred that the importers meant that the fish were cured by being dried; but the clause did not apply, and he was left to conjecture as to whether the fish might not have been originally pickled and become subsequently dry. We do not say that the protest need necessarily have stated that the fish had never been pickled, but it was essential to its sufficiency that it should amount to a notification that the importers claimed that the fish were cured by being dried or salted, and not by being pickled. Had the second paragraph applied, the protest **581]** *might be treated as definite enough; but, as the case stands, it must be held to have been insufficient.

The judgment is reversed and the cause remanded with a direction to enter judgment for the defendant.

Mr. Justice **Jackson** did not hear the argument, and took no part in the consideration and decision of the case.

ANTHONY E. SEEBERGER, Collector of Customs, *Plff. in Err.*, *v.* LEOPOLD SCHLESINGER ET AL.

(See S. C. Reporter's ed. 581-589.)

Tariff Act — commercial designation — special findings — duty on opera glasses.

1. Chinese goat skins tanned with the hair on, are not classified as "rugs," in the Tariff Act of March 3, 1883.
2. The commercial designation of an article, is not a matter of which courts can take judicial notice but is a fact to be proved like any other, by evidence.
3. No exception is necessary, in case of special findings by the court to raise the question whether the facts found support the judgment.
4. Pearl opera glasses should be classed as manufactures composed in part of metal under schedule C, of the Act of March 3, 1883, and, therefore, dutiable at forty-five per cent.

[No. 274.]

Argued and Submitted March 13, 1894. Decided April 9, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment in favor of plaintiffs, Leopold Schlesinger *et al.* against Anthony F. Seeberger, Collector of Customs, defendant, for duties illegally exacted upon imported goods. *Reversed.*

Statement by *Mr. Justice* **Brown:**

This was an action by the firm of Schlesinger & Mayer against the collector of the port of Chicago to recover duties paid upon certain importations of Chinese goat skins and pearl opera glasses, entered for consumption at the custom house at Chicago.

The case was tried by the court, without a jury. The court made a special finding of facts, and awarded the plaintiff judgment for $113.60 for excess duties upon the goat skins, and $6.60 upon the opera glasses.

Defendant sued out a writ of error from this court.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for plaintiff in error.

Messrs. **W. Wickham Smith** and **Percy L. Shuman** for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the proper classification for duties under the Act of March 3, 1883, of Chinese goat skins and pearl opera glasses.

1. In reference to the goat skins, the court found that the plaintiffs imported and entered at the custom house in the port and district of Chicago certain Chinese goat skins, dressed and finished, upon which the plaintiffs paid a duty of 40 per cent ad valorem, as "rugs" not otherwise provided for, classified and assessed by the defendant collector, under Schedule K, Act of March 3, 1883, namely: "Carpets, and carpeting of wool, flax, or cotton . . . not otherwise herein specified, forty per centum ad valorem; and mats, rugs . . shall be subjected to the rate of duty herein imposed on carpets." Plaintiffs paid these duties under protest, and appealed to the Secretary of the Treasury, claiming that such merchandise should be assessed a duty of 20 per cent ad valorem under Schedule N, "Sundries," as "skins dressed and finished, of all kinds, not specially enumerated." The court further found "that the goods in question were described in the invoice as 'Chinese goat skins;' that they are tanned with the hair on so that the skin is soft and pliant; that none

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 897.

of the skins are whole or entire, but that the articles imported are made of pieces of skins tanned as aforesaid, loosely sewed together so as to make large parallelogram-shaped pieces about 18 inches wide by 36 to 48 inches long; that they are advertised and sold to some extent for floor rugs, and are sometimes lined and trimmed for sleigh and carriage robes; that they are not always used in the shape imported, but are sometimes cut apart at the seams, or cut into strips and dyed, and used for trimming lap robes, overcoats," etc.

583] *We agree with the court below in holding that the skins in question were improperly classified as "rugs." Schedule K of the Act of March 3, 1883 (22 Stat. at L. 508) is entitled "Wool and Woolens," and, until the clause in question is reached, provides for duties upon various classes of wools, woolen goods, clothing, carpets, including, as an analogous material, the hair of the alpaca, goat, and other like animals, with fabrics made of such hair, or mixtures of the same with wool. The schedule then imposes a duty of six cents per yard upon "hemp or jute carpeting," and then provides that "carpets and carpetings of wool, flax, or cotton, or parts of either or other material, not otherwise herein specified, forty per centum ad valorem; and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings, shall be subjected to the rate of duty herein imposed on carpets or carpetings of like character or description; and the duty on all other mats not exclusively of vegetable material, screens, hassocks, and rugs, shall be forty per centum ad valorem." There is no mention here of skins, or of hair attached to the skin; and while, if the articles in question were used exclusively or principally as rugs, they might be included within that designation, the fact that they were of the size of small rugs, and were advertised and sold to some extent for that purpose, would not be sufficient, if a more specific designation could be found. It not only appears that they were sometimes lined and trimmed for sleigh and carriage robes, but that they were not always used in the shapes imported, and were sometimes cut apart at the seams, and cut into strips and dyed and used for trimming garments. In fact, their uses were so various that they afford a very unsatisfactory criterion for their classification.

The plaintiffs took the ground in their protest, and in this they were sustained by the court below, that they should be classified under Schedule N, "Sundries—Skins dressed and finished." The clause relied upon is one providing for the assessment of leathers, and reads as follows (p. 513):

"Leather, bend or belting leather, and Spanish or other sole leather, and leather not specially enumerated or provided for in this Act, fifteen per centum ad valorem.

584] *"Calfskins, tanned, or tanned and dressed, and dressed upper leather of all other kinds, and skins dressed and finished, of all kinds, not specially enumerated or provided for in this Act, and skins of morocco, finished, twenty per centum ad valorem.

"Skins of morocco, tanned, but unfinished, ten per centum ad valorem.

"All manufactures and articles of leather, or of which leather shall be a component part, not specially enumerated or provided for in this Act, thirty per centum ad valorem."

It is insisted, however, that the item of "skins dressed and finished," read in connection with the residue of the clause, and particularly with "skins for morocco, tanned, but unfinished," indicates that, by "skins dressed and finished" were meant skins dressed and finished in the similitude of leather: that is, by having the hair removed; and that a reference to the corresponding clause of the Revised Statutes, section 2504, page 477, shows still more clearly that the clause in question was not intended to include skins with the hair on:

"Leather—Bend or belting leather, and Spanish or other sole leather: fifteen per centum ad valorem; calfskins, tanned, or tanned and dressed: twenty-five per centum ad valorem; upper leather of all other kinds, and skins dressed and finished of all kinds, not otherwise provided for: twenty per centum ad valorem; skins for morocco, tanned, but unfinished: ten per centum ad valorem; manufactures and articles of leather, or of which leather shall be a component part, not otherwise provided for, thirty five percentum ad valorem.

"Leather and skins japanned, patent, or enameled: thirty-five per centum ad valorem.

"All leather and skins, tanned, not otherwise provided for: twenty-five percentum ad valorem."

In this court it is further claimed by the collector that while none of the clauses referred to include skins of animals with the hair on *eo nomine*, the goat skins in question fall either directly or under the similitude clause within the description of "dressed furs on the skin," page 513, and were dutiable at twenty per centum ad valorem; that although goat skins are *not ordinarily classified as furs—a term [585 usually reserved for the short, fine hair of certain animals, whose skins are largely used for clothing; yet in a commercial sense furs have been regarded as including other skins, perhaps more properly designated by the term "peltry;" and that within their commercial designation is included the covering of all animals whose skin is used either for warmth or ornament, with the hair on. In this connection we are cited to the case of *Astor* v. *Union Ins. Co.* 7 Cow. 202, in which an "Invoice of furs" was described as consisting of bear and racoon skins, opossum, deer, fine fisher, cross fox, marten, white racoon, wild cat, wolf, wolverine, panther and cub skins. In this case evidence was held to be properly admitted showing that, by the usage of the trade, skins valuable chiefly on account of the fur were called *fur*, while *skins* was a term appropriated to those which were valuable chiefly for the *skin*, by which we understand the skin with the hair removed. Our attention is also called to the Encyclopædia Brittannica, which, in treating of the subject of fur, includes within that designation the skins of the bear, buffalo, lamb, lion, tiger and wolf, although perhaps none of these would fall within the popular definition of furs.

The commercial designation of an article, however, is not a matter of which the courts can take judicial notice, but is a fact to be proved

like any other—by evidence. In this case there is no finding as to the commercial meaning of the word "furs," and no testimony whatever upon the subject, for clearly neither the opinion in the Astor case nor the extract from the encyclopedia can be considered as legitimate testimony. In short, the case was tried wholly upon the theory that the goat skins in controversy were either "rugs" or "skins dressed and finished." The collector, therefore, is in no position, as the case is now presented, to ask for a reversal upon this ground; but as the case must be reversed upon another ground, both parties will be at liberty upon a new trial to introduce testimony upon the question of commercial usage.

2. With references to the opera glasses, the court found that the plaintiffs had imported 586] certain shell covered opera *glasses, composed of shell, metal, and glass, upon which said merchandise the plaintiffs paid a duty of 45 per cent ad valorem, assessed by the defendant collector as "manufactured articles, composed in part of metal," under Schedule C, Act of March 3, 1883; that plaintiffs protested and appealed to the Secretary of the Treasury, claiming that these opera glasses should be assessed a duty of 25 per cent ad valorem under Schedule N, "sundries," as "shells, whole or parts of, manufactured, of every description," and under section 2499, as "articles composed of shell, metal, and glass in which the shell is the component of chief value."

The court further found from the proofs that the "said opera glasses are composed of silver or nickel plated metal tubes, fitted to slide within each other, and held together by a metal framework or connections, said tubes containing glass lenses properly fitted therein, and that said tubes are enclosed in a cover of polished mother of pearl; that the shell, when manufactured, or brought to the proper shape for such cover and properly polished, costs more than the glass lenses and metal tubes and frame when finished and ready to be combined with said pearl to make a complete opera glass."

In this connection, our attention is called to the fact that, while an exception was taken to the ruling of the court with respect to goat skins, none was taken to its rulings with respect to the opera glasses. This, however, is immaterial, no exception being necessary, in case of special findings by the court, to raise the question whether the facts found support the judgment. *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423, 428 [20: 192, 194]; *Tyng* v. *Grinnell*, 92 U. S. 467, 469 [23: 733, 734]; *Ætna Ins. Co.* v. *Boon*, 95 U. S. 117, 125 [24: 395, 396]; *Allen* v. *St. Louis Nat. Bank*, 120 U. S. 20, 30 [30: 573, 575].

The court below was of opinion that, taking the designation of "shells, whole, or parts of, manufactured," found in Schedule N, page 514, in connection with the last clause of Rev. Stat. § 2499, that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value be chargeable, these opera glasses should have been classified as manufactured shells, inasmuch as it appeared 587] that the shell, when *manufactured or brought to the proper shape for such covering and properly polished, costs more than the glass lenses and metal tubes and framework, when finished ready to be combined with said material to make a complete opera glass." We held this method of computation to be correct in *Seeberger* v. *Hardy*, 150 U. S. 420 [37: 1129], but the question of the proper classification of the opera glasses was not considered in that case.

We think the court was in error in holding that the articles in question were shells, whole, or parts of, manufactured, as this clause was obviously intended to apply to articles made entirely, or nearly so, of shell, such as combs, bracelets, chains, and lorgnons, and not to articles of which shell was a mere component, though perhaps, as in this case, the most valuable part. Nor are we satisfied that they should be classed as "articles manufactured from two or more materials," in which case, by Revised Statutes, section 2499, as amended by the Act of 1883 (22 Stat. at L. 491) duty should be assessed at the highest rate at which the component material of chief value may be chargeable. In view of the more specific designation in Schedule C, page 501, of "manufactures, articles, or wares not specially enumerated or provided for in this Act, composed wholly or in part of . . . metal," and in view of the fact that, while the metal is not the component of chief value, it is a substantial part of the finished glass, and the framework upon which the lenses and shell are mounted, we think these articles should be classed as manufactures of metal. We do not wish to be understood as holding that, if the metal be a mere incident or an immaterial part of the completed article, as, for instance, the screws or knobs upon an article of household furniture, or the buttons upon an article of clothing, such articles should be classified as manufactures in part of metal; but where, as in this case, they form a necessary and substantial part of the article, we think this clause should determine their classification. Particularly is this so in view of the fact that opera glasses are frequently made of glass and metal alone, or with an outer covering of leather, which would form an inconsiderable part of the total expense. It would be obviously unjust that these cheaper glasses should pay a *duty of forty-five per cent [588 while the more expensive glasses with shell coverings are dutiable only as manufactures of shell at twenty-five per cent.

Practically the same question was before this court in *Solomon* v. *Arthur*, 102 U. S. 208 [26: 147], in which the question arose as to the proper classification of goods composed of silk and cotton. The collector laid a duty upon them as "manufactures of silk or of which silk is the component part of chief value, not otherwise provided for;" and the question was whether they were "otherwise provided for" as "manufactures composed of mixed materials, in part of cotton, silk, wool or worsted, or flax." The goods in question were confessedly embraced in both descriptions; but as "manufactures made of mixed materials, in part of cotton, silk," etc., was more general than that of "manufactures in which silk is the component part of chief value," the two phrases were interpreted to read as follows: "Goods made of mixed materials, cotton, silk,

etc., shall pay a duty of thirty-five per cent; *but if* silk is the component part of chief value, they shall pay a duty of fifty per cent." So by analogy we may read the two clauses in question in this case as follows: "On all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable, provided that if such articles are composed wholly or in part of metal, they shall be dutiable at forty-five per cent." So in *Hartranft* v. *Meyer*, 135 U. S. 237 [34: 110], the question was whether cloth composed partly of silk, partly of cotton, and partly of wool, silk being the component material of chief value, should be classified as "manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this Act," or as "goods, wares, and merchandise, not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value." It was held that, as the latter clause was narrower and more limited than the other, they should be classified as silk goods. In the case of *Liebenroth* v. *Robertson*, 144 U. S. 85 [36: 336], photographic albums made of paper, leather, metal clasps and 589] plated *clasps, the paper being worth more than all the rest of the materials put together, were held not to be liable to duty as "manufactures and articles of leather, or of which leather shall be a component part," but as manufactures of paper, or of which paper was the component material of chief value not specially enumerated or provided for. The case was held to be determined by Revised Statutes, section 2499, as amended by the Act of March 3, 1883, that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates of which the component material of chief value may be chargeable." As the evidence distinctly showed that the paper was the component material of chief value, the albums were held to be assessable as manufactures of paper. In this case the two clauses were practically the same, one being of "manufactures and articles of leather, or of which leather shall be a component part, not specially enumerated;" and the other "paper; manufactures of, or of which paper is a component material, not specially enumerated." As the articles were made both of leather and paper, and were assessable with equal propriety under the one clause or the other, the court called to its aid section 2499, and held the article to be assessable at the highest rates at which the component material of chief value, to wit, the paper, was chargeable. If there had been in the statute such a provision with regard to articles manufactured wholly or in part of shell as there is with regard to articles manufactured wholly or in part of metal, this case would be decisive, but there is no necessity of relying upon section 2499 to aid us in the interpretation of the clauses in question here.

The views of the courts of the different circuits have not been uniform with respect to the classification of these glasses, but we agree with the district judge in the case of *Aloe* v. *Churchill*, 44 Fed. Rep. 50, that they should be classed as manufactures composed in part of metal under Schedule C, and therefore, dutiable at forty-five per cent.

The judgment of the court below, is, therefore, reversed, and the case remanded for further proceedings in conformity with this opinion.

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*ERWIN DAVIS, *Appt.*, [590
v.
THE MERCANTILE TRUST COMPANY, TRUSTEE.

(See S. C. Reporter's ed. 590-596.)

Party to appeal—mortgagor and purchaser.

1. All the parties to the record, who appear to have any interest in the order or decree appealed from, must be given an opportunity to be heard on such appeal.
2. An intervenor in a foreclosure suit cannot maintain an appeal from the decree of sale, or the order confirming it, without joining the purchaser and the mortgagor as parties to the appeal and bringing them into court.

[No. 820.]

Argued March 22, 26, 1894. Decided April 9, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio, in a suit brought by the Mercantile Trust Company, plaintiff, against the Kanawha & Ohio Railway Company *et al.*, defendants, for the foreclosure of a mortgage and sale and from the order of confirmation. *Dismissed.*

Statement by *Mr. Justice* **Brewer:**

On February 18, 1889, the Mercantile Trust Company of New York filed in the Circuit Court of the United States for the Southern District of Ohio its bill against the Kanawha & Ohio Railway Company. The bill alleged that on May 1, 1883, the defendant, the Kanawha & Ohio Railway Company, issued a series of bonds, and on the same day executed to the Mercantile Trust Company its mortgage or deed of trust to secure the payment of the principal and interest of such bonds. It alleged a default in the payment of interest due on January 1, 1889, as well as the existence of a large floating debt, and prayed the appointment of a receiver, and a decree of foreclosure and sale. On February 19 the defendant entered its appearance, and on the same day a receiver was appointed, who qualified and took possession of the mortgaged property. Subsequently, and on July 24, an amended bill was filed making additional parties defendant the Toledo & Ohio Central Railway Company and the Shawnee & Muskingum River Railway Company. On October 26 a decree *pro confesso* was entered against the latter company. On October 30, Erwin Davis, the present appellant, filed a petition alleging that he was the owner of more than $100,000

NOTE.—*As to parties in error, who necessary*, see note to Owings v. Kincannon, 8: 727.

That only parties to record can be heard on appeal or writ of error, see note to Harrison v. Nixon, 9: 201.

of the bonds secured by the mortgage or deed [591] of *trust sought to be foreclosed in this suit, and also the owner of more than $500,000, par value, of each class of stock of the defendant, the Kanawha & Ohio Railway Company, to wit, first and second preferred, and common, and asking for the removal of the receiver on the ground of his incompetency, and the appointment of some capable and disinterested person as such receiver. On the same day a decree *pro confesso* was entered against the Kanawha & Ohio Railway Company. On November 13 the petition of Davis, for the removal of the receiver and the appointment of another in his stead, was denied, and at the same time this order was made: "It is further ordered that said Erwin Davis be, and is permitted to intervene herein, and that he have liberty to be heard upon any and all proceedings herein for the protection of his interests as bondholder and stockholder of the Kanawha & Ohio Railway Company."

On November 29 the Toledo & Ohio Central Railway Company filed its consent to the entry of a decree, according to the prayer of the amended bill of complaint, and that the "cause proceed in like manner as if an order *pro confesso* had been duly entered against it more than thirty days prior" thereto. On December 5, Davis filed a second petition, reciting his interest as before, and in addition alleging the existence of certain prior mortgage liens upon the property described in the plaintiff's bill, or part of it; that in the bill there was claimed that the Kanawha & Ohio Railway Company had a floating debt of about $300,000; that since the filing of the bill that company had confessed judgment in favor of the Kanawha Improvement Company in a court of West Virginia for the sum of $285,232.20; and that, as a bondholder and stockholder of Kanawha & Ohio Railway Company, on behalf of himself and all other stockholders and creditors, he had filed a bill in the Circuit Court of the United States for the District of West Virginia, attacking such judgment so confessed, on the ground of fraud, and praying that it be canceled, set aside, and held for naught. He attached a copy of this bill, and closed the petition in these words:

592] *"Your petitioner respectfully represents that he is advised that no decree of sale of the property included in said mortgage should be decreed until a reference is had to ascertain the liens which shall have been first ascertained thereon, the amounts thereof, and the order of their priorities; that a sale should not be decreed until the validity of the judgment referred to shall have been first adjudicated.

"Petitioner therefore prays that this his petition be read and considered at the hearing; that your honors will not at said hearing enter a decree of foreclosure as prayed for in said bill until the matters of this petition have been fully heard and a proper reference to a master be made to ascertain all liens upon said railroad and the order of their priorities, and that petitioner have full relief in the premises, and, as in duty bound, he will ever pray," etc.

On the same day, to wit, December 5, 1889, a decree of foreclosure and sale was entered; that decree found a default in the payment of interest and decreed a sale unless such interest should be paid within thirty days. At the close of the decree was this entry: "Thereupon came the intervening petitioner, Erwin Davis, and prayed the court for the allowance of an appeal, with supersedeas, from the foregoing decree, and the court thereupon refused the appeal."

Subsequently, an application was made to *Mr. Justice* Harlan of this court for an appeal, and on February 11, 1890, it was allowed. The only security given on this appeal was a cost bond, in the sum of five hundred dollars, executed by Davis and his surety to the appellee, the Mercantile Trust Company, alone. This bond was approved February 27, 1890, and a citation was then signed by *Mr. Justice* Harlan, the citation running to the Mercantile Trust Company, the Kanawha & Ohio Railway Company, the Toledo & Ohio Central Railway Company, and the Shawnee & Muskingum River Railway Company. This was served on the Mercantile Trust Company, the Toledo & Ohio Central Railway Company, and the Shawnee & Muskingum River Railway Company, but not on the Kanawha & Ohio Railway Company, the mortgagor. No supersedeas bond having been executed, *a sale [593] was had under the decree on March 4, 1890, and the property struck off to Nelson Robinson and William B. Post, for the sum of $505,000. On April 7, 1890, this sale was confirmed and a deed ordered; from such order of confirmation Davis prayed an appeal, which was allowed. On such appeal also a cost bond to the Mercantile Trust Company alone was given, and a citation issued running only to the Mercantile Trust Company.

Messrs. **Walter S. Logan** and *Charles M. Demond* for appellant.

Mr. **Thomas Thacher** for appellee:

Mr. Justice **Brewer** delivered the opinion of the court:

As a preliminary matter the standing of the appellants in this court is challenged. In the court below he was not a party to the record, either plaintiff or defendant; was never substituted for either, filed no bill, cross-bill, or answer; but was simply permitted to intervene, with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder. Assuming, under the authority of *Williams* v. *Morgan*, 111 U. S. 684, 698 [28: 559, 564], that this gave him a right of appeal from any decision of the circuit court affecting his interests, it did not change the ordinary rules respecting appeals, one of which is that all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal. The rule and the reasons therefor are fully stated in *Mast* v. *Howard*, 77 U. S. 10 Wall. 416 [19: 953], and restated in *Harder* v. *Wilson*, 146 U. S. 179, 181 [36:933], and need not, therefore, be again repeated. See also *Inglehart* v. *Stansbury*, *ante*, p. 76.

In this case the appellant has taken two appeals, one from the decree and the other from the order confirming the sale. These appeals being taken separately, each must stand or fall on its own merits. Noticing first the ap-

594] peal from the order *of confirmation, it will be seen that the sale confirmed was of the mortgaged property to Robinson and Post for the sum of $505,000, of which sum $50,000 had been paid in cash by the purchasers, and the balance secured by a deposit or $1,069,000, first mortgage bonds of the Kanawha & Ohio Railway Company, the bonds in suit. Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers? If the sale be set aside, they lose the purchased premises and all the profit which might result from their purchase, and assume all the risks and delay in recovering that which they have paid into court. In *Kneeland* v. *American Loan & T. Co.* 136 U. S. 89, 95 [34: 379, 382], this court said that, "supported by sound reasons, are the following propositions: First, a party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase; and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree."

Again, not only is the purchaser interested, but also the mortgagor. He may be satisfied with the sale which was made, may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At any rate, the setting aside of one sale and the ordering of another may affect prejudicially or beneficially his interests, and because of that he has a right to be heard upon the question of setting it aside. Now the only party respondent to this appeal is the trustee. It is the only party named as obligee in the cost bond. The citation in terms runs to it only, and there is no pretense that the mortgagor or the other defendants, or the purchasers at the sale, have ever been brought into this court to respond to this appeal. Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties.

Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party 595] should be permitted *to disturb such a decree unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be willing that the decree should be set aside notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record—the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. The trustee is the only obligee named in the appeal bond, and while the citation on its face runs to all the parties to the record, it was not served on the mortgagor, the Kanawha & Ohio Railway Company, and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal. The appellant seems to have assumed that he was authorized to represent the corporation mortgagor and all the stockholders, but this is obviously a mistake. He was was not by order of court substituted for the defendant mortgagor, nor was he allowed to represent the mortgagor or to carry on its defense. The only authority given to him was to intervene for the protection of his personal interests as bondholder and stockholder. The corporation mortgagor still represented all the other stockholders, as did the trustee all the other bondholders; and while the appellant appears to have had a considerable interest, both as stockholder and bondholder, it was only a minor fraction. Out of 1160 bonds 1069 (all but 91) were *tendered by the [596 purchasers upon application for confirmation of sale, and while he claims to be the owner of $1,500,000 of the stock, it appears that the total amount thereof was $12,200,000; so that in fact he was the owner of less than one eleventh of the bonds and one eighth of the stock. No authority from these other bondholders or stockholders to him to act for them is shown, so that neither in fact nor in law was he representing the corporation mortgagor in this litigation; and as that mortgagor was interested in and affected by the decree of foreclosure and sale it should have been made a party to this appeal and brought into this court, and because of the failure so to do the appeal cannot be maintained.

For the reasons above given both appeals are dismissed.

Mr. Justice **Jackson** did not hear the argument or take any part in the decision of this case.

THE NORTH CHICAGO ROLLING MILL COMPANY, *Appt.*,
v.
THE ST. LOUIS ORE & STEEL COMPANY ET AL.

(See S. C. Reporter's ed. 596-623.)

Rights of garnishee—equitable jurisdiction—restraining collection of judgment—set-off—insolvency—non-residence—liability of garnishee—existing contracts—claims against debtor.

1. A garnishee, after a judgment at law subjecting his indebtedness to the principal debtor to the

NOTE.—*As to mesne profits; improvements may be set off*, see note to Green v. Biddle, 5: 547.

payment of the garnisher, can restrain in equity the garnisher from enforcing such payment, until the unliquidated damages due the garnishee from such debtor for the breach of a contract existing before the garnishment proceedings, can be ascertained and set off against such indebtedness, where such debtor is insolvent and a non-resident.

2. Equitable jurisdiction having once rightfully attached, cannot be defeated by matter subsequently arising which does not go to the merits of the complainant's case.

3. Equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced.

4. The adjustment of demands by counter claim or set-off rather than by independent suit is favored and encouraged by the law, to avoid circuity of action and injustice.

5. The insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference.

6. The non-residence of the party against whom the set-off is asserted is good ground for equitable relief.

7. The liability, legal and equitable, of the garnishee to the principal debtor is a measure of his liability to the attaching creditor.

8. Whatever rights the garnishee may have under existing contracts with the principal debtor, he is entitled to have the benefit thereof as against the attaching creditor.

9. The garnishee can avail himself of all claims fairly arising out of contracts with the principal debtor which were in existence when the attachment was commenced.

[No. 197.]

Argued Jan. 11, 1894. Decided April 9, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing the intervening suit of the North Chicago Rolling Mill Company, against the St. Louis Ore & Steel Company *et al.* for an injunction and an equitable set-off against certain judgments in certain attachment suits, and for judgment for any balance due plaintiff by the St. Louis Ore & Steel Company. *Reversed, and cause remanded with directions to proceed in conformity with the opinion.*

See same case below, 39 Fed. Rep. 308.

The facts are stated in the opinion.

Messrs. **E. Parmalee Prentice** and *Charles S. Holt*, for appellant:

The Chicago Company had a valid claim for damages for breach of the rail contract, which claim existed when the attachment was begun and was complete before the intervening petition was filed, and had the right in equity to set off its claim for damages against its indebtedness to the St. Louis Company and to enjoin the collection of the judgment in attachment.

A bill will lie to enjoin the collection of a judgment, on any ground of good conscience which could not have been set up at law, or which the complainant was prevented from setting up, without his own negligence.

Crim v. *Handley*, 94 U. S. 652 (24:216); *Embry* v. *Palmer*, 107 U. S. 3 (27:346); *Knox County* v. *Harshman*, 133 U. S. 154 (33:586).

In equity, any cross demand may be enforced by way of set off, if there are peculiar circumstances warranting the interposition of equity. The insolvency of the party against whom the set-off is claimed, is sufficient ground for equitable interference.

Schuler v. *Israel*, 120 U. S. 506 (30:707); *Leeds* v. *Marine Ins. Co.* 19 U. S. 6 Wheat. 565 (5:332); *Lindsay* v. *Jackson*, 2 Paige, 581; *Pond* v. *Smith*, 4 Conn. 302; *Robbins* v. *Holley*, 1 T. B. Mon. 194; *Gay* v. *Gay*, 10 Paige, 369; *Hinrichsen* v. *Reinback*, 27 Ill. 295; *Raleigh* v. *Raleigh*, 35 Ill. 512; *Hall* v. *Kimball*, 77 Ill. 161; *Chicago, D. & V. R. Co.* v. *Field*, 86 Ill. 270; *Doane* v. *Walker*, 101 Ill. 628; *Davis* v. *Milburn*, 3 Iowa, 163; *Tuscumbia, C. & D. R. Co.* v. *Rhodes*, 8 Ala. 206; *Wray* v. *Furniss*, 27 Ala. 471; *Rothschild* v. *Mack*, 115 N. Y. 1; *Richards* v. *La Tourette*, 119 N. Y. 54; *Keightley* v. *Walls*, 27 Ind. 384; *Wulschner* v. *Sells*, 87 Ind. 75; *Laybourn* v. *Seymour* (Minn.) April 27, 1893; Waterman, Set Off, § 396.

Non-residence of the party will likewise be ground for equitable interference.

Quick v. *Lemon*, 105 Ill. 578; *Taylor* v. *Stowell*, 4 Met. (Ky.) 175; *Robbins* v. *Holley*, 1 T. B. Mon. 194; *Edminson* v. *Baxter*, 4 Hayw. 112, 9 Am. Dec. 751; *Davis* v. *Milburn*, 3 Iowa, 163; *Forbes* v. *Cooper*, 88 Ky. 285.

It is no objection that the claim sought to be set off is unliquidated.

Lindsay v. *Jackson*, 2 Paige, 581; *Edminson* v. *Baxter*, and *Forbes* v. *Cooper*, *supra*.

Nor that the claim is not due, or that it accrues to the complainant after judgment at law.

Chicago, D. & V. R. Co. v. *Field*, 86 Ill. 272; *Hall* v. *Kimball*, 77 Ill. 161; *Keightley* v. *Walls*, 27 Ind. 384.

Equity having personal jurisdiction of the parties will not only offset the claim for damages against the judgment at law, but will do complete justice by rendering a decree for the excess in favor of the Chicago Company.

1 Pom. Eq. Jur. 160; *McGowin* v. *Remington*, 12 Pa. 63, 51 Am. Dec. 584; *Jones* v. *Waggoner*, 7 J. J. Marsh. 144; *Davis* v. *Milburn*, 3 Iowa, 163.

The law of recoupment and set-off in Illinois is peculiarly liberal.

Babcock v. *Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Peck* v. *Brewer*, 48 Ill. 54; *Scott* v. *Kenton*, 81 Ill. 96.

Adjustment of demands by counterclaim rather than by independent suit is everywhere favored.

Florida R. Co. v. *Smith*, 88 U. S. 21 Wall. 255 (22:513).

The attaching creditor takes no better right than the St. Louis Company.

Drake, Attachm. § 458; *Schuler* v. *Israel*, 120 U. S. 506 (30:707).

The law and practice of the state, in respect to set-off, control the Federal courts within such state.

Partridge v. *Phœnix Mut. L. Ins. Co.* 82 U. S. 15 Wall. 580 (21:230); *West* v. *Aurora*, 73 U. S. 6 Wall. 139 (18:819).

Mr. **Henry Hitchcock**, for appellees:

Appellant's claim to set off, against its indebtedness for ore, the damages alleged under the rail contract of December 1, 1883, was properly disallowed in the garnishment proceeding. Under the Illinois statute such a

claim could not be set off by the garnishee, because—

1. Said claim was for unliquidated damages, arising on a contract entirely disconnected with the contract or subject-matter out of which the garnishee's admitted indebtedness arose.

2. It was not an existing debt on July 21, 1884, when the writ of garnishment was served.

Ill. Rev. Stat. (Cothran's ed. 1887) chap. 62. § 13, Ill. Rev. Stat. (Cothran's ed. 1887) chap. 110, p. 1097, § 29; *Michigan Cent. R. Co.* v. *Chicago & M. L. S. R. Co.* 1 Ill. App. 399; *Clause* v. *Bullock Printing Press Co.* 118 Ill. 617; *Capes* v. *Burgess*, 135 Ill. 61, 68; *Evans* v. *Hughey*, 76 Ill. 120; *Robinson* v. *Hibbs*, 48 Ill. 408; *DeForrest* v. *Oder*, 42 Ill. 500; *Sargeant* v. *Kellogg*, 10 Ill. 273, 281; *Hawks* v. *Lands*, 8 Ill. 228; *Ellis* v. *Cothran*, 117 Ill. 458, 460; *Ryan* v. *Barger*, 16 Ill. 28, 30; *Ayres* v. *McConnel*, 15 Ill. 230, 233; *Kelly* v. *Garrett*, 6 Ill. 649, 653; *Martin* v. *Kunzmuller*, 37 N. Y. 396; *Myers* v. *Davis*, 22 N. Y. 489, 493; *Irvin* v. *Wright*, 2 Ill. 135; *Duncan* v. *Lyon*, 3 Johns. Ch. 351, 8 Am. Dec. 513; *Mohawk Bank* v. *Burrows*, 6 Johns. Ch. 317, 322.

Upon the facts in proof, appellant's petition was properly dismissed. According to the settled doctrine of set off in equity, appellant is not entitled to the relief here sought.

Courts of law and of equity follow the same general doctrines on the subject of set-off. No set-off will be allowed in equity in respect of a demand for uncertain damages arising on a breach of contract, nor in respect of a demand not mutual, or a demand to arise in future; nor in respect of mutual disconnected debts, in the absence of either an express or implied agreement of stoppage *pro tanto* or mutual credit in reference to said debts; nor will courts of equity allow a set off of debts accruing in different rights, except under very special circumstances, and where the proofs are clear and the equity is very strong. A set-off will be allowed in equity only on some distinct equitable ground; the mere existence of cross demands is not sufficient.

Duncan v. *Lyon*, *supra*; *Hackett* v. *Connett*, 2 Edw. Ch. 73; *Mohawk Bank* v. *Burrows*, *supra*; *Greene* v. *Darling*, 5 Mason, 201-215; *Jeffryes* v. *Agra & M. Bank*, L. R. 2 Eq. 674; *Earl of Oxford's Case*, 2 White & T. Lead. Cas. Eq. 1340, 1341; *Rawson* v. *Samuel*, 1 Craig & P. 171; *Wade* v. *Wade*, 12 Ill. 89; *Raleigh* v. *Raleigh*, 35 Ill. 512; *Zogbaum* v. *Parker*, 55 N. Y. 120; *Scammon* v. *Kimball*, 92 U. S. 362 (23: 483); 2 Story, Eq. Jur. §§ 1435-1437.

No question of "recoupment" can possibly arise in this case, since defendant's indebtedness, and the damages claimed by it, do not arise out of the same contract. Recoupment and set-off are not the same thing.

Evans v. *Hughey*, 76 Ill. 120; *Hubbard* v. *Rogers*, 64 Ill. 434; Bouvier, Law Dict. title, "*Recoupment*."

Even had defendant been shown to be insolvent, and had the damages claimed by petitioner been a proper subject of set-off, yet the equity of the Joliet Steel Co. to the benefit of the fund in controversy was certainly equal to that of the North Chicago Rolling Mill Co., both being Illinois creditors, and superior to it in respect of the greater diligence of the Joliet Steel Co. in levying its attachment and promptly reducing its claim against the Ore & Steel Co. to judgment.

Zogbaum v. *Parker*, 55 N. Y. 120; 1 Story, Eq. Jur. (13th ed.) § 64*d*.

Mr. Justice **Jackson** delivered the opinion of the court:

The principal question presented by the record in this case is whether a garnishee, who occupies the double position of debtor to the principal defendant in a definite or ascertained amount, and also that of a creditor of such principal debtor by way of unliquidated damages arising out of the breach of contract in existence when the garnishment proceedings were instituted, can, after an order at law subjecting the defined indebtedness to the payment of the garnisher, invoke the aid of a court of equity to restrain the garnisheeing creditor from enforcing the payment of the amount due until the unliquidated damages can be ascertained, and set off against such indebtedness, on the ground that the principal debtor is insolvent and a nonresident of the state in which the garnishee resides, and in which the garnishment proceedings are had? In other words, is the insolvency and nonresidence of the principal debtor, to whom the garnishee is indebted in a certain, definite amount, and against whom he has a valid *claim for unliquidated [598 damages growing out of a breach of contract between them—in existence at the commencement of the garnishment proceedings—a good ground for the exercise of equitable jurisdiction after an order, or judgment at law, declaring the sum due the principal debtor applicable to the payment of the garnisher, to stay the enforcement of such order or judgment until the unliquidated damages due the garnishee can be ascertained and set-off against the amount certain owing by him to the principal debtor?

The material facts and proceedings out of which this question arises are as follows: In November, 1883, the St. Louis Ore & Steel Company, of St. Louis, Missouri (hereafter styled the St. Louis Company) and the North Chicago Rolling Mill Company, of Chicago, Illinois (hereafter called the Chicago Company) were each engaged in the manufacture of steel rails for railroads. The St. Louis Company was also a miner of iron ore and the maker of pig metal. On November 6, 1883, the St. Louis Company entered into a contract with the Missouri Pacific Railroad Company for the sale and delivery to the railroad company of 24,000 tons of steel rails in quantities of 2000 tons per month from January to December, 1884, inclusive, for which the railroad company agreed to pay for each monthly delivery of rails on receipt of bills of lading and invoice, at the rate of $18 a ton cash, and one ton of old rails for each ton delivered.

On November 19, 1883, the St. Louis Company entered into another contract with the Missouri Pacific Railroad Company, by which it agreed to sell to the railroad company the further quantity of 18,000 tons of steel rails to be delivered at the rate of about 1500 tons per month, commencing January 1, and ending in December, 1884, for which the purchaser was to pay for each delivery of 1500 tons at the rate

of $37.50 a ton in cash, on the twentieth day of the month succeeding the delivery.

Having these engagements on its hands, the St. Louis Company on December 1, 1883, entered into a written contract with the Chicago Company, by which the latter agreed to furnish the former company 18,000 tons of No. 1, [599] Bessemer *steel rails, to be delivered free on board the cars at Chicago in about equal amounts (1500 tons) during each month of the year 1884, at the rate of $35 per gross ton (2240 pounds) to be paid by the St. Louis Company on the tenth day of each month for all rails delivered during the previous month. The contract specified that the rails to be furnished by the Chicago Company should weight 52, 56, 59, or 63 pounds per lineal yard, as per templet to be furnished by the St. Louis Company, and were to be drilled for bolts at certain distances from the ends of the rails according to their weight.

The rails were to be consigned as directed by the St. Louis Company, which was to furnish the cars for the prompt shipment thereof from Chicago, "and in the absence of the furnishing of cars upon which to load said rails, enabling the said first party (the Chicago Company) to make their deliveries as herein specified, then the said second party (the St. Louis Company) shall make their settlements and pay for said rails on the tenth day of the month, the same as though said rails had been delivered, and the non-delivery of cars shall in no way relieve the said second party from the prompt payment for the rails on the tenth day of the month as specified herein." The rails, so far as delivered, were manufactured in varying weights, upon orders given by the St. Louis Company.

On December 22, 1883, the Chicago Company entered into a contract with R. M. Cherrie & Company, of Chicago, for the purchase of 50,000 tons of iron ore, to be mined and shipped, during the year 1884, from the Pilot Knob mine in the state of Missouri, owned and operated by the St. Louis Company. This ore was to be delivered at the Chicago Company's works in quantities of from one to seven thousand tons per month, as required by the Chicago Company, and payment therefor was to be made on the fifteenth day of each month for ore delivered during the previous month. This contract, if not made by Cherrie & Company, as agents of the St. Louis Company, was guaranteed by the latter so far as the quality of the ore and its delivery were concerned.

Cherrie & Company became financially involved, and on July 3, 1884, made an assign- [600] ment to one Jenkins for the *benefit of their creditors, of whom the St. Louis Company was a large one. Upon the failure of Cherrie & Company the St. Louis Company assumed the former's ore contract with the Chicago Company, and thereafter, between the 4th and 21st days of July, 1884, delivered to the Chicago Company iron ore and pig metal to the amount or value of $44,916.82, for which payment was to be made by the Chicago Company on August 15, 1884.

On July 10, 1884, the St. Louis Company, being indebted to the Chicago Company in the sum of $21,536.56 for steel rails delivered during the previous month (June) made default in paying the same, and the next day (July 11, 1884) informed the Chicago Company by letter of its inability to pay for the June delivery of rails, and asked as a special favor to let the matter rest for a little while, as the Chicago Company had in its possession funds arising from the sale of ore and pig metal which were being delivered during the month of July. To this request no reply appears to have been made.

On July 12, 1884, the St. Louis Company again wrote the Chicago Company, expressing a doubt as to its ability to pay its debts promptly, and suggesting an arrangement by which the receivers of the Wabash Railroad Company should take certain rails and settle directly with the Chicago Company. This arrangement was not, however, consummated.

The St. Louis Company being embarrassed and having made default in paying the interest on its several issues of bonds, secured by mortgages, was, on July 21, 1884, placed in the hands of a receiver, upon a bill filed against it in the United States Circuit Court for the Eastern District of Missouri by Robert M. Olyphant, as trustee, a citizen of New York, for the foreclosure of a second mortgage upon its property. The bill alleged the insolvency of the St. Louis Company, and upon the day of its filing E. A. Hitchcock, the president of the company, was appointed provisional receiver of its property and assets, with instructions "to carry out and perform the contracts of the company for the purchase and sale of steel rails, and to preserve and protect all its property." This receivership was made permanent on August 7, 1884, and *the provisional [601] instructions were renewed. Hitchcock promptly qualified both as provisional and permanent receiver.

The receiver subsequently, on August 25, 1884, made a report to the court, in which, after referring to the several contracts of the St. Louis Company with the Missouri Pacific Railroad Company for the sale of steel rails, and with the Chicago Company and others for the purchase of such rails, together with what had been done thereunder, stated that on July 30, 1884, he had received from the railroad company an order for 2045 tons of rails to be delivered in August; that he thereupon had placed with the Chicago Company an order for 1500 tons of the rails required, the price of which, under the contract between the St Louis Company and the Chicago Company, would amount to about the sum of $52 000, and if the rails were delivered in August, that sum would have to be paid on September 10, 1884; that he had not in hand, and was not likely to have, any funds with which to meet such payment; that he had, after negotiations, failed to induce the railroad company to agree to make payment for the rails on September 10, 1884; that the railroad company had, furthermore, notified him that it was ready to carry out its contract with the St. Louis Company according to the terms thereof, but would no longer accept steel rails from other makers in the performance of that contract; that he had without success made overtures to be released from the contract of the St. Louis Company for the sale and purchase of steel rails, on the basis of the difference between the then market price of such rails, estimated at $31 per ton,

and the contract prices, which terms he regarded as just to all parties, but that these overtures were not accepted. The receiver further reported that the Chicago Company had notified him by letter under date of August 6, 1884, that it was ready and willing to carry out its contract of December 1, 1883, for the manufacture and delivery of steel rails upon the terms of payment therein mentioned, and that for the failure of the St. Louis Company to carry out the said contract it would claim damages; that the Chicago Company re-
602] quested an explicit statement from *him, as receiver, whether he would be prepared to pay in cash on the tenth of each month following the delivery of rails ordered by him under said contract, to which he had replied that he was not in possession of money sufficient to pay cash for such rails, but that the court under whose orders he was acting had power to make provision therefor: that to this the Chicago Company had replied that it was ready and willing to furnish the rails as ordered upon being notified that he was prepared to pay therefore on the tenth of the month following delivery.

The correspondence fully established the facts thus reported by the receiver. It is further shown in the correspondence between the receiver and the Chicago Company that the receiver proposed to pay for the rails which might be ordered and delivered under the contract with the St. Louis Company in receiver's certificates, which the Chicago Company declined to receive. The receiver admitting that he could not pay for the 1500 tons ordered for the next month, those rails were, for that reason, not manufactured by the Chicago Company.

The Chicago Company received no orders for rails from the St. Louis Company, or its receiver, for the month of July, or for any subsequent month during the year 1884. Nor did the receiver ever notify the Chicago Company that he was prepared to pay for the rails according to the terms of the contract between the two companies.

On the day of the receiver's appointment (July 21, 1884) the Joliet Steel Company, an Illinois corporation, commenced two attachment suits in the superior court of Cook county, Illinois, against the St. Louis Company, one for $7777.07, the other for $10,051.78, and on the same day and in the same court the Iron Mountain Company, a Missouri corporation, commenced an attachment suit against the St. Louis Company upon a claim for $19,782.60. No property of the St. Louis Company was attached under the writs issued in these suits, which were thereupon, and in conformity with the statutes of Illinois, served upon the Chicago Company, and R. E. Jenkins, as assignee of R. M. Cherrie & Company, as garnishees and interrogatories were filed for each of them to answer,
603] touching *their indebtedness to the St. Louis Company. The two suits of the Joliet Company were removed in September, 1884, to the law side of the United States Circuit Court for the Northern District of Illinois. The Chicago Company made answer in November, 1884, and a supplemental and amended answer on February 25, 1885, setting forth the transactions and matters of account between itself and the St. Louis Company, admitting an indebtedness to the latter for ore and pig iron amounting to $44,916.82, and setting up counterclaims to the amount of $56,807.50, which included the sum of $28,390.16 as damages for the failure of the St. Louis Company to carry out the steel rail contract by receiving and paying for the rails in compliance with the terms of that contract.

To this answer replication was made, and, upon the issues formed, the cause was tried before a jury. The Chicago Company introduced proof tending to establish its claim for the $28,390.16, as damages; but upon motion of the plaintiff this evidence was stricken out, and the claim for damages was disallowed by the court on the ground that, being unliquidated, it could not properly be set off at law. The disallowance of the claim for damages left a balance of $16,473 28 due by the Chicago Company to the St. Louis Company. A verdict was directed for the plaintiff for that amount, and judgment was rendered against the Chicago Company, January 13, 1886, for the sum of $16,473.28.

This garnishment proceeding was, under the Illinois statutes, in the name of the St. Louis Company, and judgment was rendered in its favor against the Chicago Company for the amount of the verdict for the use of the Joliet Company and others entitled to share therein.

In the garnishment proceedings under the attachment suit of the Iron Mountain Company in the superior court of Cook county a similar judgment was rendered against the Chicago Company as garnishee. By the laws of Illinois the sum adjudged against the Chicago Company as garnishee was a *quasi* trust fund for the use of both attaching creditors – the Joliet Company and the Iron Mountain Company.

Pending the garnishment proceedings, on September 26, *1884, Robert M. Oly-
604] phant, as trustee, filed what is called an ancillary bill in the United States Circuit Court for the Northern District of Illinois against the St. Louis Company, for the purpose of reaching the assets of the company in that jurisdiction. This bill recited the proceedings had, and the orders made, in the original suit, and asked the court to administer the assets of the company in that jurisdiction.

The Chicago Company having secured a stay of proceedings in both of the garnishment cases, thereupon filed its bill, or petition, on January 18, 1886, against the St. Louis Company, the Joliet Company, and the Iron Mountain Company, on the equity side of the United States Circuit Court for the Northern District of Illinois, in the ancillary suit of *Olyphant* v. *St. Louis Co.* This bill or petition of the Chicago Company, after setting out the rail and ore contracts, the default of the St. Louis Company in failing to perform the rail contract, and the resulting damages to the Chicago Company, the garnishment proceedings at law in the state and Federal courts, and the denial of its right therein to set off its claim for damages against the St. Louis Company, alleged that the St. Louis Company was insolvent, and that, being both insolvent and a nonresident, the Chicago Company was entitled to relief in equity by having its damages liquidated, and then set-off against the judg-

ments in the attachment suits. The prayer was for an injunction and relief by way of equitable set-off, and for judgment over for any balance due it by the St. Louis Company.

The Iron Mountain Company filed its answer in March, 1887, admitting that the claim on which its attachment suit was brought against the St. Louis Company had been settled, and disclaimed any further interest in the proceedings.

The answer of the other defendants, while admitting most of the allegations of the bill, denied that the St. Louis Company had violated or failed to perform the rail contract, or that the complainant had any valid claim for damages against it; that if there had been any breach of the rail contract, the claim for unliquidated damages could not be the subject of set-off in equity any more than in law; that if 605] the claim were *valid, it arose out of transactions distinct from the subject matter of the suit in which such set-off was claimed; that it did not exist on July 21, 1884, when the garnishment process was served; that from that date the garnisher acquired a lien upon and a right to the fund, due from the garnishee, in the nature of an equitable assignment, which could not be disturbed or affected by any subsequent breach of the rail contract by the St. Louis Company. A general replication was filed by the Chicago Company.

While this suit of the Chicago Company for equitable relief was pending, the St. Louis Company effected a compromise with its bond creditors by issuing new mortgage securities in lieu of the old bonds, and thereupon the Olyphant suits against the St. Louis Company in the United States Circuit Courts for the Eastern District of Missouri and for the Northern District of Illinois were dismissed. The decree of dismissal of the Illinois suit provided, however, that the petition of the Chicago Company should stand and be proceeded in as an original bill.

On April 9, 1887, the Joliet Steel Company assigned and transferred its two judgments for $9101.85 and for $10,760.41, respectively, against the St. Louis Company to David K. Ferguson, who, as such assignee, thereafter, in May, 1888, applied to be made, and was made, a party to the suit of the Chicago Company.

The cause came on for hearing in May, 1889, upon evidence as to the breach of the rail contract by the St. Louis Company, and the damages thence resulting to the Chicago Company, which was substantially the same as that introduced at law in the garnishment proceedings. The circuit court held that the equitable set-off sought by the bill could not be allowed for the reasons that the judgment against the Chicago Company as garnishee was for money due for pig iron and ore bought from the St. Louis Company, while the claim for unliquidated damages grew out of the failure of the St. Louis Company to receive rails under the contract of December, 1883, which had no connection with the one upon which the Chicago Company was held as garnishee; that when the Chicago 606] *Company was served as garnishee no part of the claim urged as a set-off had accrued; that the Chicago Company then had no right of action for the recovery of that claim; that it was then uncertain whether that company would make or lose money by the further performance of the rail contract. The opinion of the court concluded by saying: "Without ruling upon other questions discussed by counsel, it is sufficient to say that the claim for unliquidated damages growing out of the failure of the St. Louis Company to receive rails under the rail contract after the failure of that company and after the commencement of the suit in attachment and the service of the writ of garnishment upon the Chicago Company was properly rejected by the court in the trial of the action at law, and cannot now be set-off against the judgment rendered against the garnishee. The intervening petition is dismissed without prejudice to the right of the Chicago Company to prosecute an action against the St. Louis Company." *Olyphant* v. *St. Louis Ore & S. Co.* 39 Fed. Rep. 308.

From the decree dismissing this bill the present appeal is prosecuted, and the errors assigned by the appellant may be embraced in the general proposition that the court below erred in declining to adjudicate and determine the amount of the damages sustained by the Chicago Company from the breach of the rail contract and set off the same against the judgment at law, and in dismissing the bill, even though such dismissal was without prejudice to the right of the Chicago Company to bring suit for the recovery of such damages.

In addition to the reasons on which the court below denied relief and dismissed the bill, it is urged by the appellee that the equitable ground for relief, viz. the insolvency of the St. Louis Company, ceased to exist before the final decree was rendered. It is urged that its solvency was shown by the *settlement of its debts [612 and the dismissal of the foreclosure suits against it and the discharge of the receiver. There are several answers to this suggestion. First, the fact relied upon to establish such restored solvency, viz, the compromise of the company's bonded indebtedness by issuing new obligations secured by mortgage on all its tangible property, fails to show any actual improved financial condition, such as would be available to the Chicago Company in enforcing its claim for damages; second, as appears in the record there were other claims against the St. Louis Company which were not settled by the compromise which terminated the foreclosure suits; third, the alleged restored solvency of the St. Louis Company was not set up by supplemental pleading of any kind in this suit, although there was ample time and opportunity to do so between March, 1887, and May, 1889, when this cause was finally heard; as a matter of defense, arising after the case was at issue, the restored solvency of the St. Louis Company must have been set up by supplemental answer or other appropriate pleadings (Story Eq. Pl. § 893); fourth, equitable jurisdiction having once rightfully attached, cannot be defeated by matter subsequently arising which does not go to the merits of the complainant's case. The state of facts existing when the bill was filed must be looked to in determining the question of equitable jurisdiction, which in this case is rested on the ground of insolvency and non-residence. The latter fact is not questioned; as to the former, the Joliet Steel Company, by its petition, filed May 1, 1886, in the Olyphant foreclosure suit in the Northern Dis-

trict of Illinois, asking that the receiver be required to give bond as such in the sum of $50,000, to account for the assets received in that jurisdiction, distinctly alleged that the St. Louis Company was an insolvent, non-resident corporation, and on the strength of its petition the receiver gave bond to cover the assets within the jurisdiction of the Circuit Court of the United States for the Northern District of Illinois, and the receiver thereafter, with the consent of the Joliet Company, compromised the claim of the St. Louis Company against Cherrie & Company, and obtained securities and assets 613] thereunder, which *were allowed to be removed from the jurisdiction of the court, or applied otherwise than to the debt of the Joliet Company.

It is not shown by the record that the St. Louis Company was restored to a state of solvency before the final decree; but if that fact had been properly shown, it was not set up as a defense in the present suit, and it cannot now be invoked on behalf of the Joliet Company or its assignee.

It admits of no question that the St. Louis Company made default in the performance of the rail contract. It failed in the payment of the sum of $21,536.56 on July 10, 1884, for steel rails delivered in June. This default continued throughout the year 1884. Neither the St. Louis Company nor its receiver gave any order or orders for the manufacture of rails for July delivery. On the order for 1500 tons of rails, given for August delivery, the receiver was confessedly not prepared to pay, nor was any provision made by which the Chicago Company could reasonably expect payment therefor on September 10, 1884. The receiver had made every possible effort to raise funds by the sale of receiver's certificates, and had failed. He had nothing to pay with except "certificates," and the Chicago Company had declined to take them. It was certainly not bound to proceed with the manufacture and delivery of rails under the August order, after being notified in advance that the receiver was not prepared, and did not expect to be in funds to pay for the same unless certificates were accepted. For the reason that he had nothing to pay with, except "certificates," the receiver considered, as he stated to the president of the Chicago Company, in a letter dated September 26, 1884, that it would have been wrong to have asked the Chicago Company to make and forward rails without immediate or prospective means of paying for the same. So no further orders were given for rails, although the Chicago Company repeatedly, during August, September, and October, expressed its readiness and ability to fill all orders when the receiver was prepared to pay therefor according to the terms of the contract. The Chicago Company, early in October, indicated its willingness to reduce the price of the undelivered 614] rails to $30 per ton, upon prompt *settlement in cash, according to the contract, but this proposition was not accepted.

Under these circumstances there was a clear breach of the rail contract on the part of the St. Louis Company. The first default occurred on July 10, 1884, in failing to pay the amount then due the Chicago Company. It was further in default in not giving an order to manufacture rails for July, which was continued during the succeeding months of the year 1884; so that at the close of December, 1884, when the time for the final performance of the contract expired, there were about 10,618 tons of rails that the St. Louis Company had failed to order, receive, and pay for at the contract price of $35 per ton. Steel rails continued to decline from July, 1884, to January, 1885, the price running down to $29.50 a ton between those dates.

It is claimed for the appellee that as the Chicago Company had not rescinded and terminated the rail contract for the July breaches thereof—if entitled so to do—it was not in a position to bring suit for damages when the garnisher's right became fixed. This, however, does not affect the merits of this case. The Chicago Company was not bound to treat the contract as at an end upon the first breach thereof by the St. Louis Company. It had a right to await the expiration of the time for its final performance, and then make its claim for the entire breach. In the view we take of the question it is not material to determine at what precise date there was such a breach as would entitle the Chicago Company to damages upon the entire contract. The material thing is that the contract (for the breach of which the claim for damages arises) was in existence when the garnishment process was served. It had then been broken in one particular, if not in more, and from the situation and embarrassed condition of the St. Louis Company there was almost a certainty that it would fail to perform the contract in the future. The Chicago Company gave repeated notices to the receiver of its readiness and willingness to fullfil the contract on its part. It could only manufacture rails as they were ordered, and their weights specified. It notified the receiver time and again that it *would claim damages. That it [615 sustained damages to the extent of the difference between the contract and the market price of steel rails is clear beyond all controversy. The liability of the St. Louis Company for these damages is equally clear, but the amount thereof being unliquidated could not properly be set off in the attachment proceeding at law. Under these circumstances and conditions, has the Chicago Company any right to relief in equity by way of equitable set off? Would it be just and equitable to compel the garnishee to pay its indebtedness to the St. Louis Company for the benefit of a stranger, and then be left to either lose its valid claim for damages, or follow its non-resident insolvent debtor into another jurisdiction in the effort, more or less experimental and expensive, to collect such claim? If the St. Louis Company was the beneficial plaintiff in the judgment at law, or the case stood alone between it and the Chicago Company, there could be little or no doubt that a court of equity would, under the facts stated, afford the latter relief by way of equitable set off.

Cross-demands and counter-claims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice.

Again, it is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious, equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing. Illustrations of these general principles are found in the cases of *Leeds* v. *Marine Ins. Co.* 19 U. S. 6 Wheat. 565 [5: 332]; *Scammon* v. *Kimball*, 92 U. S. 362 [23: 483]; *Crim* v. *Handley*, 94 U. S. 652 [24: 216]; *Embry* v. *Palmer*, 107 U. S. 3 [27: 346]; *Knox County* v. *Harshman*, 133 U. S. 154 [33: 586]; *Marshall* v. *Holmes*, 141 U. S. 589 [35: 870].

The adjustment of demands by counterclaim or set-off rather than by independent [616] suit is favored and encouraged by *the law, to avoid circuity of action and injustice. *Florida R. Co.* v. *Smith*, 88 U. S. 21 Wall 255 [22: 531].

By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. *Leeds* v. *Marine Ins. Co.* 19 U. S. 6 Wheat. 565 [5: 332]; *Lindsay* v. *Jackson*, 2 Paige, 581; *Gay* v. *Gay*, 10 Paige, 369; *Pond* v. *Smith*, 4 Conn. 302; *Robbins* v. *Holley*, 1 T. B. Mon. 194; *Hinrichsen* v. *Reinback*, 27 Ill. 295; *Raleigh* v. *Raleigh*, 85 Ill. 512; *Hall* v. *Kimball*, 77 Ill. 161; *Chicago, D. & V. R. Co.* v. *Field*, 86 Ill. 270; *Doane* v. *Walker*, 101 Ill. 628; *Davis* v. *Milburn*, 3 Iowa, 163; *Tuscumbia R. Co.* v. *Rhodes*, 8 Ala. 206; *Wray* v. *Furniss*, 27 Ala. 471; *Knightley* v. *Walls*, 27 Ind. 384; *Wulschner* v. *Sels*, 87 Ind. 71; *Leylacra* v. *Seymour* (Minn.) April 27, 1893; *Rothschild* v. *Mack*, 115 N. Y. 1; *Richards* v. *La Tourette*, 119 N. Y. 54; *Schuler* v. *Israel*, 120 U. S. 506 [30: 707].

In *Schuler* v. *Israel*, *supra*, it was said by *Mr. Justice* Miller, speaking for the court that "While it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it but which was not yet due would be lost, be relieved by a proper decree in equity; and as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defenses in this proceeding which he would have in either a court of law or a court of equity."

It is suggested by the appellee that this was merely "incidental to the point decided in that case," but the proposition it announces is supported by sound principle and authority, and the Illinois decisions are in full accord therewith.

In addition to insolvency it is held by many [617] well considered *decisions, including those of Illinois, that the non-residence of the party against whom the set off is asserted is good ground for equitable relief. *Quick* v. *Lemon*, 105 Ill. 578; *Taylor* v. *Stowell*, 4 Met. (Ky.) 175; *Forbes* v. *Cooper*, 88 Ky. 285; *Robbins* v. *Holley*, 1 T. B. Mon. 18; *Edminson* v. *Baxter*, 4 Hayw. 112, 9 Am. Dec. 751; *Davis* v. *Milburn*, 3 Iowa, 163.

It is not deemed necessary to review these cases and make quotations from them. They fully establish the principles for which they are cited. There is nothing in the Illinois statutes on the subject of attachment and garnishment inconsistent with the doctrine of the foregoing decisions. Applying the principle they announce to the present case, it admits of no doubt that the Chicago Company is entitled to the relief it seeks as against the St. Louis Company. The question then remains whether the attachment proceedings, or the garnishment process thereunder, resulting in the order or judgment at law declaring the Chicago Company's ascertained indebtedness liable to the payment of the Joliet Company's judgment against the St. Louis Company, in any way changes or defeats the equity or right of the Chicago Company to the same relief?

The court below seems to have entertained the theory that while the St. Louis Company may have failed to perform the rail contract, the Chicago company's right to claim damages for the entire breach thereof had not accrued on July 21, 1884, when the garnishment process was served and the garnisher's rights attached, and, furthermore, that such claim, however meritorious as against the St. Louis Company, could not form the subject of an equitable set-off, especially as against a demand arising out of a disconnected transaction. This proceeds upon the assumption, as appellees here contend, that the garnisher by the service of the garnishment acquired such a lien upon or equitable right to the funds due from the garnishee which could not be disturbed or affected by any right or equity subsequently accruing to the latter as against the principal debtor. The service of garnishment neither changed nor interrupted the contractual relations existing between the Chicago [618] Company and the St. Louis Company. The rights and equities existing, and to arise out of those contractual relations, were in no way terminated or defeated by that service. The legal operation and the effect of the garnishment proceedings and of the final order therein made was only to impound what was legally and equitably due from the garnishee after the adjustment of the claims between the latter and the principal debtor, and place it beyond the control of the debtor and subject to collection for the benefit of the attaching creditor. The claim made by the appellee that the garnishment service operated as an equitable assignment to the garnisher of the due indebtedness from the garnishee cannot be sustained either upon reason or authority. The final order in that proceeding does not have the legal effect and operation of transferring the Chicago Company's due indebtedness to the St. Louis Company, and from the latter to the Joliet Company. The Illinois statutes in relation to garnishment are substantially the same as the generality of statutes on the subject, and contain no provision sustaining the proposition that either the service of the writ or the order made in the proceedings operates to transfer the debt, but only binds it and prevents the principal debtor from receiving it.

The English law upon the subject of garnishment and its effect differs in no material respect from that of Illinois, and in *Chatterton v. Watney*, L. R. 17 Ch. Div. 259, it was held that a garnishee order did not have the effect of transferring the debt from the garnishee.

In the case of *Ex parte Chinnery*, L. R. 12 Q. B. Div. 342, it was held by *Lord Justice* Cotton that a garnishee order absolute was not a final judgment against the garnishee, and did not make the garnisher a creditor of the garnishee. In the subsequent case of *Re Combined Weighing & Advertising Mach. Co.* L. R 43 Ch. Div. 99, the effect of a garnishee order was again under consideration, and it was held that the garnishee order did not affect any transfer, legal or equitable, of the debt owing by the garnishee, or create the relation of creditor and debtor as between the garnisher [619] and the garnishee. *Cotton, *L. J.*, said: "A garnishee order attaching the debt and enabling the person who has obtained the order to give a good discharge, does not come within the principle of equitable assignment," so as to make the garnisher a creditor of the garnishee. Bowen, *L. J.*, said: "I cannot see that this statutory relation, which was created originally by the common law procedure act, of 1854, and was perpetuated in the rules under the judicature act, is really a relation involving the creation of a fresh debt. There cannot be said to be any equitable debt. There is no assignment in equity, and I cannot see that there is any legal debt. There is an order of a court of common law that a sum equal to the original debt shall be paid by the garnishee to the judgment creditor, or as an alternative that execution may issue; but I think that the relation which is created by that section, and the order made under it does not create a debt at all." Fry, *L. J.*, said: "It is plain to my mind that there is no transfer of the debt. It is equally plain to my mind that the garnishee order does not make, therefore, the garnisher a creditor of the garnishee. What the order does is this, it gives the garnisher certain statutory rights; it enables the garnisher to say to the garnishee, 'You shall not pay to your creditor the money which you owe him.' It enables him to give a valid receipt and discharge for the money. It enables him in the event of the money not being paid to obtain execution. He has all those rights, but there is no transfer of the debt, and he is not created a creditor."

The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above or extend beyond those of his debtor; that the garnishee shall not by operation of the proceedings against him, be placed in any worse condition than he would have been in had the principal debtor's claim been enforced against him directly; that the liability, legal and equitable, of the garnishee to the principal debtor is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor and can assert only the rights of the latter. *Towner v. George*, 53 Ill. 168; *Richard-* [620] *son v. Lester*, 83 Ill. 55; *Henry v. *Wilson* (Iowa) May 12, 1892; *Huntington v. Risdon*, 43 Iowa, 518.

From these propositions and authorities it follows that the Chicago Company is entitled to assert against the Joliet Company the equitable set-off it could enforce against the St. Louis Company in respect to its claim for damages.

It is hardly necessary to observe that the appellee Ferguson, having taken an assignment from the Joliet Company *pendente lite*, occupies the same position as his assignor, and is subject to the same equity. It is sought to defeat this right of the Chicago Company by invoking in favor of the Joliet Company, and its assignee, Ferguson, the doctrine of relation so as to antedate the claim for damages. This cannot be done for two reasons: first, because the breach of contract, on which the claim for damages is based, had in fact commenced before the garnishment writ was served; second, if that had not been the case, the contract, for the non-performance of which the right for damages arises, was in existence when the garnishment proceedings were instituted.

This unquestioned fact is very material, if not controlling of the case. The court below did not give the fact that the claim for damages arose under and by virtue of a contract in existence prior to the date of the attachment its due weight and importance, as will be seen by a brief reference to the authorities bearing upon the question. Thus in *Boston Type Co. v. Mortimer*, 7 Pick. 166, 19 Am. Dec. 266, the garnishee, when summoned, was indebted to the defendant, but was at the same time liable as accommodation indorser of a note of the defendant for a large amount which became due after the garnishment, and was protested for non-payment and paid by the garnishee before he made his answer. The court held that the garnishee could set off against his indebtedness to the principal defendant the amount of the notes so paid, and in giving its decision observed: "Under these circumstances we think he cannot be held as trustee, for it would be against justice that he should be held to pay a creditor of his debtor the only money by which he can partially indemnify himself."

In the recent case of *Lannan v. Walter*, 149 Mass. 14, the *court said: "The answer [621] of the trustee on which it was discharged is, in effect, that at the time of the service of process it had in its deposits, to the credit of the defendants, $927.10, and that at the same time it held three promissory notes, which it had discounted for the benefit of the defendants, and on which they were indorsers; that since said service these notes have all matured; that the liability of the indorsers have been made absolute by due demand and notice. The makers and indorsers have all become insolvent, and the notes remain in its hands wholly unpaid, except that a small sum has been received on one of them. The amount due on each note is considerably more than $927.10. The counsel for the trustee contends that it has the right to set off the sum of money due from the defendants on any one of these notes against the deposit. We regard it as settled that if before final answer the debtor becomes indebted to the trustee on any contract entered into before the service of the writ, the latter shall have a right of set-off, and be chargeable only with the final balance, if one should be due. *Boston Type Co. v. Mortimer*, 7 Pick. 166, 19 Am. Dec. 265; Smith v.

Stearns, 19 Pick. 20; *Nickerson* v. *Chase*, 122 Mass. 296; *Eddy* v. *O'Hara*, 132 Mass. 56, 61; Pub. Stat. chap. 183, sec. 27."

So in *Farmers & M. Bank* v. *Franklin Bank*, 31 Md. 404, the court, allowing a set-off which matured after action brought, said: "There is nothing in the attachment laws in this state to justify the conclusion that it was designed by allowing garnishment to be made to place the garnishee in a worse position in reference to the rights and credits attached than if he had been sued by the defendant. The attaching creditor seeks to have himself substituted to the rights of his debtor as against the garnishee, and by laying his attachment he acquires no superior right to that of his debtor. The right of condemnation must therefore be subject to any such right of set-off or discharge existing at the time of garnishment as would be available to the garnishee if he were sued by the defendant. Any other rule would in many cases work gross injustice and might be subject to great abuse. . . . This right of set-off **622**] or discharge, and *as against the attaching creditor, should not, however, extend to any matter originating by the action of the garnishee subsequent to garnishment, as otherwise it would be in the power of the garnishee to defeat the right of condemnation, which should not by any means be allowed."

In the first of the above cited cases the liability of the garnishee was conditional and undeterminate at the time of the service of the garnishment process, and his right to claim against the principal debtor did not become fixed until long after the service of process, so that the garnishee had no cause of action against the principal debtor when the attachment writ was served. Also in each of the other cases the set-off allowed matured after the service of garnishment, but arose under a contract entered into before the service of the writ. In other words, the principle established by these cases is that whatever rights the garnishee may have under existing contracts with the principal debtor, he is entitled to have the benefit thereof as against the attaching creditor.

The latter clause of the quotation from the case of *Farmers & M. Bank* v. *Franklin Bank*, *supra*, lays down the correct rule to be applied in cases of this character, and that rule is, that while the garnishee may not, after service of the writ, by his own action acquire set-offs or counterclaims against the principal debtor to the prejudice of the attaching creditor, he may properly avail himself of all claims fairly arising out of contracts with the principal debtor which were in existence when the attachment was commenced, and under or out of which his claim against the principal debtor arises.

From the foregoing considerations we think the court below should have ascertained the damages growing out of the failure to perform the rail contract on the part of the St. Louis Company, and having ascertained the amount of such damages the same should have been allowed the complainant as a set-off against the sum of $16,473.28, found to be due from it to the St. Louis Company, and for which the garnishee order or judgment was rendered; and if **623**] that adjustment left *any balance due the complainant from the St. Louis Company, a personal decree should have been rendered therefor.

The judgment of the court below is accordingly reversed, and the cause remanded, with directions to proceed therein in conformity with this opinion.

Mr. Chief Justice **Fuller** having been of counsel, and *Mr. Justice* **White** not having been a member of the court when the case was argued, took no part in its consideration and decision.

WILLIAM B. BOGLE ET AL., *Plffs. in Err.*,
v.
DANIEL MAGONE, Collector of the Port of New York.

(See S. C. Reporter's ed. 623 627.)

Tariff Act—commercial designation.

1. A specific description of goods in a Tariff Act will prevail over a more general description in determining the duties to be imposed.
2. The commercial designation of an article is a question of fact for the jury.

[No. 291.]

Argued March 15, 1894. Decided April 9, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for defendant, Daniel Magone, Collector, in an action brought by William B. Bogle *et al.*, against said defendant, to recover back an excess of duties exacted and paid upon imported goods. *Reversed, with directions for a new trial.*

See same case below, 40 Fed. Rep. 226.

Statement by *Mr. Justice* **Gray**:

This was an action, brought May 23, 1888, against the collector of the port of New York, after due protest and appeal, to recover back an excess of duties exacted and paid upon goods imported and invoiced by the plaintiffs in 1886 and 1887 as "fish pastes," and which they contended should have been assessed as "fish, prepared or preserved," twenty-five per cent ad valorem, but which the defendant assessed as "sauces," thirty-five per cent ad valorem, under the Tariff Act of March 3, 1883, chap. 121, Schedule G, of which imposes the following rates of duty:

"Anchovies and sardines, packed in oil or otherwise," in small tin boxes, certain rates varying from ten to two and a half cents per box, according to its size; "when imported in any other form, forty per centum ad valorem.

"Fish preserved in oil, except anchovies and sardines, thirty per centum ad valorem.

*"Salmon, and all other fish, prepared **624**] or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this Act, twenty-five per centum ad valorem.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

"Pickles and sauces of all kinds, not otherwise specially enumerated or provided for in this Act, thirty-five per centum ad valorem." 22 Stat. at L. 503, 504.

At the trial, one of the plaintiffs, who were importers of fancy groceries at New York, testified that the goods in question (samples of which were produced in court) were imported as "anchovy paste" and "bloater paste." The definition in Webster's Unabridged Dictionary of "sauce," as "A mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish," being read to him, he testified that the word had a significance in the wholesale commerce of this country in 1883 and theretofore, differing from the definition read; that the commercial meaning of a sauce was a liquid, and that was the only particular in which it varied from the definition read; and that anchovy paste or bloater paste, such as represented by the samples, was not recognized in trade or commerce in 1883 and prior thereto as a sauce. On cross-examination, he testified that he understood the sense of the dictionary definition of sauce to be "anything used as a relish, either liquid or solid, as an addition to the food;" that these articles were used as food, principally in sandwiches, or like potted meats or deviled meats; that "anchovy paste" was manufactured out of anchovies, and "bloater paste" out of bloaters; that these were the only names by which they were known in trade and commerce in and before 1883, as well as since; that they had a fish taste; and that no part of each fish could be distinguished, but all was ground up fine, and spiced.

Three other importers and sellers of fancy groceries at New York, called as witnesses for the plaintiffs, testified that the term "sauces," as used in trade in and before 1883, had reference to liquids only, and did not include solids; and that the goods in question were not commonly known as sauces. One of them testified that each of these pastes was used as a direct **625**] *article of food, and not as an addition to anything to give zest to it, and was used only in a distinct form, as in a sandwich or the like; and on cross-examination testified that "he had often eaten the same articles as those in suit with a cracker or a cake, eating the paste alone first and the cracker afterwards—probably within thirty seconds after—as soon as he was able to swallow." The two other witnesses testified that it had a spicy flavor, and would induce hunger and thirst, and was used as an appetizer before a meal. The witnesses also testified that they dealt in the article known as "anchovy sauce" or "essence of anchovies," which was a liquid, and altogether different from these pastes, and never eaten alone or as an addition to bread, but as a condiment.

At the close of the plaintiffs' evidence, the court, upon motion of the defendant, directed a verdict for him, upon the grounds that "the plaintiffs had not proved facts sufficient to entitle them to recover;" that "the term 'sauces of all kinds,' in the Tariff Act, was a descriptive term of ordinary use, to be taken in its ordinary meaning, and not in any restrictive or trade meaning," and that "the ordinary use of the term 'sauces' included the articles in suit." 40 Fed. Rep. 226.

A verdict was returned accordingly, and judgment entered thereon; and the plaintiffs tendered a bill of exceptions, and sued out this writ of error.

Mr. **Everit Brown** for plaintiff in error.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.* for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

The word "sauce," as commonly used, designates a condiment, generally, but not always of liquid form, eaten as an addition to and together with a dish of food, to give it flavor and make it more palatable; and is not applied to anything which is eaten, alone or with a bit of bread, either for its own *sake only, or [**626** to stimulate the appetite for other food to be eaten afterwards. For instance, cheese eaten with bread, or ham or chicken eaten in a sandwich, or anchovies or herrings, caviare or shreds of salt fish, eaten, whether with or without bread, as an appetizer before a meal, would hardly be called a sauce.

In the dictionary of Webster, referred to at the trial, the primary definition of "sauce" is accordingly given as "A mixture or composition to be eaten with food for improving its relish; a relishing condiment; appetizing addition to the principal material of a dish." In a later edition, there is given, by way of additional definition, "Stewed or preserved fruit, eaten with other food as a relish; as apple sauce, cranberry sauce, etc."

In the Tariff Act of 1883, the clause relating to "sauces of all kinds" (unless affected by other clauses in the Act or by commercial usage) may well be held to include all substances, whether solid or liquid, fairly coming within either of these two definitions. But the second definition has no application to the present case.

The three clauses mentioned in argument as possibly applicable to the goods in question, are arranged in the Act in a natural order beginning with the most specific and restrictive, and ending with the most general; first, "anchovies," "imported in any other form" than "packed in oil or otherwise," in small tin boxes, forty per cent ad valorem; then, "all other fish, prepared or preserved," "not specially enumerated or provided for in this Act," twenty-five per cent ad valorem; and lastly, "sauces, of all kinds, not otherwise specially enumerated or provided for in this Act," thirty-five per cent ad valorem. 22 Stat. at L. 503, 504. Any article which comes within two or more of these descriptions must therefore be assigned to the earlier one. *Homer* v. *Austin*, 68 U. S. 1 Wall. 486 [17: 688]; *Reiche* v. *Smythe*, 80 U. S. 13 Wall. 162 [20: 566]; *Seeberger* v. *Cahn*, 137 U. S. 95 [34:599]; *American Net & T. Co.* v. *Worthington*, 141 U. S. 468 [35: 821].

At the trial, the plaintiffs introduced evidence that the goods in question were manufactured out of anchovies or *bloaters, [**627** ground up and spiced, were used as food, in a distinct form, or as an appetizer, principally in

a sandwich, or sometimes with a cracker, and not as a condiment; and were specifically known as "anchovy paste" and "bloater paste;" and that, in trade and commerce in 1883 and previously, the word "sauces" was applied to liquids only, and not to these pastes.

The circuit court, in directing a verdict for the defendant, ruled, in substance, that, as matter of law, and without regard to commercial usage, these articles came within the words "sauces of all kinds" in the Tariff Act. We are unable to concur in that view; or to say, either of our judicial knowledge, or in view of the evidence introduced, that these articles are necessarily "sauces" of any kind; still less, that this is so clear as to exclude the usual test of commercial designation. *Cadwalader* v. *Zeh*, *ante*, p. 115.

On the contrary, we are of opinion that the evidence of the nature and the use of these articles, and of their commercial designation, would have warranted a jury in finding that they were not "sauces," and were "fish preserved or prepared." If that fact were proved it would follow that, as such, the bloater paste, at least, was subject to the duty of only twenty-five per cent ad valorem; but a question might arise, which does not appear to have been considered at the trial, whether the anchovy paste was not subject to a duty of forty per cent ad valorem, under the earlier and more specific clause of the act, as "anchovies" "imported in any other form" than packed, in oil or otherwise, in small tin boxes.

Judgment reversed, and case remanded to the circuit court with directions to set aside the verdict and to order a new trial.

Mr. Justice **Jackson** did not hear the argument, and took no part in the decision of this case.

628] *LEVERETT SALTONSTALL, Collector of Customs for the Port of Boston and Charlestown, *Plff. in Err.*,

v.

EDWARD T. RUSSELL ET AL.

(See S. C. Reporter's ed. 628-633.)

Case submitted upon agreed facts—duties, where to be paid—protest.

1. Where the case is submitted to the court upon a statement of facts agreed by the parties, or case stated, upon which the court is to render such judgment as the law requires, all questions of the sufficiency of the pleadings are waived, and the want of an answer is immaterial, and no finding of facts by the court is necessary.
2. Except as otherwise expressly provided, duties on imported goods are to be assessed and paid at the first port of entry.
3. In an action to recover back an excess of duties paid, no recovery can be had unless protest is made under U. S. Rev. Stat. §§ 2931, 3011, within ten days after the liquidation of the duties at the port of importation and entry.

[No. 314.]

Submitted March 22, 1894. Decided April 9, 1894.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment for the plaintiffs, Edward T. Russell *et al.*, against Leverett Saltonstall, Collector of Customs, defendant, for duties illegally exacted and paid under protest upon imported goods. *Reversed, with directions to render judgment for defendant.*

Statement by *Mr. Justice* **Gray:**

This was an action, brought May 15, 1888, against the collector of customs for the Port of Boston and Charlestown, to recover back duties exacted by him, and paid under protest, upon blueberries imported by the plaintiffs from New Brunswick. No answer was filed. But the case was submitted to the decision of the circuit court upon a statement of facts, in which it was agreed that the regulations of the Treasury Department might be referred to, and that the court might enter judgment as the law required upon the facts stated, which were in substance as follows:

On October 22, 1887, the plaintiffs imported from New Castle, in the province of New Brunswick, into the port of Eastport, in the state of Maine, upon the steamship Cumberland, running regularly between St. John, N. B., Eastport, and Boston in the state of Massachusetts, five hundred cases of canned blueberries, consigned to John Thompson, the master of the steamship, to be by him entered at the custom house at Eastport, and thence to be immediately transported in *bond to **[629]** the port of Boston, consigned to the plaintiffs; and the goods were duly entered by him, as agent of the plaintiffs, at the custom house at Eastport, for warehouse and immediate transportation, without being removed from the steamship. On the same day, the duties were assessed by the collector at Eastport, and the amount of duty fixed at $144, being twenty per cent of $720, the value of the blueberries, cases, cans, and cost of packing, added together, that being the amount of the entered value, as stated in the invoice. The value of the blueberries was $315, the value of the coverings $330, and the cost of packing them $75. The cases were made of wood; each case contained twenty-four cans, made of tin; and each can contained one and a half pounds of blueberries. Both the cases and the cans were the usual and necessary coverings of such goods, and were not of any material or form designed to evade duties thereon, nor designed for use otherwise than in the bona fide transportation of the goods to the United States.

The goods were immediately transported by the same steamship to Boston. Upon examination of the goods by the United States appraisers in Boston, they reported to the defendant that the dutiable value of the same was $315, being the cost of the blueberries, without including the value of the coverings, or the cost of packing them; and the defendant wrote to the collector at Eastport, calling his attention to the fact that he had included the value of the coverings in his assessment; but he refused to correct it. Thereupon the defendant reported the case to the Secretary of the Treasury, informed the collector at Eastport of the fact, and meantime suspended the entry. On November 11, 1887, the Secretary

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NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

of the Treasury wrote a letter to the collector at Eastport, instructing him to make the correction.

On November 18, 1887, the plaintiffs entered the goods at the custom house in Boston for rewarehousing and withdrawal; the defendant assessed the duties thereon, for the same amount and made up of the same items as the collector at Eastport; and exacted payment of the same from the plaintiffs. They contended [630] *that the merchandise was subject to a duty of twenty per cent of the value of the blueberries, not including the value of the boxes and cans, or the cost of packing; and paid the assessed duties to the defendant under protest; and, being dissatisfied with his decision, on the same day gave to him, and mailed to the collector at Eastport, notices thereof in writing, setting forth distinctly and specifically the grounds of their objection, and appealed to the Secretary of the Treasury, who declined to entertain the appeal, on the ground that the protests had not been seasonably filed, but affirmed the assessment by the collector at Eastport; and the plaintiffs seasonably brought this suit to recover the sum of $81, exacted and paid upon the coverings and cost of packing.

Upon the agreed statement of facts, the circuit court gave judgment for the plaintiffs; and the defendant sued out this writ of error.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.* for plaintiff in error.

Mr. **Frederic Cunningham** for defendants in error.

Mr. Justice **Gray** delivered the opinion of the court:

The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial; and no finding of facts by the court was necessary. *Willard* v. *Wood*, 135 U. S. 309, 314 [34: 210, 213]; *Bond* v. *Dustin*, 112 U. S. 604, 607 [28: 835, 836].

It is conceded that the duties complained of were illegal, in view of the decision of this court in *Oberteuffer* v. *Robertson*, 116 U. S. 499 [29: 706], and that the only question in the case is whether protest should have been made, under sections 2931 and 3011 of the Revised Statutes, within ten days after the liquidation of the duties at Eastport.

[631] *By the customs acts of the United States, except as otherwise expressly provided, duties on imported goods are to be assessed and paid at the first port of entry. *United States* v. *Vowell*, 9 U. S. 5 Cranch, 368 [3: 128]; *Meredith* v. *United States*, 38 U. S. 13 Pet. 486, 494 [10: 258, 262]; *Hartranft* v. *Oliver*, 125 U. S. 525 [31: 813]. For the purpose of encouraging and facilitating commerce, by exempting the importer from the payment of duties until he is ready to bring his goods into market, provision has been made by which the goods may be entered for the warehousing and deposited in a bonded warehouse in the district of entry, and may be transported to a bonded warehouse in any other collection district, and the payment of duties postponed until the goods are withdrawn; and they may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which they may be subject by law at the time of such withdrawal, or after that time and within three years from such date on payment of the duties assessed on the original entry and charges, and ten per cent additional. Rev. Stat. §§ 2962, 2970, 3001, 3001; *Tremlett* v. *Adams*, 54 U. S. 13 How. 295, 303 [14: 152, 153]; *Fabbri* v. *Murphy*, 95 U. S. 191 [24: 468]; *Weston* v. *United States*, 85 U. S. 18 Wall. 322 [21: 763]. For the same purpose, provision has been made by which merchandise imported at certain ports, arriving to be consigned to one of the ports afterwards named in the statute, may be entered for warehouse and immediate transportation, and examined and the duties estimated at the port of first arrival, but the appraisement and liquidation of duties made at the port of destination. Rev. Stat. §§ 2990-2997; Acts of June 10, 1880, chap. 190 (21 Stat. at L. 174); February 22, 1887, chaps. 215, 218 (24 Stat. at L. 411, 414). But the goods in question were not deposited in or withdrawn from a bonded warehouse; nor is Eastport one of the ports at which goods can be imported and shipped through without appraisement. It follows that article 721-725, 740 and 743 of the Treasury Regulations of 1884, cited by the importers, have no application to the case; and that the assessment at Eastport was the final ascertainment and liquidation of the duties upon these goods. That such was the opinion of the Treasury Department appears from its *having addressed its [632] letter of instructions for the correction of the assessment, not to the defendant, but to the Eastport collector, as well as from the reasons which it gave for disallowing the appeal of the importers. And we have been referred to no Act of Congress, Treasury regulation or judicial decision, which warranted a new assessment of the duties upon these goods by the defendant at Boston. See *Spring* v. *Russell*, 1 Low. Dec. 258.

But this suit of the importers against him clearly comes within section 3011 of the Revised Statutes, as amended by the Act of February 27, 1877, chap. 69, which provides that "any person who shall have made payment, under protest, and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly authorized by law," may maintain an action "to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid;" but that "no recovery shall be allowed in such action, unless a protest and appeal shall have been taken as prescribed in section 2931." 19 Stat. at L. 247.

By section 2931, here referred to, "the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid" on merchandise and the dutiable costs and charges thereon, "shall be final and conclusive against all persons interested therein," unless the importer "shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of

merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury."

By virtue of this section, Eastport being "the port of importation and entry" of these goods, the decision of the collector at that port, as to the 633] rate and amount of duties to be *paid, was "the ascertainment and liquidation of the duties by the proper officers of the customs;" and the plaintiffs, not having given notice in writing of their objection to that decision within ten days thereafter, cannot maintain an action to recover back the whole or any part of the duties paid.

The conclusion, which appears to be required by the terms of the statutes, is the only one consistent with the decision of this court in *Merritt* v. *Cameron*, 137 U. S. 542 [34: 772].

It was suggested, in the brief in behalf of the importers, "that the collector had no jurisdiction or power to assess a duty upon the coverings; the liquidation was void, just as if the collector undertook to assess a duty upon domestic goods; the appraisement was void; and in such a case section 2931 of the Revised Statutes does not apply, and no protest is necessary, because there has been no valid liquidation." In support of this suggestion were cited *Oberteuffer* v. *Robertson*, 116 U. S. 499 [29: 706]; *Badger* v. *Cusimano*, 130 U. S. 39 [32: 851]; *Robertson* v. *Frank Brothers Co.* 132 U. S. 17, 24 [33: 236, 238]; *United States* v. *Thurber*, 28 Fed. Rep. 56.

But *United States* v. *Thurber* was an action by the United States to recover duties, and not an action against the collector to recover them back; in *Badger* v. *Cusimano*, and in *Robertson* v. *Frank Brothers Co.*, protests had been made in due form; in *Oberteuffer* v. *Robertson* it was distinctly recognized that the proper remedy of the importer was by protest and appeal; and the statutes, as has already been seen, make such protest and appeal essential prerequisites to recovery in an action brought to ascertain the validity of the demand and payment of duties, and to recover back any excess so paid. See also *Lawrence* v. *Caswell*, 54 U. S. 13 How. 488, 496 [14: 235, 239]; *Nicholl* v. *United States*, 74 U. S. 7 Wall. 122 [19: 125]; *Arnson* v. *Murphy*, 109 U. S. 238 [27: 920], 115 U. S. 579 [29: 491].

Judgment reversed, and case remanded to the circuit court with directions to render judgment upon the agreed statement of facts for the defendant.

634] S. B. BURCK, *Appt.*,
v.
ABNER TAYLOR.

(See S. C. Reporter's ed. 632-671.)

Contract, when void—agreement not to assign—personal confidence—disposition of profits—constructive notice.

1. As a general rule, a contract made in contravention of a statute is void and cannot be enforced.
2. Where in a contract with a state the contractor agreed not to assign the contract in whole or in part without the consent in writing of the state authorities, such agreement is binding not only upon the parties, but upon all others who seek to acquire rights in it.
3. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve a relation of personal confidence, the contract cannot be assigned by him without the consent of the other party.
4. When an executory contract is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contract or before the substitution.
5. Constructive notice of a contract cannot be implied from the fact of its record in the office of the clerk of the county, where there is no statute providing for such record.

[No. 170.]

Argued Dec. 15, 1893. Decided April 9, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, dismissing a suit in equity brought by S. B. Burck, plaintiff, against Abner Taylor, defendant, for an accounting and to recover the plaintiff's share of the profits of a contract made with the state of Texas, for the building of its capitol. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

*On December 8, 1888, appellant filed [635 his petition in the district court of Travis county, Texas, to recover of defendant the sum of $231,417, alleged to his share of the profits of the contract made with the state of Texas for the building of its capitol. The suit thus commenced was thereafter removed to the United States Circuit Court for the Western District of Texas, and on October 7, 1889, upon leave obtained, the plaintiff filed an amended bill. To this bill, on November 4, defendant demurred. On March 4, 1890, the demurrer was sustained, and the plaintiff electing to stand upon his bill and declining to amend it, a decree was entered dismissing the same with costs. From such decree of dismissal the plaintiff appealed to this court. The matters set forth in the bill are as follows: On January 18, 1882, the state of Texas, by Joseph Lee and N. L. Norton, capitol commissioners, with the approval of O. M. Roberts, governor, made and executed a contract with Matthias Schnell for the erection of the capitol building, according to certain plans and specifications; Schnell to furnish all the material and do all the work, and the state, as the consideration therefor, to convey 3,000,000 acres of land. The 26th clause of the contract is as follows:

"It is further agreed, covenanted and stipulated by the party of the second part that this contract shall not be assigned, in whole or in part, by the party of the second part without the consent in writing, of the party of the first part, signed by the governor of Texas and

NOTE.—*As to contracts: their interpretation and validity*, see note to Bell v. Bruen, 11: 89.

As to covenants in contract: when dependent and when independent, see note to Goldsborough v. Orr, 5: 600.

As to stated sum in contract; whether penalty or

the capitol building commissioners, with the advice and consent of the heads of departments."

On January 31, 1882, Matthias Schnell, Charles B. Farwell, John V. Farwell, Amos C. Babcock, and the defendant, Abner Taylor, entered into a contract by which Schnell assigned and set over to the other parties an undivided three fourths interest in said contract. The material portions of the contract are as follows:

"It is hereby agreed by and between the parties hereto that the said Matthias Schnell shall assign and set over, and by these presents does assign and set over, to the parties of the second part an undivided three fourths (¾) inter-
636] est in said *contract for the purpose that the said parties of the second part may share in any and all the profits that may arise from same, the same as the party of the first part, as their interests may appear, which is hereby agreed to be equal.

"And it is understood and agreed by and between the parties hereto that the parties of the second part are to furnish whatever money may be needed or necessary for the proper construction of said state house or for the execution of the said contract as the same may be required from time to time.

"It is further agreed and understood by and between the parties hereto that the said Matthias Schnell shall have the management and superintendence of the building and construction of said state house from the commencement to its completion, subject to the direction and control of the majority in interest herein, at a salary of five thousand ($5000) dollars per annum, payable monthly.

* * * *

"And it is further agreed that the said superintendent shall be personally responsible to the parties of the second part for any loss or damages caused or sustained by reason of his neglect or mistakes in prosecution of his duties as such superintendent, willfully done.

"And it is hereby understood and agreed that this agreement shall be binding and operative from the date of its approval by the governor of Texas and the heads of departments."

In accordance with clause 26 of the original contract, the following consent to the assignment was indorsed on the back:

"State of Texas, }
County of Travis. }

"We hereby consent to the within assignment of an interest in the contract referred to this the eleventh day of February, 1882.

"(Signed) Joseph Lee,
N. L. Norton,
Capitol Building Commissioners.
O. M. Roberts, Governor.

637] *"We advise and consent to the above consent given by the capitol building commissioners and governor this eleventh February, 1882.

"(Signed) F. R. Lubbock, Treasurer.
J. H. McLeary,
Attorney General.
W. C. Walsh,
Commissioner General Land Office.
W. M. Brown,
Comptroller."

On January 31, 1882, Schnell made an agreement with James M. Beardsley, James S. Drake, and A. A. Burck, which, after referring to the prior contracts, purported to be an assignment and transfer to each of the three of an undivided one fourth of the one fourth interest in the contract remaining in Schnell. This contract, although signed and acknowledged by all four of the parties, was without the consent in writing of the state of Texas. Afterwards and on May 9, 1882, Schnell executed in writing a further assignment in the following language:

"The State of Texas, }
County of Travis. }

"Know all men by these presents that I, Matthias Schnell, a citizen of Rock Island, in the state of Illinois, for and in consideration of the sum of fifteen thousand five hundred dollars to me now paid, the receipt whereof I do now acknowledge, have transferred, released, and conveyed to Charles B. Farwell, John V. Farwell, Abner Taylor, and Amos C. Babcock, who compose the firm of Taylor, Babcock & Co., all the rights and interest which I have in and under a certain contract made by me with Joseph Lee and N. L. Norton, capitol commissioners, for the construction of a new statehouse for the state of Texas.

"And I do also, for the consideration hereinbefore expressed, transfer, assign, and release to said parties above named all interests, rights, or claims which I may now or might hereafter assert by virtue of any contract made by me with said *parties regarding the [638
construction of said statehouse or the superintendency thereof and all interest accruing to me from any contract regarding the building of said statehouse for the state of Texas.

"In testimony whereof I have hereunto set my hand this the 9th day of May, A. D. 1882.

"(Signed) Matthias Schnell";

—which assignment was duly acknowledged, the assignment accepted in writing, and a written consent indorsed upon it as follows:

"This certifies that we, the governor of Texas and the capitol building commissioners, with the advice and counsel of the heads of departments, consent to the assignment in the foregoing instrument, made to take effect on the filing of the formal adoption of the contract referred to, and the execution and approval of the bond to carry out the same this tenth day of May, A. D. 1882.

O. M. Roberts, Governor.
Joseph Lee,
N. L. Norton,
Capitol Building Commissioners.
F. R. Lubbock, Treasurer.
W. M. Brown, Comptroller.
W. C. Walsh, Com'r Gen'l Land Office.
J. H. McLeary, Attorney General."

Liquidated damages, see note to Tayloe v. Sandiford, 5: 384.

As to construction of written contracts; how far a question for the court, see note to Ward v. United States, 20: 792.

As to when new statutes of limitations impairs obligation of contracts, see note to Koshkonong v. Burton, 26: 886.

On June 20, 1882, the firm of Taylor, Babcock & Co. assigned and transferred the entire contract to Abner Taylor, the language of the transfer being as follows:

" . . . do hereby transfer and assign, and have transferred and assigned, to Abner Taylor, the said contract to construct, build, erect, complete, and deliver to the state of Texas a capitol building and appurtenances thereto according to the plans and specifications therein referred to and made a part thereof, and each and every, all and singular, the rights, profits and benefits thereunder, the same 639] to be by him carried *out in the same manner as provided for in the original contract between the state of Texas and Matthias Schnell as aforesaid;"

—which assignment was accepted in writing by Abner Taylor, whose acceptance contained this covenant on his part:

"Now, therefore, in consideration of the fact that, by virtue of the transfers and assignments herein set out, I, the said Abner Taylor, have become the contractor with the state of Texas for the building of the capitol aforesaid, and in consideration of the fact that the capitol building commissioners, together with the governor of Texas and the several heads of departments, have consented to the several transfers and assignments aforesaid, and in further consideration of the stipulations, covenants and agreements set forth in the original contract between the state of Texas and Matthias Schnell, to the profits, rights and benefits of which I have succeeded by virtue of the said contract and the several transfers and assignments aforesaid, I, the said Abner Taylor, have agreed, covenanted, and bound myself, and do by these presents agree, covenant and bind myself, unto the state of Texas, through its capitol building commissioners, that I will in every particular carry out, finish and perform the contract made and entered into by and between the state of Texas and Matthias Schnell, a printed copy of which is hereto attached as aforesaid, in the same manner, style, and method, and according to the said terms, tenor and effect that the said Matthias Schnell was originally bound to do, and I hereby adopt the said contract as my own, and assume each and every, all and singular, the obligations therein imposed on the party of the second part as my own as fully and completely as if they had originally been assumed, incurred and undertaken by me in person, the said contract, of which the printed copy is hereto attached, being hereby incorporated into this contract and made a part thereof.

"And I, the said Abner Taylor, do hereby bind myself, my heirs, executors, and administrators to keep and perform this covenant, agreement 640] and contract according to its full *intent and meaning in each and every, all and singular, of its parts and stipulations, in every particular whatsoever.

"In testimony whereof I hereto set my signature, this, the twentieth day of June, A. D. 1882 (one thousand eight hundred and eighty two).

"[Seal.] (Signed.) Abner Taylor";

—and this assignment and acceptance, both being duly acknowledged, were also assented to in writing, indorsed on the back, the consent being in these words:

"State of Texas, }
County of Travis. }

"In accordance with the provisions of section 26 of the original contract between the state of Texas and Matthias Schnell for building a new capitol, dated eighteenth of January, 1882, we, O. M. Roberts, governor of Texas, and Joseph Lee and N. L. Norton, capitol building commissioners, acting by and with the advice and consent of the heads of departments, do hereby consent in writing to the assignment made by Matthias Schnell of his contract to Taylor, Babcock & Co., and to the further assignment made by Taylor, Babcock & Co., of the said contract to Abner Taylor; and we, the said governor, capitol building commissioners, and heads of departments do hereby recognize Abner Taylor as the contractor bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound; and in testimony of our advice and consent having been so given we hereunto subscribe our names officially this the twelfth day of July, 1882.

"(Signed) Joseph Lee,
N. L. Norton.

"Approved by and with the advice and consent of the heads of the departments.

"(Signed) O. M Roberts, Governor."

On April 14, 1883, A. A. Burck executed to plaintiff the following conveyance:

*"The State of Texas, } [641
County of Travis. }

"Know all men by these presents that I, A. A. Burck, of the county of Milam and state of Texas, in consideration of the sum of ten thousand dollars to me in hand paid by S. B. Burck, of the county of Galveston and state of Texas, the receipt of which is hereby acknowledged, have granted, bargained, sold, conveyed and released, and by these presents do grant, bargain, sell, convey, and release, unto the said S. B. Burck, heirs and assigns, the following described property, to wit: One undivided one half interest in one sixteenth interest in the capitol contract which was awarded to M. Schnell by the Texas state capitol commissioners, Joseph Lee and N. L. Norton, and transferred to me by said Schnell, together with all and singular the rights, members, improvements, hereditaments, and appurtenances to same belonging or in anywise incident or appertaining:

"To have and to hold all and singular the premises above mentioned unto the said S. B. Burck, heirs and assigns forever; and I do hereby bind myself, heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said S. B. Burck, heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand at Austin, this 14th day of April, A. D. 1883.

"A. A. Burck. [Seal.]";

—which conveyance was duly acknowledged. On May 27, 1884, A. A. Burck made an assignment to Taylor and Babcock in these words:

"Austin, Texas, May 27, 1884.

"For and in consideration of one dollar, in hand paid, and other valuable considerations I hereby sell, assign, and transfer to Abner Taylor, of the county of Cook, state of Illinois, and A. C. Babcock, of the county of Fulton, said state, all my rights, interest, and claim in and to the contract or contracts from the state 642] of Texas to build or erect a *statehouse or capitol building in the city of Austin and last mentioned state derived from a contract or agreement made with Matthias Schnell in Chicago, Cook county, Illinois, bearing date January 31st, 1882, or any interest I may have for building or erecting a statehouse or capitol building in the city of Austin, Texas, derived from said Schnell at any time or from any other source, hereby relinquishing to said Taylor and Babcock all right or claim of any character to any and all contracts or agreements that I may have heretofore had or now possess pertaining to building, erecting or constructing a statehouse or capitol building in the city of Austin, state of Texas.

"Witness my hand and seal this 27th day of May, A. D. 1884.

"A. A. Burck. [Seal.]";

—which was also duly acknowledged.

It further appears that the instrument dated January 31, by which Schnell transferred a three fourths interest in the contract to the two Farwells, Babcock, and Taylor, was filed for registration on February 13, in the office of the clerk of the county court of the county of Travis, that being the county in which the capitol building was situated, and thereafter recorded in the records of said county; that the instrument executed between Schnell, Drake, Beardsley, and Burck was also filed and recorded in the same office on February 14, 1882; likewise the assignment of May 9, 1882, from Schnell to Taylor, Babcock & Co. on May 10, 1882, and the deed from A. A. Burck to S. B. Burck, of date April 14, 1883, on April 20, 1883; also the conveyance from Burck to Taylor and Babcock, of date May 27, 1884, on May 27, 1884. It also appears from the certificate of the comptroller of public accounts of the state of Texas that the original contract of the state with Schnell, together with the assignment from Schnell to the two Farwells, Babcock, and Taylor, of date January 31, the assignment, of date May 9, from Schnell to Taylor, Babcock & Co., and the assignment from Taylor, Babcock & Co. to Abner Taylor, were all on file in his office, though when so filed is not stated. 643] With reference to the *effect of the filing in the office of the clerk of Travis county, the bill avers as follows:

"And your orator further says that the account between your orator and defendant as to this matter is still opened and unsettled, and that for reason why your orator should not have an account or relief against him the defendant pretends that he had no notice that the said A. A. Burck assigned or tranferred to your orator a one half interest in his, the said A. A. Burck's, one sixteenth interest in the profits that might arise from the building of said capitol contract, and that the defendant in good faith and without notice purchased from said A. A. Burck for a valuable consideration the said Burck's one sixteenth interest in said profits after the said A. A. Burck had sold one half of his said interest to your orator, and therefore refuses to account with plaintiff; whereas the truth is that the said transfer by A. A. Burck to your orator, which has been hereinbefore stated and made a part of this bill as an exhibit, was duly authenticated for registration in the office of the county clerk, and was duly recorded in the records of deeds of Travis county, Texas, on the 14th day of April, A. D. 1883, and said Abner Taylor then had notice of the same; whereas the said A. A. Burck did not sell or transfer any of his said interest in said profits to said Abner Taylor until the 27th day of May, 1884.

"That the said Abner Taylor ought not to be heard to aver that said registration was not notice to him of the said assignment by A. A. Burck to your orator, for that the formation of the copartnership between Matthias Schnell, Abner Taylor, Amos C. Babcock, Charles B. Farwell, and John V. Farwell, as hereinbefore alleged, wherein it was stipulated that the profits arising from building the capitol should be divided between said parties or with the assignees of either party, the said copartnership caused said contract of copartnership, which contained an assignment by said Schnell of three fourths of his interest in said capitol contract, to be recorded in the register of deeds of Travis county, whereupon the said A. A. Burck, J. M. Beardsley, and James S. Drake, acting on this means of giving notice of assignments adopted by said *partnership, 644] caused their said assignment to be recorded in the office of the clerk of the county court of Travis county in the records of deeds; and afterwards, when the said Schnell assigned his remaining interest in said contract, and in the profits that might arise from the fulfillment of the same to the other members of said firm styled Taylor, Babcock & Co., the said firm caused said last mentioned assignment to be also recorded in the said register of deeds as a means of giving notice thereof; that when the said firm of Taylor, Babcock & Co. and the individual members thereof assigned their interests in said contract to Abner Taylor, the defendant herein, they and said Taylor in their contract of assignment referred to the several mesne assignments of interests in said contract as being of record in the office of the clerk of the county court of Travis county, and referred to said records for full particulars as to said mesne assignments, whereby the said parties concerned in said contract for building said capitol building agreed and established a custom among themselves to give notice of assignments of interests in said capitol contract or in the profits that might arise from the fulfillment of the same by recording such assignments in the records of deeds of Travis county, Texas, and by their conduct in so recording such assignments, and referring to said records and not otherwise giving notice of such assignments led your orator to believe and justified him in believing that said partnership and its assigns would take notice of the assignment by said A. A. Burck to your orator when your orator placed the same on record in the records of deeds of Travis county, duly authenticated for record; that your orator, fully believing that such record would be accepted as notice of the said assignment to your orator, caused

his said assignment to be promptly recorded in the records of deeds of Travis county on the 14th day of April, 1883, which was more than a year before the said Abner Taylor purchased any interest from the said A. A. Burck."

And with regard to the rights acquired by defendant, through the conveyance of May 27, 1884, from A. A. Burck to him, it avers as follows:

645] *"And your orator further says that said assignment by A. A. Burck to Abner Taylor did not purport on its face to sell or assign to said Taylor the interests in the profits of said capitol contract which the said A. A. Burck had assigned to your orator, but only purported to assign to said Taylor whatever interest the said A. A. Burck had at the time of the said assignment to Abner Taylor, or might thereafter have; wherefor the said Abner Taylor, defendant, was placed upon notice and inquiry as to whether A. A. Burck had parted with any of his interest before the assignment of his remaining interest to the said Abner Taylor, but the said Abner Taylor made no inquiry of said A. A. Burck as to whether he had parted with any of his, the said Burck's interest, nor did the said Taylor examine or cause to be examined the records of deeds of Travis county for any record of an assignment by said A. A. Burck, notwithstanding the said custom and practice of all the parties concerned in assignments affecting said capitol contract or interest in the profits thereof to record all such assignments and the agreement thereby affected to that (as their?) method of giving notice of assignments."

The bill further alleges the performance of the contract by Taylor, large profits as the result thereof, and prays an accounting.

Messrs. **F. Chas. Hume** and *F. G. Morris* for appellant.

The bill and exhibits show that the instrument under which Taylor asserts title is a quit-claim, and that he took thereunder not as a bona fide purchaser, but subject to the prior assignment of A. A. Burck to Taylor, which purported to, and did, convey to the latter only the then present, subsisting interest of the former in the capitol construction contracts.

2 Pom. Eq. Jur. §§ 591, 626, 688, 695, 745, 752, 753; 1 Warvelle, Vendors, pp. 337, 338, § 5; 2 Warvelle, Vendors, p. 615, § 13; 1 Devlin, Deeds, §§ 671, 674; *Bishop* v. *Holcomb*, 10 Conn. 446; *Oliver* v. *Piatt*, 44 U. S. 3 How. 409 (11: 656); *Van Rensselaer* v. *Kearney*, 52 U. S. 11 How. 322 (13: 713); *May* v. *Le Claire*, 78 U. S. 11 Wall. 232 (20: 53); *Dickerson* v. *Colgrove*, 100 U. S. 584 (25: 620); *Baker* v. *Humphrey*, 101 U. S. 499 (25: 1067); *Alexander* v. *Rodriguez* ("*Villa* v. *Rodriguez*") 79 U. S. 12 Wall. 338 (20: 406); *Brown* v. *Jackson*, 16 U. S. 3 Wheat. 452 (4: 432); *Runyon* v. *Smith*, 18 Fed. Rep. 580; *United States* v. *Sliney*, 21 Fed. Rep. 895; *Hastings* v. *Nissen*, 31 Fed. Rep. 600; *McClung* v. *Steen*, 32 Fed. Rep. 374; *Gest* v. *Packwood*, 34 Fed. Rep. 372; *Shepard* v. *Hunsacker*, Posey, U. C. (Tex.) 579; *Rodgers* v. *Burchard*, 34 Tex. 452; *Hamman* v. *Keigwin*, 39 Tex. 42; *Carter* v. *Wise*, 39 Tex. 275; *Harrison* v. *Boring*, 44 Tex. 260; *Milam Co.* v. *Bateman*, 54 Tex. 169; *Tram Lumber Co.* v. *Hancock*, 70 Tex. 313; *Garrett* v. *Christopher*, 74 Tex. 454; *Richardson* v. *Levi*, 67 Tex. 361-367; *Watkins* v. *Edwards*, 23 Tex. 447.

The rule that circumstances occurring in a transaction which should put a party thereto on inquiry, charge him with notice of all facts which he might have learned if proper inquiry had been made, applies to notices of assignments of choses in action.

Anderson v. *Van Alen*, 12 Johns. 348; *Hackett* v. *Martin*, 8 Me. 77.

The fact that Taylor as a party to the contract by which Schnell transferred three fourths interest in the building contract to Taylor, Babcock & Co., agreed to the stipulation in said contract for a division of the profits between the parties "or their heirs or assigns" charged him particularly to make inquiry for assignments, and emphasized the significance of the terms of the assignment, tendered to Taylor by A. A. Burck by which Burck proposed to assign only his present interest or that which might thereafter accrue to him. The failure to make inquiry under such circumstances was negligence which prevented him from becoming a bona fide purchaser.

Anderson v. *Van Alen* and *Hackett* v. *Martin*, *supra*.

In cases such as the present record presents, he who is first in time is first in right.

2 Pom. Eq. Jur. § 695; *Thayer* v. *Daniels*, 113 Mass. 131; *Bush* v. *Lathrop*, 22 N. Y. 535, 546; *Conover* v. *Van Mater*, 18 N. J. Eq. 484.

But whatever the true rule may be, it would seem to be indisputable, that, to say the least, the purchaser of a chose in action whose title can be adjudged superior to that of a prior assignee, by reason of the latter's failure to notify the debtor or trustee before the former's purchase and notification—must be a bona fide purchaser.

Spain v. *Brent*, 68 U. S. 1 Wall. 623 (17: 624); *Judson* v. *Corcoran*, 58 U. S. 17 How. 614 (15: 232); *Ward* v. *Morrison*, 25 Vt. 600; *Loomis* v. *Loomis*, 26 Vt. 203; *Clodfelter* v. *Cox*, 1 Sneed, 339-341; *Judah* v. *Judd*, 5 Day, 355; *Bishop* v. *Holcomb*, 10 Conn. 446; *Van Buskirk* v. *Hartford F. Ins. Co.* 14 Conn. 144, 36 Am. Dec. 473.

Mr. **George E. Hamilton** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

That which arrests the attention is that, though the defendant furnished all the means and did all the work of building the capitol, and although the authorities of the state expressly recognized him as the contractor, bound in all respects to carry out the contract with the state in the same manner as the original contractor, and though he had no knowledge of any claim of plaintiff, the court is asked to recognize the latter as the owner of one thirty-second of the profits of the *contract, [646 and to compel the defendant to pay him that amount. While only one thirty-second of the profits is asked for, the rule would be the same if thirty one thirty-seconds were sued for, and the first and principal question which arises is, whether these transactions between Schnell and A. A. Burck and between A. A. Burck and plaintiff had, with-

out the knowledge of the defendant, operated to create in the plaintiff a valid claim to a share of the profits. The contract in its twenty-sixth clause stipulated that there should be no assignment in whole or in part by the contractor without the consent in writing of the state authorities. No such consent was given to the assignment by Schnell to Burck, nor does it appear that the state ever in any form recognized the plaintiff, or his immediate grantor, as having any interest in, or control of, the contract, or any part thereof. He was to both the state and the defendant, who did the work, an unknown party until after the full completion of the contract, when for the first time he appears claiming an interest in the profits by virtue of an assignment and transfer, made before the work was done and in disregard of the terms of the contract.

It is earnestly insisted by counsel that this provision forbidding an assignment without the written consent of the state authorities, was solely for the benefit and protection of the state; that it did not restrict or interfere with the right of the contractor to dispose, in any way he saw fit, of an interest in the contract, or the profits thereof, so long as the party to whom such transfer was made attempted no interference with the actual work, and presented no claim against the state. The contract in the possession of the contractor was his property, and the profits arising therefrom, and any interest therein, were as much the subject of disposal as any other property, and the only limitation was one for the benefit of the state and could not be claimed by any subsequent assignee from the contractor. The case of *Hobbs* v. *McLean*, 117 U. S. 567 [29: 940], is relied upon as authority for this contention. In that case one Peck having, in response to an advertisement from the proper authorities, put in a bid for furnishing wood and hay to the government, and expecting that 647] the contract *would be awarded to him, entered into a partnership with McLean and Harmon, by which Peck was to furnish one half of the capital necessary to carry on the partnership business, and McLean and Harmon each one fourth, the profits and losses of the partnership to be divided in like proportion. The partnership was for the purpose of carrying out this expected contract. Subsequently, the contract with the government was obtained, and after it had been performed and the money therefor paid to an assignee in bankruptcy of Peck, the other partners, McLean and Harmon, filed their bill to recover their proportionate share of the profits as fixed by the terms of this partnership. Among the defenses was that the partnership was invalid by reason of section 3737, Revised Statutes, which reads as follows:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

But this defense was overruled, the court, by *Mr. Justice* Woods, observing in respect thereto:

"Interpreting the articles in the light of the statute, as it is the duty of the court to do, they were not intended to transfer, and do not transfer, to the plaintiffs any claim or demand, legal or equitable, against the United States, or any right to exact payment from the government by suit or otherwise. They may be fairly construed to be the personal contract of Peck, by which, in consideration of money to be advanced and services to be performed by the plaintiffs, he agreed to divide with them a fund which he expected to receive from the United States, on a contract which he had not yet entered into. This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can be held to effect a transfer of Peck's contract with the United States, and to be a violation of the statute.

*"We are of opinion that the partner-[648 ship contract was not opposed to the policy of the statute. The sections under consideration were passed for the protection of the government. *Goodman* v. *Niblack*, 102 U. S. 556 [26: 229]. They were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might alway know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

It is insisted that, tested by the rule thus laid down, this stipulation of clause 26 was one solely for the benefit of the state, and worked no restriction on the right of the contractor to dispose, in advance of the completion of the contract, of the profits which should enure therefrom.

We cannot concur in these views. By the section quoted not only was a transfer of the contract prohibited, but also the result of such a forbidden transfer declared. In terms it was said that any "such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned." *Expressio unius est exclusio alterius.* The express declaration that so far as the United States are concerned a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the government is concerned, and it alone can raise any question of the violation of the statute. The government in effect, by this section, said to every contractor, You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as we are concerned you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.

It is familiar law that not every contract in contravention of the terms of a statute is void, and the courts will search the language

[649] *of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. *Harris* v. *Runnels*, 53 U. S. 12 How. 79 [13: 901]; *Miller* v. *Ammon*, 145 U. S. 421 [36: 759]; *Pangborn* v. *Westlake*, 36 Iowa, 546.

It was in pursuance of this line of thought that the court in *Hobbs* v. *McLean*, ruled as it did as to the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. But it it has never been doubted that, as a general rule, a contract made in contravention of a statute is void and cannot be enforced, and the only exception arises when, from an examination of the statute, the courts are able to discern a different or a limited purpose on the part of the law makers.

It is true that, in the case at bar, we have no construction of a statute, but only of the terms of a contract. That contract, however, was as binding on the one party as the other. The contractor assented to its terms precisely as did the state, and his promise was not to assign the contract in whole or in part without the consent in writing of the state authorities. It was a promise which entered into and became one of the terms of the contract, and one which was binding, not only upon the parties, but upon all others who sought to acquire rights in it. It may be conceded that, primarily, it was a provision intended, although not expressed, for the benefit of the state, and to protect it from interference by by other parties in the performance of the contract, to secure the constant and sole service of a contractor with whom the state was willing to deal, and to relieve itself from the annoyance of claims springing up during or after the completion of the contract in favor of parties of whose interests in the contract it had no previous knowledge, and to the acquisition of whose interests it had not consented. Conceded all this, and yet it remains true that it was a stipulation which was one of the terms of the contract and binding upon the contractor, and equally binding upon all who dealt with him. It is unnecessary to hold that the contractor might not be personally bound upon his promise made before the performance [650] of the contract to *transfer a portion of his profits to any third-party. Whatever liabilities he might assume by such a promise, it would be an independent promise on his part, and would not let the promisee into an interest in the contract. It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; the contract remaining all the time the property of the contractor, subject to disposal by and with the consent of the state. To him alone the state would remain under obligations, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release. By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. This was while the contract was executory and before the work was done, and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized "Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound." In other words, by the consent of parties, and in accordance with express provisions of the contract, before the work was done Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. The contract was still executory; nothing had been earned by Schnell, and nothing was due to him. He steps out of the contract and Taylor steps in; Taylor is accepted as the contractor and proceeds with the work. Would it not be strange if, after having thus completed the contract, some person could, on the strength of an unknown transfer of the entire profits of the contract made before the transfer to Taylor, compel the latter to pay to him such entire profits? And yet if one *thirty- [651] second of the entire profits can be so obtained, all the profits could, in like manner, have been obtained.

It will be borne in mind that the instrument of date January 31, 1882 by which Schnell transferred to Taylor, Babcock & Co. a three-fourths interest in the contract did not operate to make Schnell a mere beneficiary of profits. He and they became thereby joint contractors with the state. He was under the same obligation of performance as they, and for any failure in respect thereto the state could hold him responsible equally with them. The mere fact that there was a division between themselves as to duties in no manner abridged the fact that he was a joint contractor with them. They, it is true, were to furnish the money, but he was to have the management and superintendence. He was to take his part in the performance of the contract. Not only that, but, as seen, he was to be personally responsible to them for any loss or damage caused or sustained by reason of his neglect or mistakes. So, that if he had gone on jointly with them in the performance of the contract as provided for, out of the profits earned in the performance of the contract, they would have had a right to deduct from the amount coming to him all the loss and damages which they had sustained by reason of his neglect and mistakes.

We have thus far rested the non assignability of this contract, or any interest therein, to plaintiff's grantor upon the express stipulation of clause 26; but even in the absence of such a clause, it was not competent for Schnell, by his own act, and without the consent of the state, the other contracting party, to transfer any interest in this contract. It is a contract of that nature which is not susceptible of assignment without the consent of the other party. *Arkansas Valley Smelt. Co.* v. *Belden Min. Co.* 127 U. S. 379 [32:246]; *Delaware*

County Comrs. v. *Diebold Safe & L. Co.* 133 U. S. 473, 488 [33:674, 680]. In the latter case it was said by this court:

"A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But 652] when *rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract."

So that even if clause 26 had been omitted from the contract, Schnell, the contractor, could never have transferred an interest in it to the grantor of plaintiff so as to vest in him a right to take part in the work, or a subsequent right to recover from the state on the completion of the work. All that could ever have been acquired by an assignment or transfer by Schnell, without the consent of the state, was a right to maintain an independent action against him for whatever share of the profits he had attempted to transfer. But that obligation would be personal to Schnell, and was not assumed by the defendant, or Taylor, Babcock & Co. when they took an assignment of the entire contract from Schnell. Assuming to the state the performance of the contract carried with it no assumption of Schnell's unauthorized assignments or of his promises to pay over certain portions of the profits he would have received had he performed the contract. In other words, stepping into the place of Schnell in this contract with the state, they did not assume his personal liabilities to third parties. They assumed his obligations to the state, and they took with those obligations a right to receive the entire consideration promised by the state, and they did not agree to become liable for all or any independent promises he had made in reference to the contract.

It is true that in that assignment it was stipulated that the profits were "to be divided as the interests of the parties appear under the contract, or to their heirs or assigns." If Schnell, with Taylor, Babcock & Co., had under that assignment performed the contract with the state and had made profits thereby, it may be that this plaintiff after giving notice could have enforced both against Schnell and this defendant a one thirty second of such profits, rest- 653] ing upon this stipulation for *division among the parties or their assigns, but as Schnell never earned any share in the profits there is nothing upon which that stipulation can take effect. The profits which would have resulted if Schnell, with Taylor, Babcock & Co., had performed the contract might have been very different from that which did result from the performance of the contract by Taylor alone. It is a mistake to suppose that the profits to be derived from the performance of a contract, as yet unexecuted, are something separable from the performance—as a coupon is detachable from a bond—and can be sent floating through the channels of commerce as a separate obligation. The profits are tied up in the contract to such an extent that the promise in respect to them becomes of value only when he who makes the promise shall have earned the profits through the performance of the contract. And when the contract, being wholly executory, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original contractor before the substitution.

We have thus far considered this case on the assumption that the defendant proceeded with the completion of his contract in ignorance of any transfer to plaintiff, and that such was the case is, we think, a fair inference from the allegations of the bill. The pleader has evidently sought to charge constructive notice from the fact of record in the office of the clerk of the county in which the work was done, but in which none of the land promised and deeded was situated. It is not pretended that there was any statute providing for such record, or making the record notice to subsequent assignees or purchasers (Tex. Rev. Stat. art. 4331; *Burnham* v. *Chandler*, 15 Tex. 441; *Wright* v. *Lancaster*, 48 Tex. 250) but it is alleged that the assignments and transfers under which the defendant claims were recorded in that office. The argument seems to be that the defendant and his assignors selected filing and record in that office as a means of giving notice to other parties of their rights, and that having made such selection was equivalent to an admission that *they would accept[654 a like filing and record as notice to them, but that argument cannot be sustained. The defendant and his assignors may have desired to give as much publicity as possible to the fact of the transfers to themselves, and in seeking to give such publicity may have selected the filing and record in one of the principal offices of the county as a means thereto, but they did not thereby create a new law in respect to notice. They never in terms declared, and their own acts of filing for record carried, no implied declaration of their willingness to accept a similar record as notice to themselves. They had a right to rely upon the law of the state, as enacted by its legislature, and were not bound by any constructive notice other than those laws provided. If notice was essential to charge them, actual notice should have been given, at least in the absence of a statute providing some means for constructive notice. Indeed, it is a mere and not very reasonable inference from the fact that they placed these instruments on record that their purpose was thereby to give notice. As well might it be assumed that they simply sought to have preserved for their own use a recorded copy of their assignments rather then rest upon their own possession of the original papers. It is true in this part of the bill there is a statement that "said Abner Taylor then had notice of the same." This language standing by itself is open to a construction that actual notice was charged, but that no such construction should be given to it is evident from the paragraph immediately following, in which the pleader alleges that notice was given by filing

and record, and states the reasons why such filing and record should be accepted as constructive notice. Indeed, we do not understand from counsel's brief or argument that there is a claim that there was actual notice given of these transfers.

Finally, it is claimed that the defendant was chargeable with notice because the assignment which he took from A. A. Burck, on May 27, 1884, was really nothing but a quitclaim; that a party taking under a quitclaim deed cannot be a bona fide purchaser, but takes with notice of all limitations of his grantor's rights, and in respect thereto several authorities **655**] are *cited from the state of Texas and elsewhere as to the rights of one taking under such a deed.

We do not care to enter into the consideration of this question; for, while the instrument is open to two constructions, yet, conceding that it in terms only quitclaimed, it took nothing away from Taylor's rights; it was not executed until two years and over after Schnell had parted with all his interest in the contract to Taylor, Babcock & Co., and it could not possibly have the retroactive effect of vesting in the plaintiff a right as against Taylor, which he did not theretofore have. All that can be inferred from that instrument is that more than two years after Schnell had parted with his entire interest in the contract to defendant and his associates, and they had assumed full responsibility to the state, and nearly two years after defendant had accepted the sole responsibility of the contract, and after he had partially performed its obligations, he ascertained in some way the existence of an outstanding claim in favor of A. A. Burck and, rather than litigate with him the validity of that claim, purchased it. It was not an admission that A. A. Burck had a valid claim to the extent of the attempted assignment from Schnell to him, and the fact that it was in the mere language of a quitclaim as likely resulted from the unwillingness of A. A. Burck to assume the obligations of a covenant or warranty as from any other reason.

In conclusion, we hold that by the nature of the contract as well as its express stipulation Schnell was incapacitated from transferring an interest therein without the consent of the state; that the attempted transfers from him to A. A. Burck and from A. A. Burck to S. B. Burck created simply a personal obligation which could be enforced against him alone; that the assignments and transfers with the consent of the state vested the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of the plaintiff's claim; and that by his performance of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to Schnell, and no obligation to perform any promise which Schnell **656**]made *to plaintiff or plaintiff's assignor.

The judgment of the circuit court is affirmed.

Mr. Justice **White** was not a member of this court when this case was argued, and took no part in its decision.

Mr. Justice **Jackson** dissenting:

I am unable to concur in the opinion and judgment of the court in this case, and will briefly state the grounds of my dissent.

The case stands upon the bill, original and amended, and demurrer thereto. From the nature of the building contract between the state of Texas and Schnell, as well as the covenant contained in the twenty-sixth clause thereof, providing that the contract should not be assigned in whole or in part by the contractor without the consent, in writing, of the designated state officials, "with the advice and consent of the heads of departments," the conclusion is reached by the court that "Schnell was incapacitated from transferring an interest therein without the consent of the state; that he admitted transfers from him to A. A. Burck, and from A. A. Burck to S. P. Burck (complainant) created simply a personal obligation, which could be enforced against him alone; that the assignments and transfers, with the consent of the state, vested the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of the plaintiff's claim; that by his performance of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to Schnell and no obligation to perform any promise which Schnell made to plaintiff or plaintiff's assignor."

I find nothing in the allegations of the bill or in the exhibits, made a part thereof, which sustains the statement that Taylor "took without notice of the plaintiff's claim." The bill certainly does not admit that Taylor took the transfer to himself and Babcock from A. A. Burck without notice of the previous transfer to S. B. Burck. The other conclusions involve legal and equitable propositions, which, as applied to the *admitted facts of this [**657** case, are not, in my opinion, correct.

There are important allegations in the bill, and provisions in some of the contracts, made exhibits thereto and parts thereof, which are admitted by the demurrer, but which are not noticed or considered in the opinion. By the contract of January 31, 1882 (Exhibit "L") Schnell assigned and set over to Charles B. Farwell, John V. Farwell, Amos C. Babcock, and Abner Taylor, "an undivided three fourths interest in said (state) contract, for the purpose that the said parties of the second part may share in any and all the profits that may arise from same, the same as the party of the first part (Schnell) as their interests may appear, which is hereby agreed to be equal;" that is, the assignees collectively were interested in the three fourths interest transferred to them. This contract further provided that the assignees were "to furnish whatever money may be needed or necessary for the proper construction of said statehouse or for the execution of the said contract as the same may be required from time to time." The sum of $13,000, which the parties acknowledged to be then due Schnell, was to be paid with interest "whenever the sum of $50,000 shall have been realized by the sale of lands named in said (state) contract." After the payment of that sum the contract provides "that the said parties of the second part are to have all the remaining profits until all the money advanced as above stipulated shall be paid, with six per cent interest

thereon per annum from the time said money is advanced, and all the other profits are to be divided as the interests of the parties appear under the contract or to their heirs or assigns. It is further agreed by and between the parties hereto that Amos C. Babcock, one of the parties of the second part, shall be the trustee for the parties herein named of each part, to act as and be the trustee to receive the title to be conveyed in pursuance of the contract between the state of Texas and the said Matthias Schnell and receipt for same to the proper officers of said state, and do all other things required of the said Schnell pertaining to the conveyance of the lands under said contract with the state of [658] Texas or *capitol building commissioners, and to hold the same and to make such conveyances or sales of said lands or any portion thereof from time to time as the parties hereto may direct."

The state of Texas, by its proper officials, gave its written consent to this contract of assignment, which operated to substitute Schnell and his assignees, composing a partnership under the style of Taylor, Babcock & Company, as the contractors with the state in place of the original contractor. In thus becoming the substituted contractors with the state, instead of Schnell, the members of the partnership in no way abrogated or terminated the provisions of their private contract *inter esse* as above set forth. It admits of no question that by the terms of this partnership contract Schnell was not required to make any advances or incur any expenditures in executing the state contract and completing the capitol building, as the four assignees of an undivided three fourths interest in the state contract were to advance all the funds required for that purpose, and obtain their reimbursement from the sales of the lands to be received from the state in settlement for the work. It is equally clear that Schnell retained a one fourth share of the profits that might be realized on the contract after refunding advances made by his copartners in completing the capitol building. Now, the state of Texas certainly had no concern with these private matters and agreements between the new contractors. It was not interested in, or in any way affected by, the relative or respective shares of the contractors in the profits which might be made. Neither had the state any interest in the question as to how, or amongst whom, such profits, if any, should be divided. These were matters to be settled among the copartners or associate contractors, and they were settled by them in the provision of their private contract which provided that, after repaying the amount expended in constructing the state capitol, "all the other profits are to be divided as the interests of the parties appear under the contract, or to their heirs or assigns." It can hardly be doubted that this language permitted and provided for the assignment by either or all of the partners of his or their [659] share in the profits, and that such *assignee could equitably assert a right thereto against any person into whose hands such profits might come, or be found, except a bona fide purchaser thereof for value without notice of the assignee's rights. Such an assignee of a share in the profits of the enterprise would have nothing to do with the execution of the state contract out of which profits might arise. Nor would he touch the state at any point, or in any way affect its rights, interest, or convenience. The contractor's covenant not to assign the building contract without the consent, in writing, of designated state officials, did not extend to or cover an assignment by the contractor of a share or interest in the profits which it was expected would arise from the execution of the contract. The state had notice of the provisions of the private partnership contract which included "assigns" among those entitled to share in the division of the profits, and in consenting to the arrangements made by that contract it may be fairly assumed to have assented to such provisions. The right to assign a share or interest in the profits was one of the terms of the copartnership, which the state accepted as contractor in the place of Schnell. In thus accepting the firm as contractor, with notice that its members had provided for their "assigns" to share in the profits of the building contract, the state itself could not thereafter have objected to Schnell's assignment of his interest, wholly or partially, in the profits that the firm might make out of the contract, whether such assignment was made before the completion of the work, or after.

Suppose the firm of Taylor, Babcock & Company, having the same copartnership articles and agreements as to how the members should share in the profits of the business, had been the original, instead of the substituted, contractors? Could or would it be held that the contract with the state, or the twenty-sixth clause thereof, would operate or have the effect to prevent any member of the firm from assigning a part of his interest in the profits that might be realized in completing the state building? Such a proposition as this could not be maintained. It would be too clear for argument that the state contract with the partnership could not control the *articles of copart- [660] nership as between the partners and third parties in respect to what might be realized by the firm out of the contract with the state. Each partner of a firm has an undoubted right to make a valid assignment, either absolutely or as security, in the profits of a partnership. No partner owns absolutely any part of the partnership property. He cannot assign any particular part of such property, or any specific amount of the profits of the concern. But the assignment of his share, or any part thereof, in such profits will pass such part of the profits as may remain after payment of the firm's debts, and settlement of the partnership accounts. The right conferred by the assignment is an intangible thing and can only be reduced to possession by a demand for account, and no notice of such an assignment need be given other than a demand for an account of such profits. This is the rule laid down in *Wallace's App.*, 104 Pa. 559, where it was held "that a purchaser of a partner's interest, whether at private or judicial sale, acquires merely the right to demand an account from the other partners and receive a certain share of the balance remaining after the payment of the partners' debts and the adjustment of the partners' equities. This right is

an intangible thing, and can only be reduced to possession by a demand for an account." In that case it was further held that the assignee of a partners' interest was superior to the claim of general creditors, and all others claiming under the partnership, except the purchasers for value without notice.

The right of the partners, under the articles of copartnership, as well as under the general law, to make a transfer or assignment of their interest in the profits of the firm, should not be confounded with the right of the firm to make an assignment of the contract, so far as the state is concerned. In accepting the copartnership as its contractor the state did not undertake to control the ordinary rights of partners, nor abrogate their private agreement. The opinion of the court asserts the proposition and reaches the conclusion that, notwithstanding the terms of the partnership agreement, which provided that the "assigns" of any [661] member of the firm should *be included amongst those who were to share in the profits of the enterprise, as their interest might appear, still such an assignee could acquire no right or title to the profits as against the firm, or members thereof, into whose hands such profits might come, without the consent of the state to such assignment; and as the result of this startling proposition, holds that the appellee, Taylor, who was a member of the firm and a party to that agreement, is relieved from liability to account for profits which belong to the appellant, as the assignee of Schnell. I know of no principle or authority upon which this can be sustained.

Having retained a one fourth interest in the profits of the building contract, Schnell, on January 31, 1882, by written contract, after reciting the contracts with the state, and with Taylor, Babcock, and the Farwells, transferred and assigned to A. A. Burck and two others, separately and severally, an undivided one fourth part "of all and whatever share, interest, or advantage, whether in money, lands, or otherwise, which he (said Schnell) may be entitled to have or receive under or by virtue of the contracts herein mentioned and referred to," excepting only the $5000 to be paid for his services as superintendent, and $13,000 coming to him out of the first $50,000 proceeds of land sales. This assignment contained the provision "that this contract shall be binding upon and inure to the executors, administrators, heirs, and assigns of the several parties hereto respectively, and that the same shall be recognized by the parties and trustee named in the contracts herein referred to."

This assignment to A. A. Burck was witnessed by A. C. Babcock, of the firm of Taylor, Babcock & Company, and trustee of the parties to receive and sell the lands to be acquired under the building contract. He not only witnessed the contract, but appeared before the proper officers and proved its execution for registration. The firm of Taylor, Babcock & Company thus had notice through one member thereof of the assignment. In addition to this it is distinctly alleged in the amended bill that this transfer was executed by Schnell "with the knowledge and assent of said part-
[662] nership," *meaning Taylor, Babcock & Company. It is further alleged "that the said Matthias Schnell, having assigned to the said A. A. Burck a right to one sixteenth interest in the profits that might arise from the construction of said capitol under said contract with the state of Texas, and having made such assignment to said Burck at the time said partnership was existing, as hereinbefore alleged, with the knowledge and assent of said firm as it then existed, the right of the said A. A. Burck to have one sixteenth of the profits that might arise from the carrying out of said contract and to have an accounting therefor became binding upon said firm and its assignees."

On May 9, 1882, Schnell by written contract transferred his remaining interest in the contracts (consisting of his claim of $13,000, and an undivided one sixteenth interest or share in the profits that might be realized) to Charles B. and John V. Farwell, Abner Taylor, and A. C. Babcock, "who composed the firm of Taylor, Babcock & Company." In respect to this assignment, which the state approved, the original petition charges "that the said Taylor, Babcock & Company received said assignment from Matthias Schnell of all his interest in said contract to complete said state capitol with full notice of the interest of said A. A. Burck, as hereinbefore alleged, an undivided one half of which interest A. A. Burck subsequently transferred to plaintiff, S. B. Burck, as aforesaid, and that the said Abner Taylor had full notice of the interest of the said A. A. Burck at the time of the said transfer of Taylor, Babcock & Company to him, the said Abner Taylor, and with full notice that by the terms of the agreement and assignment executed by and between said Matthias Schnell, of the first part, and J. M. Beardsley, James S. Drake, A. A. Burck, of the second part, that the same should be binding on, and inure to, the executors, administrators, heirs, or assigns of the several parties to the said contract."

Now, after this transfer by Schnell of his interest to the firm of Taylor, Babcock & Company, what was the situation in respect to the profits that might be realized from the building contract? It was clearly this: Taylor, Babcock & Company *thereafter held and [663] owned the three fourths interest acquired under the partnership contract of January 31, 1882, and one sixteenth interest derived from the assignment of May 9, 1882, aggregating thirteen sixteenths interest in the profits, leaving the outstanding three sixteenths assigned to A. A. Burck and others by Schnell on January 31, 1882. The stipulations of the partnership contract were in no way changed or affected by Schnell's assignment of his remaining interest to the firm of Taylor, Babcock & Company. The obligation of Taylor and his associates, Babcock and the Farwells, to furnish the money required to complete the contract was not altered or abrogated in any way, and if the contract had been completed by Taylor, Babcock & Company, the profits realized from the sales of the lands, after refunding the expenditures made in completing the contract, would have been distributable between the parties in the proportion of thirteen sixteenths to Taylor, Babcock & Company,

one sixteenth to A. A. Burck, and two sixteenths to the other two assignees of Schnell.

On June 20, 1882, the firm of Taylor, Babcock & Company transferred the building contract to Abner Taylor, which was assented to by the state, and Taylor thereby became the contractor. But in so doing he did not cease to be bound by the terms of the partnership contract under which Schnell retained his one fourth interest in the profits, and a right to assign it, as he did. In other words, Taylor, in acquiring the shares of the members of the firm of Taylor, Babcock & Company, in no way either terminated or affected the interest of the parties holding the outstanding interests in the profits assigned by Schnell to A. A. Burck, with the knowledge and consent of both Taylor and the firm of Taylor, Babcock & Company. Nor did the transfer to Taylor by Babcock and the Farwells, as members of the firm of Taylor, Babcock & Company, in any way relieve Taylor from the provisions of the contract of January 31, 1882, which required himself and associates, other than Schnell, to furnish all the money needed to complete the building. The only effect of that transfer was simply to place Taylor in the shoes of Taylor, Babcock & Company, subjecting him to all the obligations resting upon [664] himself and assignors, *and affected by all the rights and equities which were binding upon the firm, not only in respect to the state, but as to all others interested in the result of the enterprise.

It is held, in the opinion of the court, that this assignment by the members of the firm of Taylor, Babcock & Company to the appellee, Taylor, with the consent of the state vested in him the absolute and sole interest in the contract, and profits arising therefrom, and that by his completion of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to either Schnell or to others claiming under Schnell. Schnell's assignee, holding the outstanding one sixteenth interest in the profits, was no party to that arrangement. His rights were fixed by the partnership articles, and how and upon what principle can it be maintained that Taylor's acquisition of the interest of Babcock and the Farwells in the contract, and the profits thence to arise, can cut off this outstanding interest held by Burck? By taking the assignment from his copartners, Taylor was in no way released from the obligation to furnish money and complete the contract which rested upon the firm of Taylor, Babcock & Company; and how is it then that, by acquiring the interest of his copartners, he can terminate or extinguish the right of Schnell's assignee, previously acquired with the knowledge and consent of the firm of Taylor, Babcock & Company? Can rights acquired with Taylor's knowledge and consent be cut off and extinguished by the private dealings between himself and partners, even though it be with the consent of the state? No such proposition can be sustained either upon principle or authority.

By the transfer of April 14, 1883, from A. A. Burck to the complainant S. B. Burck (Exhibit "O") the latter acquired an undivided one half interest in the one sixteenth interest held by the former, and thereby became entitled to one thirty-secondth part of the profits that might arise upon the completion of the contract, and the sales of the land to be received therefor. This transfer left A. A. Burck the holder of one thirty-secondth interest in the profits, and, thereafter, on May 27, 1884, he assigned to Abner Taylor *and A. C. [665 Babcock all his right, interest, and claim in and to the contract with the state of Texas derived from Schnell, or any interest he might have in the erection of the capitol building.

These two assignments by A. A. Burck are not, upon their faces, in conflict. They may well stand together. That to S. B. Burck was of a specific interest; that to Taylor and Babcock may be fairly construed to cover A. A. Burck's remaining interest of one thirty-secondth share of the profits. This last transfer does not purport to convey the one thirty-secondth interest previously transferred to S. B. Burck, and there is no allegation in the bill to give color to the idea that Taylor and Babcock, in taking the assignment of May 27, 1884, from A. A. Burck supposed that they were getting a one sixteenth interest instead of a one thirty-secondth interest. When that assignment was made to them, Taylor and Babcock both knew that A. A. Burck had acquired from Schnell a one sixteenth interest in the profits, and it is somewhat significant that they accepted an assignment from him, general in its character, without specification as to the interest conveyed. It is alleged that this transfer from A. A. Burck to Taylor and Babcock did not, upon its face, purport to convey the interest previously conveyed to S. B. Burck. Upon demurrer this statement of the bill, with respect to the purport of that transfer, must be taken as true. In *Campbell* v. *Mackay*, 1 Myl. & C. 603, Lord Chancellor Cottenham laid down the rule "that the court upon demurrer must assume the statement of the bill, with respect to the purport of a deed, to be true, and the demurring party is not at liberty to read the instrument itself for the purpose of disproving the statement, notwithstanding that for greater certainty as to its contents the bill expressly refers to it as being in the demurring party's possession."

When this assignment of May 27, 1884, was made to Taylor and Babcock, the latter had ceased to be a co-contractor for the erection of the building.

The state never assented to either of these assignments by A. A. Burck. The want of that assent is held to violate the transfer to S. B. Burck, while it does not affect that made to *Taylor and Babcock. In reference to [666 these A. A. Burck assignments the bill charges "that for reason why your orator should not have an account or relief against him the defendant pretends that he had no notice that the said A. A. Burck assigned or transferred to your orator a one half interest in his, the said A. A. Burck's, one sixteenth interest in the profits that might arise from the building of said capitol contract, and that the defendant in good faith and without notice purchased from said A. A. Burck for valuable consideration the said Burck's one sixteenth in said profits after the said A. A. Burck had sold one half of his said interest to your orator, and therefore re-

fuses to account with plaintiff; whereas the truth is that the said transfer by A. A. Burck to your orator, which has been hereinbefore stated and made a part of this bill as an exhibit, was duly authenticated for registration in the office of county clerk, and was duly recorded in the records of deeds of Travis county, Texas, on the 14th day of April, A. D. 1883, and said Abner Taylor then had notice of the same; whereas the said A. A. Burck did not sell or transfer any of his said interest in said profits to said Abner Taylor until the 27th day of May, 1884."

Suppose, as suggested in the opinion of the court, that this does not amount to anything more than an averment of constructive notice arising from the registration of the transfer? It was certainly not an admission that Taylor had no notice of that assignment. But considering the subject-matter of the interest transferred by Schnell to A. A. Burck, and by him to S. B. Burck, and the situation of the parties, the question arises whether want of a definite allegation that Taylor and Babcock had notice of the complainant's interest when they took their assignment from A. A. Burck, can in any way affect or defeat the complainant's rights according to the allegations of the bill?

The interest involved was to arise out of the sales of lands then being, and thereafter to be acquired, without expense to Schnell or his assignees. To whom was an assignee of an interest in the profits under duty and obligation to give notice? The ordinary rule applicable [667] to the transfer of debts or choses *in action has no application to the case, as shown in *Wallace's App.* 104 Pa. 603. The principle which would govern and control the question and the conflicting rights of complainant and Taylor and Babcock, if there is any real conflict between them, is the equitable doctrine of a bona fide purchaser for value without notice. This is a matter of defense on the part of such purchaser. There is certainly nothing on the face of either the bill or the contracts, made exhibits thereto, to indicate that Taylor, or Taylor and Babcock, has or can assert any such defense, and yet the court's opinion and conclusion gives Taylor the full benefit of that position as effectually as though he had set it up by answer and established it by proof.

There is a clear distinction between choses in action and chattel or freehold interests. This distinction is pointed out in *Wiltshire* v. *Rabbits*, 14 Sim. 75, 77, in which it was held that the person who took the first assignment of an annuity charged on leaseholds was entitled to priority over the person who took the second, notwithstanding the latter may have been beforehand with the former in giving the trustee notice of his security. The same general principle is asserted in *McCreight* v. *Foster*, L. R. 5 Ch. 604, 610. And in *Wilmot* v. *Pike*, 5 Hare, 14, it was distinctly held that the doctrine of notice applicable in determining the priority of charges on choses in action does not prevail as to equitable estates in land. In that case several mortgages were held to take effect with regard to interests arising out of real estate, according to the order of time at which they were respectively created, and that their *priorities were not* affected by the giving or failing to give notice to the party in whom the legal estate was vested.

But even treating the interest here involved as an ordinary chose in action, no proposition is better settled than an assignee of such a right can take only such interest as his assignor has to transfer, and will be bound by all equities binding on the latter, unless it affirmatively appears that the subsequent assignee took without notice. *Davies* v. *Austin*, 1 Ves. Jr. 247; *Brashear* v. *West*, 32 U. S. 7 Pet. 608 [8: 801]; *Livingston* v. *Dean*, 2 Johns. Ch. 479; *McKinnis* v. *Rutherford*, 21 N. C. *14; [668] *Webster* v. *Wise*, 1 Paige, 319; *Gay* v. *Gay*, 10 Paige, 369.

There is no allegation in the bill which can be tortured into an admission that Taylor occupies the position of a bona fide purchaser, for value without notice, of the interest of A. A. Burck previously conveyed to S. B. Burck. The opinion of the court goes far beyond giving Taylor the benefit of such position. It, in principle and effect, gives to the covenant against transferring the state contract a greater effect than a law or a statute could have had. How can the rule laid down by the court that the covenant against transferring the state contract has the effect to defeat the rights of an assignee from a member of the firm of contractors be reconciled with the principle announced in *McBlair* v. *Gibbes*, 58 U. S. 17 How. 232, 239 [15:132, 135]; *Brooks* v. *Martin*, 69 U. S. 2 Wall. 70, 87 [17: 732, 738]; *Union Pac. R. Co.* v. *Durant*, 95 U. S. 576 [24: 391]; and also in *Sharp* v. *Taylor*, 2 Phil. Ch. 801, 818? In these cases it was held that there was a distinction between enforcing an illegal or prohibited contract, and the assertion of a title to funds that had been realized out of such transactions. Here the contract with the state has been completed. The state is not objecting to the assignment made by Schnell to A. A. Burck, and by A. A. Burck to S. B. Burck, and certainly Taylor, who not only had knowledge of Schnell's assignment to A. A. Burck, but is charged with having assented thereto, is not in a position to interpose an objection which even the state could not urge in order to withhold funds that do not belong to him. What the Lord Chancellor said in *Sharp* v. *Taylor*, *supra*, is directly in point here: "As between these two, can this supposed evasion of the law be set up as a defense by one against the otherwise clear title of the other? In this particular suit can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of Parliament has been violated or neglected? Can one of two partners in any import trade defeat the other by showing that there was some irregularity in passing the goods through the custom house? The answer *to this, as to [669] the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken

in *Tenant* v. *Elliot*, 1 Bos. & P. 3; and *Farmer* v. *Russell*, 1 Bos. & P. 296, and recognized and approved by Sir William Grant in *Thomson* v. *Thomson*, 7 Ves. Jr. 473."

The same principle is laid down in the recent case of *Kingsbury* v. *Burrill*, 151 Mass. 199, where it was held that an assignment of a fractional part of a claim is good in equity where the person who is to pay raises no objection, following *James* v. *Newton*, 142 Mass. 366, 56 Am. Rep. 692.

The present case cannot be distinguished in principle from the rule announced in *Hobbs* v. *McLean*, 117 U. S. 567 [29: 940], in which A, having contracted with the United States to furnish supplies of wood and hay to troops in Montana, entered into partnership with B and C for the purpose of executing the contract. A was to furnish half the capital, B and C one fourth each, and profits and losses were to be divided on that basis; but, in fact, the capital was furnished by B and C. A delivered the wood according to the contract, but failed to deliver the hay, and, payment being refused, he brought suit in his own name in the Court of Claims against the United States to recover the contract price of the wood. In this suit B and C each was a witness on behalf of A, and each testified that he had no "interest, direct or indirect, in the claim," except as a creditor of A holding his note. Pending the suit, A became bankrupt, and then died. His administratrix was admitted to prosecute the suit, but before entry of final judgment his assignee in bankruptcy was substituted in her place. Final judgment was then rendered in favor of the assignee, and the amount of the judgment was paid him. B and C, as surviving partners, then filed a bill in equity against the assignee and the attorneys and counsel to recover their shares in the partnership property, and the court sustained their right to recover.

670] *The attempt to draw distinctions between decisions which involve no substantial differences in principle is not only unwise, but is attended inevitably with embarrassment in the administration of the law. The cases of *Arkansas Valley Smelt. Co.* v. *Belden Min. Co.* 127 U. S. 379 [32: 246]; and *Delaware County Comrs.* v. *Diebold Safe & L. Co.* 133 U. S. 488 [33: 680]; cited in the opinion of the court, fall far short of asserting the proposition that a member of the firm of Taylor, Babcock & Company (the substituted contractors with the state) could not transfer an interest in the profits to arise out of the building contract without the consent of the state. There is a class of cases where the services to be rendered are of such a personal character that they cannot be assigned; but where is the authority that holds that where a firm is a contractor to do certain work a member of such firm cannot assign or transfer his share of the profits to arise therefrom? I have looked in vain for such an authority.

The real question before the court upon the bill, and the demurrer thereto, is not whether Schnell could have assigned to A. A. Burck the right to take part in or assert any control over the construction of the state capitol, or to have recovered from the state the compensation it had promised to pay therefor? But the question is, can Taylor retain a share of the profits which belong to Schnell by the partnership agreement, made with himself and his associates upon full consideration, a portion of which profits Schnell, "with his knowledge and consent," transferred to A. A. Burck, who assigned a part thereof to the complainant? Under and by what provision of the contract described in the record, did Taylor become entitled to hold that share for his own benefit?

The bill shows that the building cost about $3,700,000; that the lands received from the state as compensation for the work, and since sold, were worth from ten to eleven million dollars, and the profits made on the transaction were between seven and eight million dollars. By the terms of the partnership contract, all the expenditures connected with the completion of the building were to be refunded with interest, and the remaining profits were to be divided "as the interest of the *parties[671 or their assigns might appear." The complainant as an "assign" holds title to one thirty-secondth interest of those profits. The bill clearly discloses his right thereto, and I fail to see upon what principle Taylor can dispute his claim or deny the account which he seeks. To allow him to do so, under the allegations in this bill, and upon the ground on which it is rested, that the state did not assent to the complainant's acquisition of the interest he holds, is not only a perversion of right and justice, but finds no sanction or support in either principle or authority.

Mr. Justice **Shiras** concurs in this dissent.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

GEORGIANNA C. BOOTH, Administratrix of the estate of FRED. D. BOOTH, deceased.

(See S. C. Reporter's ed. 671, 672.)

Jurisdictional amount.

A judgment cannot be amended on motion of the defendant by the addition of an amount not claimed by plaintiff, so as to bring the case within the jurisdiction of this court.

[No. 327.]

Submitted March 28, 1894. Decided April 9, 1894.

IN ERROR to the Circuit Court of the United States for the District of Minnesota, to review a judgment in favor of plaintiff Georgianna C. Booth, Administratrix, etc., against the Northern Pacific Railroad company, defendant, for damages for the death of Fred. D. Booth, occasioned by the wrongful act or omission of the defendant. *Dismissed.*

The facts are stated in the opinion.

Messrs. **James McNaught, A. H. Garland** and **H. J. May** for plaintiff in error.

Mr. **C. D. O'Brien** for defendant in error.

***The Chief Justice:** This was an[672 action to recover damages for the death of Fred. D. Booth, alleged to have been occasioned by

NOTE.—*As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute*, see note to Schunk v. Moline M. & S. Co. 27: 256.

the wrongful act or omission of the defendant, brought under the statute of the state of Minnesota in that behalf, which limited the recovery to not exceeding five thousand dollars. The case being tried to a jury resulted in a verdict in plaintiff's favor, January 10, 1890, for five thousand dollars, and, after motions for a new trial and in arrest had been overruled, judgment was rendered for that amount on May 12, 1890. On the following nineteenth of May the circuit court, on motion of the defendant's counsel, apparently made *ex parte*, ordered the judgment to be amended so as to read that the plaintiff recover the sum of five thousand dollars, "the amount found to be due by the jury, together with the sum of one hundred and sixteen and $\frac{73}{100}$ dollars, ($116.73) the amount of interest thereon from the rendition of the verdict to date."

These proceedings were had at December term, 1889. On July 3, 1890, one of the days of the succeeding June term plaintiff moved the court to vacate the amendatory order of May 19, which motion was overruled. Defendant thereafter sued out this writ of error. But the writ cannot be maintained unless it appear that the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars, and in this case the judgment would be the measure of the jurisdiction. As originally rendered this did not exceed that sum, and we are of opinion that it could not be amended on motion of the defendant by the addition of an amount not claimed by plaintiff, so as to bring the case within our jurisdiction. Since the defendant confessedly made its motion with the sole object of obtaining a writ of error not otherwise allowable, and, in doing so, conceded that the amount sought to be added was not in dispute, we decline to permit what was done to be efficacious in the accomplishment of the purpose designed.

Writ of error dismissed.

673] ALEXANDER H. ROBERTSON, Trustee of the Estate of ELLA V. DAVIS, deceased, *Appt.*,

v.

SAMUEL M. CHAPMAN ET AL.

(See S. C. Reporter's ed. 673-634.)

Agent's sale to himself—cannot become the purchaser—may buy from the purchaser.

1. If an agent to sell effects a sale to himself, under cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter seasonably made, will be compelled to surrender it, or if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale.

2. An agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale.

3. Where an agent to sell, sells to a purchaser without any understanding or expectation of the agent that he is to become interested in the purchase with the purchaser or is to take his place in the purchase, he is at liberty afterwards to buy the property of such purchaser.

[No. 255.]

Argued March 9, 12, 1894. Decided April 2, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Nebraska, in favor of defendants Samuel M. Chapman *et al.*, in a suit in equity brought by Alexander H. Robertson, trustee, etc., plaintiff, to obtain a decree setting aside and cancelling of record certain deeds and mortgages alleged to have been made in fraud of the plaintiff's rights. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William A. Fisher** and **Alexander H. Robertson** for appellant.

Mr. **George E. Hamilton** for appellees.

***Mr. Justice Harlan** delivered the [674] opinion of the court:

This appeal brings up for review a decree dismissing a bill brought by the appellant for the purpose, among others, of obtaining a decree setting aside and cancelling of record certain deed and mortgages alleged to have been made in fraud of his rights.

The principle question in the case is whether the real estate covered by those deeds and mortgages, was acquired by the appellee Polk in violation of his duty to the appellant.

Ella V. Davis, a citizen of Maryland, died in 1881, leaving a will, by which Augustine C. Dalrymple was appointed a trustee with power to sell and convey such estate of the testatrix as did not yield an income, and could not be leased to advantage.

Dalrymple renounced the trusteeship, and on the 3rd of June, 1881, by an order of the proper court of Maryland, William A. Stewart was appointed in his place as trustee. Stewart, subsequently, on the 6th day of April, 1885, resigned that position, and the present appellant was substituted in his place.

NOTE.—*As to nature and extent of agent's authority; effect, as to third parties, of private restrictions on general agent; unexpected emergencies; implied agency; apparent authority binds principal; principal's liability for torts; carelessness, fraud, or negligence of agent, or his illegal acts,* see note to Parsons v. Armor, 7: 725.

That agent cannot bind principal by deed unless he has authority by deed to do so; exception, see note to Clark v. Graham, 5: 334.

An agent to sell cannot effect a sale to himself; nor can an agent to buy, buy of himself; qualifications of the rule; dealings for himself.

An agent employed to sell, cannot himself become the purchaser; and an agent, employed to buy, cannot himself be the seller. Paley, Principal & Agent (Lloyd's ed.) 33, 34, 37; 1 Story, Eq. Jur. §§ 315, 316 *a*; 3 Chitty, Commercial Law, chap. 3, p. 216, 217; 1 Livermore, Agency, chap. 8, p. 416, § 6; Lees v. Nuttall, 1 Russ. & M. 53, 2 Myl. 819; Copeland v. Mercantile Ins. Co. 6 Pick. 198; Reed v. Warner, 5 Paige, 650; Lowther v. Lowther, 13 Ves. Jr. 103; Reed v. Morris, 2 Myl. & C. 374; Beal v. McKiernan, 6 La. 407; Bartholomew v. Leech, 7 Watts, 472.

So, an agent employed to purchase, cannot purchase for himself. Taylor v. Salmon, 4 Myl. & C. 139.

An agent to sell goods cannot sell to himself although the sale is public and there is no actual fraud; and in case he does so he will be required to

The testatrix at her death, was the owner of numerous lots in Plattsmouth, Cass county, Nebraska. In the fall of 1885 the appellant Robertson visited that city for the purpose of effecting a sale of them, if, upon investigation, it was deemed best to do so. He employed the appellees Samuel M. Chapman and Milton D. Polk, partners in the practice of law as Chapman & Polk, to attend to the probating of the will in Cass county, and to obtain a judgment of the proper court construing the will and authorizing a sale of the lots. While in Plattsmouth, after conferring with real estate agents and others to whom he was introduced by Chapman, and who were familiar with the value of property in that city, he fully determined to sell these lots; the only question, he testified, "was to find a purchaser at $4000."

After returning to Baltimore, the place of his residence, Robertson received a letter from Chapman, dated October 22, 1885, in which the latter said: "We have been canvassing the sale of the realty belonging to the Davis estate and $4000 is the best offer we can get—$1000 down and the balance *when a [675 deed is made and confirmed by court. I have prepared petition to sell and will take first order next week. If a sale of this property is consummated, it should be done before winter sets in, as you cannot then in all probability, get a fair offer before matters open up next spring. Looking this property over, I am, as you well know, very firmly convinced that

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account to his principal for any profit realized. Rockford Watch Co. v. Manifold, 36 Neb. 801.

An agent for the purchase of land cannot, without the consent of his principal, acquire an interest in the subject-matter of the agency adverse to the principal. Boswell v. Cunningham, 21 L. R. A. 54, 32 Fed. 277.

All the profits and advantages gained by a purchase for himself by an agent who was employed to purchase the property for his principal, will belong to the principal. Boswell v. Cunningham, *supra*.

An agent cannot become a purchaser for his own benefit, of the subject-matter of his agency without the full knowledge and acquiescence of his principal. Jansen v. Williams, 20 L. R. A. 207, 36 Neb. 829.

An agent to purchase a half interest in a mining lode at a specified price, who purchases the whole lode in his own name at a price more than double that authorized for the half, notifies his principal thereof, and offers to convey the half interest upon receipt of the amount paid therefor, is entitled to treat the whole purchase as his own upon the failure of the principal for ten months to pay to him the money expended, although the principal writes that he will take the property, but asks for specific description thereof, and at the end of ten months sends less than the amount demanded. Wenham v. Switzer, 51 Fed. Rep. 351.

While an agent cannot acquire an interest adverse to his principal in property within the agency, without the latter's knowledge, he may acquire such interest with the consent of the principal, after making known to him all material facts. Kramer v. Winsow, 154 Pa. 637.

A tax deed acquired by one while he was acting as agent to institute mortgage foreclosure proceedings and to pay the taxes out of the rent of the mortgaged property cannot be set up by him against his principal. Gonzalia v. Bartelsman, 143 Ill. 634.

An agent to sell cannot buy for himself at the price named, although his authority is termed an option. Colbert v. Shepherd, 89 Va. 401.

If an agent locate land for himself which he ought to locate for his principal, he is in equity a trustee for his principal. Felix v. Patrick, 145 U. S. 317 (36: 719).

Tax deeds of the principal's land taken in his own name by an agent either to look after and care for or to sell the land, vest no title in him, but amount, at most, to a redemption from the tax sales. Geisinger v. Beyl, 80 Wis. 443.

An agent to purchase real estate at a specified price is at liberty to purchase for himself at a higher price, if he has first unsuccessfully made all reasonable efforts to purchase for his principal at the price named. Pearsall v. Hirsh, 26 Jones & S. 410.

An agent will not be permitted to act for himself and his principal the same transaction, so as to buy of himself, as agent, the property of his principal. McNutt v. Dix, 10 L. R. A. 660, 83 Mich. 328.

An attorney in fact authorized to sell lands cannot make a valid conveyance thereof to himself and wife for a nominal consideration, such conveyance being fraudulent and void as against the principal. Winter v. McMillan, 87 Cal. 276.

An agent authorized to purchase stocks of a third party is guilty of constructive fraud, where, without his principal's knowledge, he substitutes his own stocks instead of those of the party intended. Miller v. Curtiss, 27 Jones & S. 503.

An agent who is authorized to loan the money of his principal may loan it to a firm of which he is a member, the principal having the option to repudiate or ratify the transaction. Wiley v. Stewart, 23 Ill. App. 236, 122 Ill. 545.

If an agent employed to purchase property for the principal himself becomes the seller of the property, the principal may, if he chooses, retain the property, and if he does so, he cannot reclaim the consideration paid. Disbrow v. Secor, 58 Conn. 35.

An agent cannot acquire his principal's property by using his own funds to make what is in effect a redemption of the subject-matter of the agency. DeMallagh v. DeMallagh, 77 Cal. 126.

The financial agents of a railroad company are not prevented from buying bonds secured by a mortgage upon the railroad property, where their conduct is open and fair, and the transaction conducted in good faith. Atwood v. Shenandoah Valley R. Co. 85 Va. 966.

Where a principal directs his agent to purchase property for him, and instructs the agent that he is willing to give a certain price, and the agent purchases it for a less price he cannot charge the principal with the larger price which the latter had instructed the agent he was willing to pay. Kilbourn v. Sunderland, 130 U. S. 505 (32: 1005).

An agent cannot buy the property of his principal. Randall v. Lautenberger, 16 R. I. 158; McKay v. Williams, 67 Mich. 547.

Where an agent to buy property charged and received from his principal over $21,000 more than he paid for the property, he was guilty of gross misconduct, and forfeited all his interest and rights under the contract. Blair v. Shaeffer, 33 Fed. Rep. 218.

A broker employed to sell real estate cannot compel his principal to carry out a contract negotiated by him for the sale to a third person jointly with himself, nor can he recover commissions upon such sale, where the principal declines to ratify the agreement. Finch v. Conrade, 154 Pa. 328.

you should sell it now, as a long, hard winter will, in the condition it now is, unquestionably reduce it in value."

Under date of November 14, 1885, Polk, in the name of his firm, wrote to Robertson: "A man here by the name of O'Donohoe says he will give $4000 for that property—$1000 cash, balance in three equal annual payments, at 7 per cent, secured by mortgage on that, together with mortgage on other property, so that the security will be ample. Not long ago he offered $4000 cash, but times are dull here now, and he says the time payment offer is the best he will do. If the above is satisfactory to you, you can advise us, and we will arrange the matter to close up the trade with him as soon as possible, as money matters are getting close here, with no flattering prospect of better times soon. We are yours to command. The above is the best we have been able to do thus far, but if not satisfactory let us hear from you at your convenience."

To this letter Robertson replied, under date of November 17, 1885, as follows: "Yours of the 14th is before me. I am decidedly of opinion that the property in your city should be sold, and that, too, at once. I think the offer a fair one, and you are authorized to accept the same. Please send me the mortgage and notes as soon as consummated."

On account of the absence from Plattsmouth of both Chapman and Polk, some delay occurred in the preparation of the deed, mortgage, and notes. But, on the 12th of December, 1885, the papers were mailed to Robertson—Polk, in the name of his firm, writing: "Enclosed please find blank deed, mortgage, and notes of O'Donohoe. He did not like giving his notes before he got his deed, but finally he signed everything up in proper shape. Now there are some taxes due and payable against the property, and I agreed with him that when he paid 676] *the $1000 (on the receipt of his deed) we would accept tax receipts for those taxes in lieu of the amount of taxes in currency. Court is in session, and we expect to have had a decree before this, but have not; no doubt will have by time deed reaches us. Money matters are very close here. . . . You can send us deed and we will collect and remit to you, or if you do not know us well enough to be satisfied and do not care to inquire of any bank in this city, you can send deed to First National Bank with full instructions." To this letter was this postscript: "O'Donohoe claimed he might want to pay off those notes next fall, and would not sign unless they were made so he could pay them if he chose to do so. I did not think it would make any difference with you."

Under date of December 17, 1885, Robertson returned the deed, notes, and mortgage to Chapman & Polk, with directions to record the mortgage, returning the original to him, and to deliver the deed when a decree for the sale of the property was passed. In this letter Robertson said: "Please see that a decree is passed by your court authorizing sale before you deliver deed; under our arrangement fee of $400 was to be charged and divided between us." Polk, in the name of his firm, replied, December 22, 1885: "Yours of recent date at hand, with deed duly executed and mortgage which I forgot to seal in my hurry to get it off in the mail. I have sealed the same and will place on record as soon as we get decree and O'Donohoe pays in the money."

On the 22d of January, 1886, Polk enclosed to Robertson a draft for $449.15, as the balance in cash due on the first payment for the property bought by O'Donohoe. In that letter, Polk said: "I reserved our fee of $200 out of the $1000, together with the taxes. . . . I will send complete statement in a day or two with duplicate tax receipts, together with what money is in bank here belonging to you." Under date of January 26, 1886, he enclosed a statement to Robertson, indicating that he had received the cash payment of $1000, and accounting for it as follows: "Paid fee, $200; paid taxes, $319 50; remitted, $449.15." This left a balance of $31.35. In a postscript to this last letter, Polk said: "Now shall *I re-[677 mit you the balance due or shall I apply it on taxes? The balance on taxes will have to stand until note is due and be deducted from that, I suppose. I think from the way things have been running that a sale at $3000 would have been profitable for the estate."

On the 28th day of January, 1886, the mortgage given by O'Donohoe and wife to the appellant, as trustee, to secure the notes executed by O'Donohoe, was filed in the proper office for record.

On the 3d of April, 1886, Polk wrote to Robertson: "If you would like the money on the note which falls due first, send it to Citizens' Bank at Plattsmouth for payment at an early date."

Under date of May 1, 1886, Polk wrote to Robertson: "Your favor of recent date at hand. The note you speak of was duly received by the bank, and is in their hands for payment. I traded O'Donohue out of the property and had a note of $800, which was due several days ago, that I expected to put right on that note, as I have assumed the payment of them; but the party did not pay promptly, as I expected. He says, however, he will get me the money as soon as he can, which will not be long. If nothing happens I want to pay the other two notes in August." This letter is without date, but Polk fixes May 1, 1886, as the date, while Robertson fixes the month of February, 1886, as the time when he was first informed by Polk that he bought the property from O'Donohoe. It should be stated in this connection that Chapman had, upon examination, reached the conclusion that a decree to sell the property was unnecessary, and that the trustee had authority under the will to make a sale.

The record contains many letters that passed between Polk and Robertson in 1886, 1887, and 1888, which, upon their face show that the latter, after receiving the letter of May 1, 1886, treated the former as the owner of the property by purchase from O'Donohoe.

Prior to the institution of the present suit, Polk had fully paid the first of the notes given by O'Donohoe and a portion of the second note. And Polk and wife sold and conveyed some of the lots and mortgaged others.

*On the 21st of August, 1888, O'Don-[678 ohoe wrote the following letter to Robertson:

"M. O'Donohoe, attorney and solicitor.

"Plattsmouth, Neb., August 21, 1888.

"A. H. Robertson, Baltimore.

"SIR: I am not the real and 'bona fide' purchaser of the property in this city of which you are the trustee. Milton D. Polk, Mr. Chapman's partner, is the purchaser. He was the agent, and as such could not become the purchaser. He agreed with me to purchase it and that he would pay me. He has failed to pay me, and if you employ me I can set aside the sale and the property falls again into your hands. I deeded the property to Polk on the same day on which I bought from you, and next day Polk sold ½, half, lot on Main St. to V. V. Leonard for $1600.00. It was worth $2000.00. In fact, the 2 half lots on Main St. were worth the $4000.00 in ready cash. The whole property is worth now $20,000 and even more. You have received $2000.00, and you can have five times the amount if—agree with me. The deed can be readily set aside.

"Polk managed and controlled the whole deception by which the sale was effected. If you give me power of attorney to act I will set the deed aside without any expense to you."

"Your sincerely, M. O'Donohoe.

The present suit was brought January 26, 1889, to obtain a decree setting aside the above mentioned conveyances and mortgages as having been made in fraud of the rights of Robertson. So far as Polk and Chapman are concerned, the bill charges that they fraudulently represented to the plaintiff that the property was in fact worth only $4000, when they knew or ought to have known that it was worth much more than that sum; and that the original purchase in the name of O'Donohoe was a mere device upon the part of Polk, in violation of his duty as the plaintiff's attorney and agent, to get the property at less than its [679] value, concealing from the plaintiff, *all the while before the conveyance to O'Donohoe, the fact that he, Polk, bought in the name of O'Donohoe. In respect to the grantees and mortgagees, holding under Polk, the charge is, that they knew or should have known that the conveyances and mortgages in question were in fraud of plaintiff's rights. The relief asked was that all the conveyances and mortgages be canceled, and if that could not be done, that plaintiff have personal judgment against O'Donohoe, Polk, and Chapman, for the full value of the property. The plaintiff offered to pay into court the money he had received through the alleged sale to O'Donohoe for the use of such persons as were entitled to it, in case the conveyances and mortgages referred to were canceled of record.

Notwithstanding the positive statement in his letter of August 21, 1888, to the effect that Polk was the real purchaser of the property, and had practiced a deception upon the plaintiff, O'Donohoe, in an answer verified by his oath, alleged the fact to be "that said Chapman & Polk, at the request of this answering defendant, notified complainant that he (this answering defendant) wished to purchase said real estate at said price; that after some correspondence this answering defendant did purchase said property in good faith, intending to keep the same for his own use; that soon afterwards this answering defendant became satisfied it would be impossible for him to pay the balance due on said property, namely, $3000, without great inconvenience to him; that thereupon this answering defendant, for a good and valuable consideration, sold and conveyed said property to Milton D. Polk, one of the co-defendants herein; that each of said sales were bona fide and without any collusion between this defendant and his codefendants; that each of said transactions was complete and entire in itself, and also that at the time of said transaction the full value thereof was paid in each instance, and there was no intention on the part of this defendant to defraud in any manner the estate of said deceased; . . . that there was no understanding by this answering defendant that said sale should in fact be a sale to said Polk, and that said deed from complaint to this answering defendant *was [680] not recorded sooner than it was for the reason that this answering defendant experienced difficulty in raising the first $1000 in cash which he was compelled to pay before said Chapman & Polk would deliver said deed to him."

The answers of Chapman and Polk met all the material allegations of the bill with full and explicit denials.

The record before us discloses nothing upon which to found a charge of fraud or want of good faith upon the part of the defendant Chapman. His partner and himself were employed to attend to the probating of the will of plaintiff's testatrix, and to obtain a decree construing it and authorizing a sale of the property in Plattsmouth belonging to the Davis estate. The fee which, by agreement with the plaintiff, was authorized to be charged had reference entirely to legal services to be rendered by his firm. He did not assume any responsibility in connection with the property in question, except such as would arise from services of that kind. He did not undertake, for compensation, to negotiate a sale of it for the plaintiff.

When the plaintiff visited Plattsmouth in the fall of 1885 for the purpose of ascertaining the condition of the Davis estate in that city, and of determining what was his duty as trustee in respect to it, he invited an expression of opinion by Chapman as to what the property was worth. The latter informed him that his judgment upon such a subject was of little value, but that he would put him in communication with persons whose opinions were entitled to consideration. This was done, and, upon full information as to the then value of real estate in Plattsmouth, the plaintiff determined before leaving that city to sell, if he could get an offer of $4000. And, after his return to Baltimore, he received a letter from Chapman, stating that he and Polk had canvassed the subject, and that $4000 was the best price that could be obtained. Chapman advised the acceptance of the offer, as is shown by his letter of October 22, 1885. But this advice, and Chapman's expression of willingness to assist in finding a purchaser, were not in execution of his duties as an attorney, although, perhaps, superinduced by the *relations [681] established between his firm and the plaintiff in respect to the legal services to be rendered.

The only evidence tending to show that the firm of Chapman & Polk undertook to act as

agents for the sale of this property is furnished by certain letters written by Polk in the name of his firm to the plaintiff. But those letters were written without the knowledge or direction of Chapman, and Polk was without authority, in virtue of his partnership with Chapman in the practice of the law, to accept for his firm an agency for the mere sale of real estate. Whatever he did, in respect to the sale made to O'Donohoe, was upon his own responsibility, and imposed no liability upon the defendant Chapman.

What is the case as to the defendant Polk? It is not to be doubted that the relations between himself and the plaintiff in respect to the sale of this property, were those of agent and principal. He was precluded by the position voluntarily assumed by him from taking advantage of his principal, or from dealing with the property committed to his care in any other capacity than as an agent, who was bound to subordinate his own interests to those of his principal. He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict. If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues he must act, in the matter of such [682] agency, *solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal.

It is earnestly contended that the evidence brings the present case within the operation of these principles. In this view of the facts we do not concur. The charge against Polk of dereliction of duty is not sustained. While there is some evidence tending to show that he desired, from the outset, to acquire an interest in this property, it does not appear that he intended to practice any deception upon the plaintiff. At any rate, he was not, in fact, interested in the offer made by O'Donohoe. The latter purchased on his own account exclusively, and without any understanding that Polk was to become interested with him, or should take his place in the purchase. Polk had no expectation, when O'Donohoe's offer was accepted, of becoming the owner of the property.

The only circumstance in the case indicating a want of frankness, on the part of Polk in his letters to the plaintiff, was a statement in the letter of January 22, 1886, implying that he had actually collected the cash payment of $1000. His explanation of this statement is that he had not been as diligent as he should have been in concluding the business, and he did not suppose it was of any consequence to the plaintiff whether the $1000 came from him or from O'Donohoe. It would have been more consistent with the truth if he had then stated that he had agreed, or would agree, with O'Donohoe to take the property, and, therefore, as between himself and O'Donohoe, he was bound to make good the latter's obligations to the plaintiff. But the failure of Polk to notify the plaintiff of his agreement with O'Donohoe immediately upon its being made, cannot affect any right acquired by him under that agreement. The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed a deed to O'Donohoe, *and placed [683] it in the hands of Polk, to be delivered to O'Donohoe, whenever a decree for the sale of the property was obtained, and upon the payment of the $1000 stipulated to be paid in cash. So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. Nothing then stood in the way either of O'Donohoe agreeing that Polk should take the property, or of Polk becoming a purchaser from him. If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe. And his failure to give notice of his purchase immediately upon its being made cannot be regarded as a fraud upon the rights of the plaintiff. A real bona fide sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee. Upon this ground, the decree below can be sustained, without impairing, in any degree, the rule that an agent will not be permitted to become the purchaser, without the knowledge or consent of his principal, of property committed to him for sale. That the defendant Polk did not intend to conceal the fact of his purchase, is made clear by his letter of May 1, 1886, in which he informed the plaintiff that he had "traded O'Donohoe out of the property." The plaintiff's recollection was that this information was received by him from Polk some time in February, 1886. He never complained, at the time, or afterwards, that Polk took O'Donohoe's place in the purchase. But his present complaint, based upon O'Donohoe's letter of August 21, 1888, is that Polk, his agent to sell, while pretending

to have sold to O'Donohoe, had, without his 684 knowledge or assent, taken the *property for himself, in the name of O'Donohoe, and that he did not become aware of that fact until August, 1888. If this complaint were well founded, the plaintiff, according to the principles to which we have referred to, and which are deeply rooted in the law, would be entitled to a decree that would deprive Folk of the fruits of his infidelity. But, as already suggested, the evidence does not justify the conclusion that O'Donohoe's purchase was, in fact, for the benefit of Polk.

It is proper to say that in our decision of this case, no controlling weight has been attached to the statements made by O'Donohoe.

Decree affirmed.

Mr. Justice **Jackson** and *Mr. Justice* **White** did not hear the argument, and took no part in the decision of the case.

THE UNION PACIFIC RAILWAY COMPANY, *Plff. in Err.*,

v.

WILSON I. SNYDER, Administrator of the estate of WILLIAM DANIELS, deceased.

(See S. C. Reporter's ed. 684-691.)

Exception, when waived—master's duty to furnish and keep in repair machinery—such duty cannot be delegated so as to exonerate the master—excuse for not inspecting cars.

1. An exception to a denial of a motion to dismiss the complaint made at the close of plaintiff's evidence is waived by defendant's afterwards proceeding with the case and giving evidence on his part.
2. It is the master's duty to exercise reasonable care to furnish suitable machinery and appliances, and to keep the same in repair, and to make inspection thereof, and he cannot interpose as a defense, in an action for injury to a servant, the neglect of another servant to perform that duty.
3. It is the duty of a railroad company to see to it that the wheels of its cars, which are about to be drawn out on its road are in safe and proper condition, and this duty cannot be delegated so as to exonerate the company from liability to its servants for injuries caused by an omission to perform that duty or by its negligent performance.
4. A railroad company is not excused from its duty to inspect its car, by the sufficiency of the number of its inspectors and their competency.

[No. 165.]

Argued and Submitted March 13, 1894. Decided April 16, 1894.

IN ERROR to the Supreme Court of the Territory of Utah, to review a judgment of that court, affirming the judgment of the District Court of that Territory for plaintiff, Wilson I. Snyder, Administrator, etc., against the Union Pacific Railway Company, defendant, for damages for personal injuries of plaintiff's intestate, sustained by defendant's negligence. *Affirmed.*

See same case below, 6 Utah, 357.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought by William Daniels against the Union Pacific Railway Company, in the District Court for *the Third [685 Judicial District of the Territory of Utah, to

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NOTE.—*As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master*, see note to Baltimore & O. R. Co. v. Baugh, 37: 773.

As to master's duty to furnish suitable and safe machinery and appliances; and liability to servant for their being insufficient or out of repair, see note to Richmond & D. R. Co. v. Elliott, 37: 723.

As to when railroad company or other corporations are liable for punitive or exemplary damages, see note to Lake Shore & M. S. R. Co. v. Prentice, 37: 98.

As to responsibility of master to servant for carefulness and competency of coservants, see note to Wabash R. Co. v. McDaniels, 27: 605.

As to who are coemployés or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant, see note to Hough v. Texas & P. R. Co. 25: 612.

Master's duty to furnish machinery and appliances and to keep the same in repair; delegatim of duty; roadbed; bridges; obstructions near track; engines; cars; brakes.

An employer is responsible to his workmen for personal injuries occasioned by a defective system of using machinery, as well as for injuries caused by a defect in the machinery itself. Webster v. Foley, 21 Can. S. C. 580.

To justify a recovery against a master for injuries resulting to a servant from defective machinery, plaintiff must show a direct connection between the defect proved and the accident; and if the accident is caused by the breaking of a shaft, and the defect proved is the deficiency of a journal, there can be no recovery, unless the proof shows that the deficiency had a tendency to cause the break and that such tendency was sufficient to charge the master with notice. Breen v. St. Louis Cooperage Co. 50 Mo. App. 202.

A master is liable to an employé for personal injuries sustained through the failure of one to whom he has delegated the duty of furnishing suitable tools and implements to repair a defective machine. Schulz v. Rohe, 4 Misc. 384.

An elevator is, in many respects, a dangerous machine; and an employer is required to exercise great care to render as free from danger as careful foresight and precaution may reasonably dictate, an elevator which employés, in the course of their employment, are authorized or directed to use. Wise v. Ackerman, 76 Md. 375.

Entrusting the care of an elevator to an independent contractor will not absolve the master from liability for injuries to his servant by reason of its becoming out of repair. Bartley v. Trorlicht, 49 Mo. App. 214.

An employé of the owners of a furnace, in charge of cars owned by the latter and used in carrying coal over a railroad under a traffic arrangement by which his employers are to furnish their own cars with a man to take charge of them, is within Pa. Act of April 4, 1868, placing a person employed upon the premises of a railroad company in the same position, as regards recovery for personal injuries, as an employé of the company. Miller v. Cornwall R. Co. 154 Pa. 473.

A duty of a railroad company to an employé to furnish safe appliances cannot be affected by a contract between it and a third person giving the latter control of the cars and requiring him to make all repairs. Gulf, C. & S. F. R. Co. v. Shearer, 1 Tex. Civ. App. 343.

A railway company is not liable to an employé

recover damages for personal injuries alleged to have been sustained because of defendant's negligence. During the pendency of the writ of error in this court, Daniels died and his administrator was substituted.

The complaint alleged that plaintiff was an employé of the defendant company as brakeman on a freight train; that the company by its negligence and carelessness allowed a wheel of one of its freight cars to become defective through a large open crack in it, which rendered the car unsafe; that the crack was an old one, and could have been easily discovered by a proper inspection of the wheels; that it was the duty of the defendant to inspect the wheels of all cars used by it and running on its road, at stations at short intervals along the line of the road; that an inspecting station was established at Green river, Wyoming, at which point the defect would have been discovered had the company's inspection service at that point been suitable and sufficient; that the company negligently and wrongfully employed incompetent agents in that service; that they did not employ sufficient in number; that those employed negligently inspected; that the defect by which the accident and ensuing injuries were caused was not discovered by reason of the company's negligence; and that plaintiff, without fault or negligence on his part, was injured by the breaking of the defective wheel and the train being thereby thrown from the track.

The answer denied the essential averments of the complaint. Plaintiff recovered a verdict and defendant moved for a new trial, which was overruled, and judgment rendered, from which an appeal was prosecuted to the supreme court of Utah territory, where it was affirmed. The opinion is reported, *Daniels* v. *Union Pac. R. Co.* 6 Utah, 357 To review that judgment this writ of error was sued out.

The errors assigned and relied on at the bar were that the court erred in overruling defendant's motion for a non-suit made at the close of plaintiff's testimony; that the court erred in giving each of the following instructions:

"8th. In this case, if you find that the plaintiff was injured *in consequence of the wreck| 686 of the train caused by a crack and break in one of the wheels of the car on a train operated by the plaintiff, if you find that by the exercise of proper care and caution in inspecting the wheels the crack was of such a nature that it might have been discovered by the agents or servants of the defendant employed for that purpose, then such neglect to discover the crack was negligence on the part of the defendant and for which it may be held liable in this action.

"9th. If you find that there was a want of care and diligence on the part of the persons engaged in inspecting the wheels of the cars of defendant and that the accident was caused thereby it is not a defense for the defendant to show that it used proper diligence and care alone and only in the selecting of such agents but the defendant is responsible for the acts of his employés in repairing and inspecting machinery to the same extent as if he were himself present doing the act;"

—and that the court erred in refusing to give each of the following instructions requested by the defendant:

"Fourth. The plaintiff by his contract of hiring was held to assume the risks of injury from the ordinary dangers of the particular employment and the nature of the business engaged in, and if you find from the evidence that the accident causing the injury in ques-

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for an injury arising from a defect in its ways, works, and machinery, unless such defect arose from, or was not discovered or remedied owing to, the negligence of the company or some of its superior officers entrusted with the duty of seeing that they were kept in proper condition. Mary Lee Coal & R. Co. v. Chambliss, 97 Ala. 171, 53 Am. & Eng. R. Cas. 254.

A broncho which will kick when struck is a defective and, under some circumstances, a dangerous appliance in the propelling power of a street car to which it is attached. Leigh v. Omaha Street R. Co. 36 Neb. 131.

Failure of a railroad company to block frogs in its track at way stations is not, as matter of law, negligence which will entitle an employé to recover for injuries sustained by his foot catching in a frog and being run over by a train, in the absence of proof that such blocking is necessary, proper, or in general use upon other roads, or that the frog without blocking is not reasonably safe for the purpose for which it is designed. Spencer v. New York Cent. & H. R. R. Co. 67 Hun, 196.

A railway company is bound to exercise only ordinary and reasonable care for the protection of its employés against destruction of its bridges, and not the utmost human foresight or skill to provide against an unprecedented rainfall or freshet. Galveston, H. & S. A. R. Co. v. Daniels, 1 Tex. Civ. App. 695.

A railroad company is liable for the death of an employé by the breaking of an engine through a bridge whose piers have been displaced by ice driven against them by a storm such as might reasonably have been anticipated. Carney v. Caraquet R. Co. 29 N. B. 425.

Failure of a railway company to discover and remove within a reasonable time a dangerous object overhanging or projecting near its track is its negligence, and will render it liable for injuries to a brakeman resulting therefrom, although the projection was placed there by the negligence of a fellow servant. Texas & P. R. Co. v. Hohn, 1 Tex. Civ. App. 36.

A railway company owes the duty to a switchman to keep its tracks on which the latter is to perform his duties, free from obstructions which would imperil his person, and the switchman has a right to assume that the way is not dangerously obstructed by a car which, unknown to him, is dangerously near the track on which his own train is running. Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 53 Am. & Eng. R. Cas. 115.

A railway company is liable for injuries sustained by a brakeman, without his fault, by being knocked from the train by one of the stays of a bridge while he was climbing a ladder on the side of a box car, on a dark, cold morning, in response to the usual signal and in the prudent discharge of his duty, as the train was passing over the bridge, where the accident was due to the fact that the track was negligently placed nearer to that side of the bridge than to the other. Ft. Worth & B. C. R. Co. v. Graves (Tex. Civ. App.) Feb. 23, 1893.

A railroad company is not liable for the death of an employé killed by the explosion of the crown sheet of a boiler on a locomotive engine which had been examined a week before on suspicion of

tion was one of the perils incident to the employment your verdict should be for the defendant.

"Fifth. The presumption of the law in this case is that the defendant exercised proper care and diligence in employing competent and sufficient number of servants to safely carry on its several departments of labor and in furnishing safe machinery and appliances with which the plaintiff was to do his work, and the burden of proof to show the contrary is on the plaintiff.

"You are further instructed that as between employer and servant, as in this case, negligence on the part of the former is not proven nor to be inferred from the existence of a defect which caused the injury.

"Sixth. Although the inspector of the defendant at Green river station, whose duty it was to inspect the said broken wheel, was guilty of negligence in making the inspection, and that [687] *negligence resulted in the wrecking of the train on which the plaintiff was, and the injury of which he complains, still he cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of such inspector or retaining him in his position, and to establish such negligence on the part of the defendant not only the incompetence of such inspector must be shown, but it must also be shown that defendant failed to exercise ordinary care to ascertain his fitness for that service prior to his appointment or failed to remove him after his incompetency had come to the notice of the defendant or to some officer or agent of defendant having power to remove him or after such incompetency would have been ascertained by the exercise of ordinary care on the part of the defendant or such agent or officer.

"Seventh. To render the negligence of the inspector whose duty it was to inspect the said broken wheel the negligence of the defendant, or to render the defendant liable therefor, it is incumbent on the plaintiff to prove that the said inspector was appointed to or retained in his said position with knowledge on the part of the defendant, or some officer or agent of it having the power of appointment and removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable and ordinary care and diligence on the part of the defendant or of such officer or agent."

Messrs. **Artemas H. Holmes** and *John F. Dillon*, for plaintiff in error:

The court erred in not granting the defendant's motions for a nonsuit.

Baylis v. *Travellers Ins. Co.* 113 U. S. 316 (28: 989); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 116 (22: 718); *Grand Trunk R. Co.* v. *Cummings*, 106 U. S. 700 (27: 266); *Acciden. Ins. Co. of N. A.* v. *Crandal*, 120 U. S. 527 (30: 740); *Northern Pac. R. Co.* v. *Mares*, 123 U. S. 710 (31: 296).

If the plaintiff suffered from any negligence or lack in the performance of duty on the part of the defendant or its agents or servants, it was because of the negligence of a coservant, the car inspector Fogle, who was the fellow servant of the plaintiff.

Baltimore & O. R. Co. v. *Baugh*, 149 U. S. 369 (37: 772).

Here was no question as to the car inspector being the vice principal, representative or *ali-*

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having been burned, but pronounced sound, and thereafter used in hauling freight and passenger trains under a pressure of from 140 to 145 pounds, and which at last exploded under a pressure of 110 pounds while running at a moderate rate of speed. Racine v. New York Cent. & H. R. R. Co. 70 Hun, 453.

A railway company is under the same obligation to furnish safe cars and appliances for the use of its employés, whether the cars belong to it or to a connecting line. St. Louis, A. & T. R. Co. v. Putnam, 1 Tex. Civ. App. 142.

A railroad company is not bound for the protection of its employés, in moving cars in its freight yards, to have upon such cars a light or a man to handle it, or to require a man to precede each car to announce its approach. Crowe v. New York Cent. & H. R. R. Co. 70 Hun, 37.

The mere fact that the brakes on a coal car were out of order at the time an employé thereon was injured is sufficient to render the employer liable, unless he had an opportunity for knowledge of such defects or should have known of them. Mixter v. Imperial Coal Co. 152 Pa. 395.

A railroad company is not relieved from liability to a section hand resulting from the use of a hand car with an insufficient brake of whose insufficiency it had notice, by the fact that the section foreman in charge of the car was a fellow servant of the person injured. Northern Pac. R. Co. v. Charless, 51 Fed. Rep. 562, 51 Am. & Eng. R. Cas. 198.

It is the duty of a railway company to furnish cars with reasonably safe coupling appliances in good order, so far as it can by the exercise of ordinary care; and an employé has the right to assume that the couplings of a car are in proper order, unless he knows, or by ordinary care ought to know, the contrary, it not being his duty to examine or inspect the attachments of the car. Fordyce v. Yarbrough, 1 Tex. Civ. App. 260.

A railway company is liable for injuries to an employé who was caught between cars while coupling them because the company allowed the coupling apparatus to become defective. Fordyce v. Yarbrough, *supra*.

An employer is not liable for injuries to a boy of fourteen unnecessarily riding upon an elevator intended solely for freight, from his heel projecting beyond the edge of the elevator, catching under a beam an inch away from the side of the elevator platform, although the elevator shaft is not sheathed or boarded, and no protection is afforded against contact with such beam by anything projecting from the elevator, where such sheathing would render it impossible or inconvenient to use the elevator for freight, and it has been used for years without accident. Hoehmann v. Moss Engraving Co. 4 Misc. 160.

An employé cannot recover for injuries received by the fall of an elevator, where no cause of the accident is shown except the breaking of the clamp holding the hoisting cable, which is not shown to be insufficient or defective. Lawson v. Merrall, 69 Hun, 278.

An employer who knowingly furnishes an employé a kicking horse to work with, without notice or warning, is liable to the employé for injuries from a kick by the horse. Helmke v. Stetler 69 Hun, 107.

ter ego of defendant, as was the case in *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612) and *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755).

Chicago, M. & St. P. R. Co. v. *Ross*, 112 U. S. 377 (28: 787) *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224); *Quebec SS. Co.* v. *Merchant*, 133 U. S. 375 (33: 656) *Gunther* v. *Liverpool & L. & G. Ins. Co.* 134 U. S. 110 (33: 857); *Washington & G. R. Co* v. *McDade*, 135 U. S. 554 (34: 235); *Burt* v. *Sierra Butte Gold Min. Co.* 132 U. S. 483 (34: 1031); and *Baltimore & O. R. Co.* v. *Baugh*, 149 U.S. 368 (37: 772), are cases wherein rules of law are established and applied to cases parallel to this case, and are applicable here.

When plaintiff rested, as well as at the close of the case, plaintiff had failed to establish the burden imposed upon him and essential to any recovery, namely, any negligence or omission of duty on the part of defendant or its agents.

Baltimore & O. R. Co. v. *Baugh, supra.*

Mr. **Arthur Brown**, for defendant in error:

Acts which the master, as such, is bound to perform for the safety and protection of his employés cannot be delegated so as to exonerate the former from liability to a servant who is injured by omission to perform the act or duty, or by its negligent performance.

The act or omission is the omission of the master irrespective of the grade of the servant whose negligence caused the injury.

Flike v. *Boston & A. R. Co.* 53 N.Y. 549, 13 Am. Rep. 545; *Ford* v. *Fitchburg R. Co.* 110 Mass. 240; *Elmer* v. *Locke*, 135 Mass. 575; *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755); *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Patterson* v. *Pittsburg & C. R. Co.* 76 Pa. 389, 18 Am. Dec. 412; *Lansing* v. *New York Cent. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Huddleston* v. *Lowell Machine Shop*, 106 Mass. 282.

It is the master's duty to furnish suitable machinery and appliances to carry on the business for which he employs the servant.

Hough v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755).

This is a continuing duty and involves the exercise of like care in keeping such machinery and appliances in repair, including the duty of making inspections, tests and examinations at proper intervals.

Northern Pac. R. Co. v. *Herbert, supra; Cunard SS. Co.* v. *Carey*, 119 U. S. 245 (30: 354); *St. Louis & S. F. R. Co.* v. *Farr*, 56 Fed. Rep. 997; *Union Pac. R. Co.* v. *Callaghan*, 56 Fed. Rep. 989; *Union Pac. R. Co.* v. *James*, 56 Fed. Rep. 1001; *Little Rock & M. R. Co.* v. *Moseley*, 56 Fed. Rep. 1012; *Fay* v. *Minneapolis & St. L. R. Co.* 30 Minn. 231; *Condon* v. *Missouri Pac. R. Co.* 78 Mo. 567; *Brann* v. *Chicago, R. I. & P. R. Co.* 53 Iowa, 596, 36 Am. Rep. 243; *Missouri Pac. R. Co.* v. *Dwyer*, 36 Kan. 58; *Chicago & N. W. R. Co.* v. *Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Long* v. *Pacific R. Co.* 65 Mo. 225; *King* v. *Ohio & M. R. Co.* 14 Fed. Rep. 277; *Carpenter* v. *Mexican Nat. R. Co.* 39 Fed. Rep. 315; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368 (37: 772).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

1. At the close of the plaintiff's evidence, the defendant moved to dismiss the complaint which motion was denied, and defendant excepted. Thereupon the defendant proceeded *with its case and adduced evidence on [688 its part. This waived the exception, and the action of the court in overruling the motion to dismiss cannot be assigned for error. *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202 [36: 405]; *Brown* v. *Southern Pac. Co.* 7 Utah, 288, 291.

2. The evidence tended to show that Daniel was a brakeman in the employment of the company, and in the discharge of his duties as such, April 3, 1887, on a freight train made up at Green river, and running thence westward, that he was ordered on top of the train to set the brakes at different points going down a long hill, and was so engaged when the train was suddenly wrecked, and he was severely injured; that a wheel on one of the cars of the train had an old crack in it, some twelve inches long, which rendered it unsafe; that the wheel gave way by reason of the fracture and thus the disaster occurred; and that, although the crack, being old, was filled with greasy dirt and rust, it could have been detected without difficulty if the wheel had been properly examined at Green river, which was an inspecting station, at which trains were made up.

Upon the inferences properly deducible from such evidence, the rule applied, which requires of the master the exercise of reasonable care in furnishing suitable machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections, tests, and examinations at the proper intervals. As observed in *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 218 [25: 612, 615], the duty of a railroad company "in that respect to its employés is discharged when, but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés;" and the company "cannot in respect of such matters interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation." *Hough* v. *Texas & P. R. Co.* and **Northern Pac. R. Co.* v. *Her-* [689 *bert*, 116 U. S. 642 [29: 755], to the same effect, were cited in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 386 [37: 772, 780], and it was said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some

places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other." And see *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Rogers* v. *Ludlow Mfg. Co.* 144 Mass. 198, 59 Am. Rep. 68; *Spicer* v. *South Boston Iron Co.* 138 Mass. 426.

There can be no doubt that under the circumstances of the case at bar the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition, and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty or through its negligent performance.

690] *The rulings of the court in giving the eighth and ninth instructions for plaintiff, and in refusing to give the sixth and seventh instructions requested on the part of defendant, were not, therefore, open to the exceptions taken. The sufficiency of the number of inspectors and their competency furnished no defense, nor the contrary, the ground of recovery, though some of the averments of the complaint may have indicated that cause of action.

The trial court charged the jury, among other things, that the defendant was required to "use a reasonable care, consistent with the nature and extent of the business, and provide proper machinery; but it is not responsible for hidden defects, which could not have been discovered by a careful inspection;" that "the burden of proof is in this case, as in all other cases like it, upon the plaintiff, to make out his case to your satisfaction. The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose; and where there are injuries to its servants, or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective. If, by reasonable and ordinary care and prudence, the master may know of the defect in the machinery which he operates, it is his duty to keep advised of its condition, and not needlessly expose his servants to peril or danger;" that "in employing the plaintiff, the corporation defendant did not become an insurer of his life or his safety. The servant takes the ordinary risks of his employment. The duty of the defendant towards him was the exercise of reasonable care in furnishing and keeping its machinery and appliances, about which he is required to perform his work, in a reasonably safe condition. It was the defendant's duty also to use like ordinary care in selecting competent fellow-servants, and in a sufficient number, to insure that the work would be safely done; and this duty was discharged by the defendant *if the care [691] disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men engaged in the same kind of business, ordinarily exercise."

And that, "as between employer and employé, between master and servant, as in this case, negligence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of."

The defendant had no reason to complain because the fourth and fifth instructions, which it asked, were not otherwise given than as contained in the views thus expressed by the court.

Judgment affirmed.

Mr. Justice **Jackson** did not hear the argument, and took no part in the decision of this case.

MAX SCHOENFELD ET AL., *Plffs. in Err.*,
v.
FRANCIS HENDRICKS, Collector of the Port of New York.

(See S. C. Reporter's ed. 691-695.)

Appraisement of imported goods—action against collector—repeal of law—when United States circuit court has no jurisdicion.

1. Under the Act of June 10, 1890, if the importer is dissatisfied with the appraisement of imported goods, he may obtain a reappraisement by a general appraiser, whose decision will govern, unless the importer shall carry the matter before the board of general appraisers, whose decision shall be final.
2. The common law right of action against a collector to recover duties illegally collected was taken away by Act of Congress, and a statutory remedy given, which was exclusive.
3. Section 3011 of the Revised Statutes, which authorized an action against a collector to recover money paid as duties, when such duties were not authorized by law was repealed by the Act of June 10, 1890, as were also sections 2931, 3012, 3012½, 3013, and other remedies substituted.
4. The United States circuit court has no jurisdiction of an action against a collector to recover duties illegally assessed and paid on imported goods.

[No. 1067.]

Submitted March 5, 1894. Decided April 16, 1894.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for defendant, Francis Hendricks, Collector, in an action brought against him, by Max Schoenfeld *et al.*, to recover duties alleged to have been unlawfully assessed. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. Wickham Smith** for plaintiff in error.

Mr. **Lawrence Maxwell, Jr.,** *Solicitor Gen.*, for defendant in error.

692] **Mr. Chief Justice* **Fuller** delivered the opinion of the court:

This was an action brought by Max Schoenfeld, David Schoenfeld, Lewis Loeb, and Ferdinand E. Loeb against Francis Hendricks, collector of the port of New York, in the Circuit Court of the United States for the Southern District of New York, to recover duties alleged to have been unlawfully assessed.

The defendant demurred to the complaint for want of jurisdiction. The circuit court held that it had no jurisdiction, sustained the demurrer, rendered judgment for defendant, and certified the question of jurisdiction to this court.

The complaint alleged that, upon entry made at the port of New York, the invoice was transmitted by the collector to the appraiser for appraisement of the merchandise therein described; that the appraisement was not conducted according to law by the appraiser and resulted in an illegal addition to the value of the merchandise; and that thereafter the collector assessed the duties upon the valuation so arrived at, which liquidation, therefore, plaintiffs alleged "to be wholly illegal, null, and void."

Under section 13 of the Act of Congress "to simplify the laws in relation to the collection of the revenues," approved June 10, 1890 (26 Stat. at L. 131, chap. 407) it was provided that if the importer, owner, agent, or consignee of merchandise imported should be dissatisfied with the appraisement thereof he might, by giving notice to the collector in writing of such dissatisfaction, obtain a reappraisement by one of the general appraisers, and that the decision of the general appraiser in such cases should govern as to the dutiable value, unless the importer, owner, consignee, or agent should still be dissatisfied and carry the matter, as provided, before the board of three general appraisers on duty at the port, the decision of which board should be final and conclusive.

In the case at bar the importers did not avail themselves of the means pointed out for the correction of the alleged error, and it follows 693]that the exaction by the collector on *the value according to the appraisement cannot be held to be illegal, since if the appraisement remained unquestioned, the collector was bound to proceed thereon.

It was decided by this court in *Arnson* v. *Murphy*, 109 U. S. 238 [27: 920], that the common law right of action against a collector to recover duties illegally collected was taken away by Act of Congress, and a statutory remedy given, which was exclusive. *Arnson* v. *Murphy*, 115 U. S. 579 [29: 491]; *Cheatham* v. *Norvell*, 92 U. S. 85 [23: 561]. While the common law right was outstanding, the collector withheld, as an indemnity, the sum in dispute, but Congress provided that he must pay into the Treasury all moneys received officially, and that the Secretary of the Treasury should refund erroneous and illegal exactions. A suit to recover back an excess of duty necessarily could only be maintained as affirmatively specified in the statute. Rev. Stat. (2d ed.) §§ 2931, 3010-3013; Act of February 27, 1877 (19 Stat. at L. 240, 247, chap. 69); *Hager* v. *Swayne*, 149 U. S. 242, 244 [37: 719].

Section 3011 of the Revised Statutes, which authorized an action against a collector to recover money paid as duties "when such amount of duties was not, or was not wholly, authorized by law," was repealed by section 29 of the Act of June 10, 1890, as were also sections 2931, 3012, 3012½, 3013; and the remedies substituted which these importers did not see fit to pursue. Moreover, section 25 of this Act provided: "That from and after the taking effect of this Act no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this Act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this Act."

This section exempted the collector from suit in respect of any rulings or decisions as to the classification of merchandise; *the duties[694 charged thereon; the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which the importer might under the Act be entitled to appeal from the decision of the collector or other officer, or from any board of appraisers provided for in the Act; and its operation is not confined to rulings and decisions of the collector from which an appeal lies ultimately to the circuit court.

We held in *Passavant* v. *United States*, 148 U. S. 214 [37: 426], that the Act of June 10, 1890, conferred no jurisdiction upon the circuit courts of the United States, on the application of dissatisfied importers, to review and reverse a decision of a board of general appraisers ascertaining and fixing the dutiable value of imported goods, when such board has acted in pursuance of law, and without fraud or other misconduct from which bad faith could be implied; but it does not result from that conclusion that in such cases the collector is still subject to suit.

In *Ex parte Fassett*, 142 U. S. 479 [35: 1097], the question arose as to whether a British built steam pleasure yacht, purchased in England by a citizen of the United States, and duly entered at the port of New York, was liable to duty as an imported article; and it was held that, as the owner, in order to have the benefit of proceedings under the Act of June 10, 1890, would have been obliged to concede that the vessel was imported merchandise and to make entry of her as such, which was the very question in

contention, he had pursued the proper remedy by filing his libel in the District Court of the United States for the Southern District of New York, which had jurisdiction of the vessel, under the circumstances disclosed, by virtue of section 934 of the Revised Statutes.

In *Robertson* v. *Frank Brothers Co.* 132 U. S. 17 [33: 236], *Oelbermann* v. *Merritt*, 123 U. S. 356 [31: 164], and other cases cited for plaintiffs in error, it was decided that while the general rule that the valuation of merchandise made by the appraiser, and unappealed from, is conclusive, the appraisement was subject to being impeached on grounds therein indicated, but these cases were adjudicated while section 695] 3011 of the Revised Statutes was still in force, and in view of the provision therein made for suits against the collector.

We are of opinion that this action would not lie at common law, the money being required by section 3010 to be paid into the Treasury; that it was not authorized by statute; and that the question of jurisdiction certified was properly answered by the circuit court in the negative.

Judgment affirmed.

Mr. Justice **Jackson** was absent when this case was submitted, and took no part in its decision.

CHARLES C. WORTHINGTON ET AL., *Plfs. in Err.*,
v.
CITY OF BOSTON.

(See S. C. Reporter's ed. 695-707.)

City, when bound by contract.

A city is bound by a contract made by its water board, without first advertising for proposals by bidders as required by an ordinance of the city, where it was made by special authority of the city council and mayor.

[No. 312.]

Submitted March 20, 21, 1894. Decided April 9, 1894.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts, to review a judgment in favor of the defendant, the City of Boston, in an action brought by Charles C. Worthington *et al.*, plaintiffs, upon a written agreement made between them and the Boston Water Board. *Reversed, and cause remanded with directions to enter judgment in favor of the plaintiffs.*

See same case below, 41 Fed. Rep. 23.

The facts are stated in the opinion.

Mr. **George F. Edmunds**, for plaintiff in error:

The statutes of Massachusetts did not require any advertisement for work of this character in any case.

The city council had as complete authority over the subject as any private person would have over his own business.

The water board was the mere creature and agent of the city council, subject in all respects to its control and direction.

The whole case is one of a general agency, under general instructions, with a complete power of control by the principal in such special instances as it might think fit in departing from the general instructions, as the occasion should seem to require.

The council had authority to make this arrangement without advertisement and in its own discretion.

As the water board had complete general authority over the whole subject of increasing and improving the water service according to its own discretion, unless interfered with by the council, it might have made the contract with the plaintiffs that it did make for these special machines without the aid of special order.

Yarnold v. *Lawrence*, 15 Kan. 126; *Hobart* v. *Detroit*, 17 Mich. 246; *Atty. Gen.* v. *Detroit*, 26 Mich. 263; *Re Dugro*, 50 N. Y. 515; *Nicolson Pav. Co.* v. *Painter*, 35 Cal. 699; *Zottman* v. *San Francisco*, 20 Cal. 96, 81 Am. Dec. 96; *Dean* v. *Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Burgess* v. *Jefferson*, 21 La. Ann. 143.

Mr. **Andrew J. Bailey**, for defendant in error:

The ordinance cited provides that the Boston Water Board shall not make any contract estimated to involve more than ten thousand dollars until it has advertised for proposals therefore, and all persons having to do with the city must take notice of the ordinance.

Heland v. *Lowell*, 3 Allen, 408, 81 Am. Dec. 670; *Taylor* v. *Lambertville*, 43 N. J. Eq. 107.

The Boston Water Board not having complied with this ordinance, the contract made by it, was not the contract of the city, and is not binding upon it.

Brady v. *New York*, 20 N. Y. 312; *Nicolson Pav. Co.* v. *Painter*, 35 Cal. 699; *Zottman* v. *San Francisco*, 20 Cal. 99-102; *Dean* v. *Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Dolan* v. *New York*, 4 Abb. Pr. N. S. 397; *Pierce* v. *United States* ("*The Floyd Acceptances*") 74 U. S. 7 Wall. 676 (19: 173); *Re Eager*, 46 N. Y. 100; *Lowell Five Cent. Sav. Bank* v. *Winchester*, 8 Allen, 109; *Palmer* v. *Haverhill*, 98 Mass. 487; *Baltimore* v. *Eschbach*, 18 Md. 282; *Dibble* v. *New Haven*, 56 Conn. 199; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 29, 9 Am. Dec. 111; *Moran* v. *Miami County Comrs.* 67 U. S. 2 Black, 725 (17: 344); *Agawam Nat. Bank* v. *South Hadley*, 128 Mass. 506; *McClure* v. *Oxford Twp.* 94 U. S. 429 (24: 129); *Horton* v. *Thompson*, 71 N. Y. 513.

The fact stated in the sixteenth clause of the statement of facts has no bearing on this case.

Butler v. *Charlestown*, 7 Gray, 12; *Sikes* v. *Hatfield*, 13 Gray, 347.

The order did not annul or repeal the ordinance cited.

Third Nat. Bank of St. Louis v. *Harrison*, 8 Fed. Rep. 721; *Chicago, M. & St. P. R. Co.* v. *United States*, 127 U. S. 405 (32: 180); *United States* v. *Benson*, 31 Fed. Rep. 896-899; *Chew Heong* v. *United States*, 112 U. S. 536 549 (28: 770-773); *Gilson* v. *Emery*, 11 Gray, 430.

Nor can there be any claim of a ratification by the city.

Turney v. *Bridgeport*, 55 Conn. 412.

NOTE.—*As to contracts, their interpretation and validity*, see note to Bell v. Bruen, 11: 89.

As to construction of written contracts; how far a question for the court, see note to Ward v. United States, 20: 793.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiffs in error, as surviving partners of a firm doing business under the name of Henry R. Worthington, brought this action upon a written agreement concluded, May 19, 1885, between that firm and the Boston Water Board—the latter assuming to act on behalf of the city of Boston.

This agreement involved the expenditure of a large sum of money for pumping engines and machinery in connection with the "high-service" extension of the water works of the city, and was made without an advertisement for proposals by bidders.

696] *The court below tried the case without a jury pursuant to a written stipulation of the parties, and, being of opinion that without such advertisement the Water Board had no authority to make the agreement, gave judgment in favor of the city. 41 Fed. Rep. 23. Whether the Water Board had such authority depends upon certain facts set forth in an agreed statement of the parties. These facts are as follows:

The city of Boston previous to, and ever since, the year 1875 was authorized to take water from Lake Cochituate, Sudbury river, and Mystic lake, to build and maintain aqueducts, dams, reservoirs, and to lay pipes, establish hydrants, and supply its inhabitants with water in such manner and by such agents, officers, and servants as the city council should from time to time direct; and previous to 1875 it had established the Cochituate Water Board and the Mystic Water Board to exercise those powers, subject to the ordinances and orders of the city.

By chapter 80 of the statutes of Massachusetts, in force in 1875, it was provided: "The city council of the city of Boston may establish by ordinance a water board to be known as the Boston Water Board, consisting of three able and discreet persons to be appointed by the mayor, with the advice and consent of the city council, and to receive such compensation as the city council may from time to time determine. The said board may be empowered by said city council to exercise all or any of the powers conferred by the statutes of the commonwealth upon the city of Boston, with reference to supplying said city with water, or of the Cochituate and Mystic water boards, and also to act as the agent of the city of Boston in doing any and all things which the city is now authorized to do in relation to the taking of lands, water rights, and other property, and the establishment and maintenance of works and appliances for supplying the city of Boston or other cities and towns with pure water, and the said Boston Water Board shall, so far as the city council of said city may by ordinance prescribe, succeed to all the powers and duties formerly vested in the Cochituate Water Board and Mystic Water Board."

697] *On the 22d day of March, 1876, the city council of Boston, with the approval of the mayor, passed an ordinance that was in force when the agreement in question was made, and which, among other things, provided: "There shall be a board to be known as the Boston Water Board and to consist of three members. *Said board* shall have and exercise all the powers so far as such powers can be legally delegated by the city council, which were granted to the city by or are held by the city under chapter one hundred and sixty-seven of the statutes of the commonwealth of the year eighteen hundred and forty-six, chapter one hundred and seventy-seven of the said statutes of the year eighteen hundred and seventy two, and by or under any and all statutes in addition, to either of the before-mentioned chapters, subject, however, to the authority of the city council from time to time, by ordinances, orders, or resolutions, to instruct said board, and to change and limit their powers. Said board may, subject to the approval of the mayor, sell or lease such of the property connected with the water works as they deem expedient, and all necessary deeds and leases shall be executed by the mayor and counter-signed by the chairman of said board. No contract or purchase which is estimated to involve an expenditure of more than ten thousand dollars, except a contract for the laying of pipe, shall be made by the said board until they have advertised, as hereinafter provided, for sealed proposals thereof. . . . All proposals shall be publicly opened at the time and place designated in the advertisement, and the said board may reject any or all bids which are offered, and it shall be their duty to reject the bids of all irresponsible parties."

For several years prior to 1884 the question of extending the high service works of the Cochituate Water Department, which comprised a part of the city water works, was before the city council.

In 1881, the Water Board submitted to the council the following estimate of the cost of such extension: "For engine buildings, wells, engine foundations, etc., $149,000; one engine, capacity 10,000,000 gallons, $75,000; one relief engine, capacity *5,000,000 gallons (based [698 on using one of Mystic pumping engines) $18,000; lands and reservoir (No. 1) capacity 15,000,000 gallons, $169,000; land damages for reservoir (No. 3) and pipe lines, $28,000; pipe mains, force and supply, $237,000; add 10 per cent for superintendence, engineering and contingencies, $67,600; total, $743,600."

The Water Board, November 17, 1884, submitted to the council another estimate of the cost of such extension, as follows: "For engine buildings, wells, engine foundation, connection chamber, $142,000; one engine, capacity 10,000,000 gallons, $60,000; one relief engine, capacity 5,000,000 gallons, $25,000; land and reservoir, capacity 15,000,000 gallons, including gate chamber, $210,000; land damages for reservoir No. 3, $28,000, pipe mains, force and supply, $231,000; add 10 per cent engineering and contingencies, $69,000; total, $765,600."

On December 23, 1884, an order was duly passed by the city council, and approved by the mayor, to this effect. "*Ordered*, That the city treasurer be authorized to borrow, under the direction of the committee on finance, and at such a rate of interest as they shall determine, the sum of $766,000, which sum is hereby appropriated, and the Boston Water Board is authorized to expend the same for the extension of the high-service works of the Cochituate Water Department."

On December 31, 1884, the City Engineer,

Henry M. Wightman, addressed to the Water Board a letter, in which he said: "The board should determine the pumping engine it will use, as such determination is necessary before a plan of the pumping station can be made. I am of the opinion that the improved Worthington engine will prove the most advantageous for the city, and as a three million gallon engine of this type is running at the Worthington pump works in New York, it would be advisable for the board to examine this engine before any decision is made."

The Water Board adopted plans and specifications for the proposed extension, requiring, among other things, two engines of the daily capacity of five million and ten million gallons, respectively, estimated by the board to cost from $85,000 to $93,000, and the discontinu-
699] ance of the pumping station on *Elmwood street, at the Highlands, and the engines and machinery therein. And on the 3d day of April, 1885, it sent this communication to the city council: "The plans for the extension of high service, as detailed ex-City Engineer, Joseph P. Davis, and the late City Engineer, Henry M. Wightman, require the establishment of a new pumping station at Chestnut Hill of larger capacity than the present one at the Highlands, and the discontinuance of the latter. Mr. Wightman, after a careful examination of the matter, concluded that it would be advantageous for the city to exchange if possible the small engines now in use for the larger ones required in the extension of the high service, and so recommended to the board. We therefore ask 'That the Water Board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity, for those of the capacity required by the plans and estimates of the new high-service extension.'"

On April 20, 1885, the following order, prepared by the chairman of the Water Board, and which had duly passed both branches of the city council, was approved by the mayor: "*Ordered*, That the Water Board be authorized to exchange such pumping engines and machinery as are inadequate or of insufficient capacity for those of the capacity required by the plans and estimate of the new high-service extension, the expense of such exchange to be charged to the appropriation for high-service extension."

On April 21, 1885, the Water Board visited New York and examined the improved or high duty Worthington engine, and other engines in New York, Philadelphia, and Brooklyn, all of which they had done several times before subsequently to January 1, 1885, and on the previous visits had been accompanied by the City Engineer; and on April 24, 1885, received from the firm of Henry R. Worthington the following proposal, sent at the suggestion of the Chairman of the Water Board in accordance with the recommendation of the City Engineer as above set forth: "We beg leave to submit the following proposal: For $106,575, will furnish and erect the pumps, etc., ready
700] for continuous service. Whole to *the satisfaction of the City Engineer, and under such specifications as to details as may hereafter be agreed upon. Above price on assumption that we are to receive other engines and boilers on Elmwood street. Boilers according to specifications accompanying—also feeding apparatus. We guarantee 100,000,000 foot pounds with 100 pounds of coal. Also materials and labor shall be first class and equal to any other work furnished by us. We agree to complete work in eight months from date of signing contract." On the same day the Water Board returned the following answer: "Your proposal of April 24, 1885, to furnish high service pumping plant for the city of Boston for the sum of one hundred and six thousand five hundred and seventy-five dollars ($106,575) is hereby accepted under the conditions that the detailed specifications and terms of the contract for the above mentioned work shall be satisfactory to both parties concerned in the said proposal; it being understood that the present pumping plant at the Elmwood station is to be exchanged, as per the terms of your proposition."

The "other engines and boilers" and "pumping plant" above referred to were the engines and machinery of the pumping station on Elmwood street at the Highlands, that were to be discontinued, and consisted of one small low-duty Worthington engine, made in 1878, and of the daily capacity of 3,000,000 gallons, and one engine and two boilers made by the Boston Machine Company, said engine being made in 1870, and of the daily capacity of 1,800,000 gallons—all of the aggregate value of $3500.

The distinguishing feature of the improved or high-duty Worthington engine was a "high-duty" attachment, the patent for which was owned and used exclusively by the plaintiffs. This device, so far as the parties to this suit knew, was the only one beside a fly wheel that secured high economy of steam and fuel by enabling the steam to be cut off from the cylinder at an early point in the stroke of the piston without causing a loss of speed; the effect of plaintiff's device and of the fly-wheel, together with the expansion of the steam left in the cylinder, being to carry the piston through the *remainder of its stroke without loss [701 of speed. It avoided the vibration on the water column incident to the use of a crank and fly wheel, and could be used on the duplex low-duty Worthington engine the motion was such that a fly wheel could not be used with it. The duplex high-duty or low-duty Worthington engine was the only form of engine that secured an absolutely steady and regular flow of water, and whose steadiness and regularity of flow was in no way dependent on speed, and the low duty duplex engine was, January 1, 1885, and ever since has been, manufactured by other parties besides the plaintiffs.

The plaintiffs had knowledge of the above ordinance requiring advertisement for proposals, but were informed by the chairman of the Water Board that the order of April 20, 1885, avoided any necessity of advertising in this instance; and on May 19, 1885, the Board, in the name of and claiming to act for the defendant, and whose whole authority in the premises, if any it had, was derived from the orders, ordinances, and statutes referred to, and the plaintiffs' firm, without any advertise-

ment for proposals, entered into a contract the material portions of which were that Worthington should make and erect at Chestnut Hill reservoir two high-duty Worthington pumping engines, one of ten million and one of five million gallons daily capacity, and the boilers and appurtenances for the same; that the defendant should pay the plaintiffs therefor the sum of $106,575, and the pumping machinery, boilers, and all their appurtenances then located in the Highland pumping station, and valued at $3500, were to become the property of the contractors,

That agreement provided for payments to the contractors as follows: Twenty per cent of the contract price to be paid when the steam cylinders of the engines were cast; fifteen per cent, when the water cylinders were cast; fifteen per cent, when the steam-cylinders of the engines were bored and planed; fifteen per cent, when both engines were erected; and fifteen per cent, when the boilers and engines were delivered at the pumping station at Chestnut Hill reservoir in Boston; such payments not to be made or de- 702] manded unless the work *was progressing faithfully and to the satisfaction of the city engineer. The balance of the money due the contractor was to be paid, and the pumping machinery at the Highland pumping station was to become the contractor's property, upon the completion of the entire work according to the terms of the agreement, and "its connection to the high-service system of the city of Boston, all to the satisfaction of the said engineer."

On the date of the execution of the agreement a bond in the sum of $25,000, with sureties, running to the city of Boston, was delivered to the Water Board to secure the faithful performance of the contract. This bond was accepted for the city by the Board and attached to the contract, and, when this action was brought, was in possession of the city auditor.

The pumping engines and machinery called for by the contract were of a capacity required by the plans and specifications for the new high-service extension, and were capable of doing the work contemplated by the orders of December 23, 1884, and April 20, 1885. The expenditure for piping was less than the estimate therefor, and the entire amount expended and agreed to be expended for the new high-service extension by the Water Board did not exceed the whole sum appropriated for that purpose.

The plaintiffs, before the commencement of this action, had performed so much of the work described in the contract as entitled them to receive 65 per cent of the contract price, and notified the defendant that they were ready and willing to deliver the engines and boilers and perform the remainder of the work described in the contract; but the defendant had refused to receive the same, or to pay any of the installments named in the contract, although requested so to do, and notified the plaintiffs that it would not allow said engines and boilers to be delivered, and would not pay for the same.

In the year 1877, the Water Board and Henry R. Worthington contracted for an engine, at a cost of $20,000, without advertising therefor, and the price stipulated therein was *paid by the* city.

The facts, set forth in the written stipulation of the parties, bring this case within very narrow limits.

*The grant of power to the Water [704 Board, by the ordinance of March 22, 1876, was subject to the right of the city council, from time to time, by ordinances, orders, or resolutions, to instruct the Board, and to change and limit its authority, and, also, to the condition that no contract or purchase, estimated to involve an expenditure of more than ten thousand dollars, except a contract for the laying of pipe, should be made without an advertisement for sealed proposals in the mode prescribed by that ordinance.

The contract in question did involve an expenditure of more than ten thousand dollars, and, therefore, was one not within the authority of the Water Board to make, without first advertising for sealed proposals, unless, as the plaintiffs contend, the city council intended, by the ordinance of April 20, 1885, to dispense with advertising for proposals for exchanging such pumping engines and machinery as were found to be inadequate or insufficient, for engines and machinery required by the plans and specifications of the new high-service extension.

We are of opinion that the contention of the plaintiffs rests upon a sound interpretation of the ordinance of 1885. The city council was empowered by the statutes of the commonwealth to create a Water Board with authority to exercise all the powers the city could exercise for the purpose of supplying the municipality with water, and to act as the agent of the city in establishing and maintaining works and appliances to that end. The city council having conferred upon the Water Board, subject to the conditions named, all the authority the city had in respect to such matters, that Board could have obtained, by exchange, the new engines and machinery specified in the agreement in question, upon duly advertising for sealed proposals. It would seem, therefore, that the only object of the ordinance of 1885 could have been to enable the Water Board to effect such exchange by contract, without advertising for proposals.

And there were reasons why that course should be pursued, if the intention was to secure, for the purposes of the high service extension, the improved or high duty Worthington *engine. The patent for that engine was [705 owned and exclusively used by the firm of Henry R. Worthington, and the beneficial results ordinarily attending sealed proposals by competing bidders could not have been obtained in this instance by advertisement. Nothing could have been gained for the city by competition among bidders, one of whom only was entitled to use the patented engine it desired to obtain.

The city council had been fully informed by the Water Board of the cost of the high-service extension. The city engineer had recommended the purchase of the improved Worthington engine. And the city council could not have been ignorant of the fact that the proposed new engines and machinery would cost not far from $100,000, and that plans and specifications, involving an expendi-

ture of about that amount, had been adopted by the Water Board with the approval of the city engineer. It was distinctly informed by the Board that the city engineer had carefully considered the whole matter, and was of opinion that the public interests would be promoted if the small engines then in use were dispensed with altogether, by "exchange if possible," and the larger ones, required in the extension of the high service, substituted for them. The city council was, therefore, asked to give the board authority "to exchange" such pumping engines and machinery as were inadequate or insufficient for such as were required by the plans and estimates of the new high-service extension—an authority that need not have been specially conferred, if the Board was to pursue the method of advertising for proposals. The authority asked was given, not generally, but with express reference to particular plans and estimates, the expense of the exchange to be charged "to the appropriation for high service extension." As that appropriation was based upon estimates furnished by the Water Board to the city council; as those estimates upon their face showed that the expense of engines and machinery required in the high-service extension would be large in comparison with the value of the small engines and machinery then in use and which were to be discontinued, the suggestion that the city council could not have contemplated an "exchange" of 706] engines *and machinery worth only $3500 for engines and machinery worth over $100,000, is of little moment. It is manifest that the city council was aware, when it passed the ordinance of April 20, 1885, that the Water Board had in mind the new improved or high-duty Worthington engine. Interpreting that ordinance in the light of all the circumstances preceding and attending its passage, we are not at liberty to doubt that the city council was aware of the recommendations of the city engineer, or that the object of the ordinance was to enable the Water Board, by contract, without advertising for sealed proposals from bidders, to exchange the engines and machinery then in use for the new and improved Worthington engine, exclusively manufactured by the firm of Henry R. Worthington. The Water Board was authorized by that ordinance to create a debt for engines and machinery, not without restriction as to cost, but of the capacity "required by the plans and estimates of the high-service extension," lessened by such amount as could be obtained, in exchange, for the insufficient engines and machinery then in use. The city council thus had in view the value of the inadequate engines and machinery then in use, and the value of the new engines and machines; the cost of the latter being made known to them by the plans and estimates submitted by the Water Board. The better interpretation of the ordinance of 1885, is, therefore, that the exchange, authorized to be made, was expected to be accomplished without resorting to an advertisement for proposals.

This conclusion has been reached independently of the fact that some years before the present transaction the city paid the sum of $20,000 for an engine obtained by the Water Board from Henry R. Worthington, by contract, without advertising for proposals. A single instance of that kind, showing a departure from the ordinance regulating the subject of contracts and purchases by the Water Board, cannot be allowed to operate as a repeal of that part of the ordinance requiring an advertisement for proposals where the Board makes a contract or purchase involving an expenditure of more than ten thousand dollars. We place our decision in the present case upon what *we regard the fair [707 interpretation of the ordinance under which the exchange in question was made.

It was agreed that if, on the facts stated by the parties, the city was liable, judgment should be entered in favor of the plaintiffs for the sum of $35,000, with interest from April 15, 1889. We are of opinion the city is liable upon the contract made by the Water Board.

The judgment is reversed and the cause is remanded, with directions to enter judgment in favor of the plaintiffs accordingly.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1893.

Vol. 153.

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1893.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

THEODORE LOWNDES, *Plff. in Err.*,
v.
THE BOARD OF TRUSTEES OF THE TOWN OF HUNTINGTON.

(See S. C. Reporter's ed. 1-33.)

State decisions—practice in Federal courts—land used for oyster beds—state rule as to real property—descriptions of boundaries—land under water—adverse possession—license, how revoked.

1. The settled rule of decision in the courts of the state is controlling as to the form of the action, the title of the plaintiff to submerged lands and the special defenses of the defendant.
2. The practice, forms, and mode of proceedings in actions at law in the Federal courts are required to conform as nearly as may be to those in the state courts.
3. In New York one who claims the right to occupy submerged land for the cultivation of oysters, and exercises acts of ownership thereupon and claims an interest therein, is a proper defendant in an action for the possession of the premises.
4. As to the rights attaching to lands within the territorial limits of the state, whatever has become a settled rule of real property by the decisions of its courts is conclusive on this court.
5. If the language in the description of boundaries is clear, that should control, and should not be narrowed and limited by any mere ambiguity in the subsequent statement of the appurtenances to the grant.
6. In a grant of land under water, the term "the sound," named as a boundary, means the body of water known by such name, and does not include waters opening into or connected therewith.
7. In order to create a title springing out of possession, such possession must be adverse and exclusive.
8. An implied license from the state to use land under water for oyster cultivation is subject to revocation, and is revoked by a notice served upon the licensee by one to whom the state has ceded all its rights.
9. The title to the submerged lands in Huntington Bay passed to the town of Huntington by the colonial grants to that town and by the law of

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NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question*, see note to Hamblin v. Western Land Co. 37: 267.

As to what necessary to constitute adverse possession; requisites of, see note to Ricard v. Williams, 5: 398.

As to occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 9: 624.

As to misdescription in deeds; when it avoids them; when does not, see note to Wallace v. Penfield, 27: 147.

As to what is sufficient delivery of a deed to pass the title, see note to Tompkins v. Wheeler, 10: 903.

As to natural objects or needle; which governs in survey of land, see note to Newsom v. Pryor, 5: 382.

New York of May 10, 1888, at least for the purpose of oyster cultivation.

[No. 117.]

Argued Dec. 18, 19, 1893. Decided April 16, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of New York, to review a judgment in favor of plaintiff, the town of Huntington, against Theodore Lowndes, defendant, in an action of ejectment, to recover lands lying under water in Huntington Bay, in the state of New York. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On September 1, 1888, the defendant in error commenced an action in the supreme court of the state of New York for the county of Suffolk. Its complaint alleged that "the trustees of the freeholders and commonalty of the town of Huntington and their successors" were a body corporate, created and incorporated by and under three charters granted, the first by 2] *Richard Nicholls, Governor General under James, Duke of York, of all his territories in America, and dated November 30, 1666; the second by Thomas Dongan, Governor General of the Province of New York under James the Second, King of England, and dated August 2, 1688; and the third by Benjamin Fletcher, Governor General under William and Mary, and dated October 5, 1694.

It also alleged that the plaintiff was the lawful successor of the said trustees, etc., and as such, and by virtue of said patents and charters, and the laws of the state of New York, was the lawful owner and seised in fee, subject to the right of navigation, of a certain described tract of land of about 300 acres, lying under water in Huntington Bay, in the town of Huntington, and that, as such owner, it was entitled to the exclusive possession and use thereof for oyster cultivation.

The complaint further charged that the defendant had theretofore exercised, and still exercised, acts of ownership upon said lands, and claimed title thereto and a right to the exclusive possession thereof; that he had planted, or caused to be planted, oysters thereon, and unlawfully withheld the lands from the plaintiff.

There was also an allegation of notice to quit, and a prayer for judgment against the defendant for the immediate and exclusive control of the premises. The defendant, who was a citizen of the state of Connecticut, having been brought in by publication, removed the case to the Circuit Court of the United States for the Eastern District of New York. In that court he filed an answer denying plaintiff's title, and pleading possession since 1866. Thereafter, on the 14th of November, 1889, the case was tried before a jury, and at the close thereof, the court directed a verdict for the plaintiff. On the verdict a judgment was duly rendered, and to reverse such judgment this writ of error was sued out.

Mr. **James C. Carter** for plaintiff in error:

A grant by the sovereign power of lands under public navigable waters, is, in a high degree, unusual and contrary to ordinary public policy. No conveyance should be held to have such an effect unless it appear by clear and unambiguous language that such was the intention.

Charles River Bridge Proprs. v. *Warren Bridge Proprs.* 36 U. S. 11 Pet. 426 (9: 776); *Martin* v. *Waddell*, 41 U. S. 16 Pet. 369 (10: 997); *Rice* v. *Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 369 (17: 150); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Lansing* v. *Smith*, 4 Wend. 9, 21 Am. Dec. 89; *Chenango Bridge Co.* v. *Binghamton Bridge Co.* 27 N. Y. 87, 70 U. S. 3 Wall. 51 (18: 137).

The act of cession of 1888 by the state of New York is wholly ineffective as a support to the present suit.

This is an action of ejectment, and can be maintained only when the plaintiff is entitled to the possession of the property.

As against all persons, except the state of New York, therefore, the plaintiff in error had a perfect legal right to the exclusive occupation and enjoyment of his bed.

Fleet v. *Hegeman*, 14 Wend. 42; *Decker* v. *Fisher*, 4 Barb. 592; *Lowndes* v. *Dickerson*, 34 Barb. 586; *People* v. *Haven*, 121 N. Y. 316.

The law of New York (Penal Code, § 431) making it a misdemeanor for non residents either to plant or gather oysters in the waters of that state without the consent of the owner, is applicable to any of the waters of the state held in private ownership. It is extremely questionable whether it was designed, or should be held, to extend to waters owned by the state.

The observation of Bradley, *J.*, in the case of *People* v. *Lowndes*, 130 N. Y. 463, if intended to include the state as being an owner, was not necessary to the decision, and was not to a point definitely argued.

Plaintiff in error prepared his bed and began his planting as early as 1867; he was a resident of the state until 1872, and, of course, no question could be made as to the perfect acquisition of his right.

It was not the design of this section 441 of the Penal Code to revoke the license and permission under which the plaintiff in error had acted, upon the strength of which he had expended much labor and money, and to destroy the useful business which he had been carrying on.

It was no part of the purpose of this enactment to accomplish any revocation of prior consent.

The act is capable of a reasonable construction and that is to apply it to the future and not to the past; to make the future establishment of beds unlawful, leaving those already established unaffected.

The unnecessary and unwise discrimination in this act between residents and non residents in respect to the use of the bottom of public waters for the cultivation of oysters was abrogated by chapter 321 of the Laws of 1893.

Messrs. **David B. Hill,** *Thomas Young, C. R. Street* and *N. S. Ackerly*, for defendants in error:

Huntington Bay is within the limits of the patents.

Robins v. *Ackerly*, 91 N. Y. 98; *North Hempstead* v. *Thompson*, 115 N. Y. 635.

The title to all lands embraced within the discovered territories vested in the king, and this title included as well the rivers and seas within the international limit as the dry lands.

Johnson v. *McIntosh*, 21 U. S. 8 Wheat. 595 (5: 694); *Brookhaven Trustees* v. *Strong*, 60 N. Y. 72; *People* v. *Van Rensselaer*, 9 N. Y. 291.

These waters seem to have been called a harbor in early papers. But haven is a more proper term as applies to these waters.

Hale, De Portibus Maris; Angell, Tide Waters, 38; *Rex* v. *Bishop of Rochester*, 1 Mod. 195.

Distinct words of relation in the king's grant are good to pass away anything.

Rex v. *Bishop of Chester*, 5 Mod. 301.

The patents convey a good title to the lands under these waters, subject to a full and free right of navigation.

Rogers v. *Jones*, 1 Wend. 238, 19 Am. Rep. 493; *Brookhaven Trustees* v. *Strong*, 60 N. Y. 72; *Hand* v. *Newton*, 92 N. Y. 88; *Southampton Trustees* v. *Mecox Bay Oyster Co.* 116 N. Y. 1; *People* v. *Van Rensselaer*, 9 N. Y. 291; *Furman* v. *New York*, 10 N. Y. 567; *Towle* v. *Remsen*, 70 N. Y. 308; *Langdon* v. *New York*, 93 N. Y. 134; *New York* v. *Hart*, 95 N. Y. 443.

It is the rule of the United States Supreme Court in cases involving the question of title to lands wholly within a state to follow the decisions of the highest court of the state when those decisions have been uniform.

Gage v. *Pumpelly*, 115 U. S. 454 (29: 449); *Bondurant* v. *Watson*, 103 U. S. 281 (26: 447); *Suydam* v. *Williamson*, 65 U. S. 24 How. 427 (16: 742); *Jackson* v. *Chew*, 25 U. S. 12 Wheat. 162 (6: 586); *Beauregard* v. *New Orleans*, 59 U. S. 18 How. 497 (15: 469).

The decisions of the highest courts of New York have been uniform as to the construction of the colonial act of legislature confirming these grants and as to the construction of the constitution, and consequently should be binding on the United States courts.

Elmwood v. *Marcy*, 92 U. S. 289 (23: 710); *Indianapolis & St. L. R. Co.* v. *Vance*, 96 U. S. 594 (24: 825).

The colonial grants vest in the trustees of the town an exclusive oyster fishery.

Lord Fitzwalter's Case, 1 Mod. 106.

The three several patents of the town, in express words, convey to the town "all fishing, hawking, hunting," etc., within the boundaries prescribed. That the intent was to convey to the town an exclusive fishery, we think there can be no reasonable doubt.

A prescription for a common fishery therein, as appurtenant to an estate, is bad.

Ward v. *Cresswell*, Willes, 265; Angell, Tide Waters, 274.

Magna Charta did not restrain the king from granting exclusive fisheries to his subjects, as he had hitherto been accustomed to do.

2 Bl. Com. 39; Cruise, Dig. 261, title *Franchise; Somersett* v. *Fogwell*, 5 Barn. & C. 875; *Case of Sewers*, 6 Coke, pt. 13, pp. 35, 36; *Carter* v. *Murcot*, 4 Burr. 2162; 1 Gt. Britain & Ireland Stats. 579, 718; 2 Gt. Britain & Ireland Stats. 213, 242, 644, 688.

The king has made grants of several and exclusive fisheries since Magna Charta, and these grants have been sustained.

Hamilton v. *Donegall*, 3 Ridgway, Parl. Cas. 276, 328; *Carter* v. *Murcot*, 4 Burr. 2163; *Lord Fitzwalter's Case*, 1 Mod. 105; *Oxford* v. *Richardson*, 4 T. R. 439; *Seymour* v. *Courtenay*, 5 Burr. 284; *Peers* v. *Lucy*, 4 Mod. 356; *Somersett* v. *Fogwell*, 5 Barn. & C. 875; *Carson* v. *Blazer*, 2 Binn. 476, 4 Am. Dec. 463; *Coolidge* v. *Williams*, 4 Mass. 144; *Stoughton* v. *Baker*, 4 Mass. 522, 3 Am. Dec. 236; *Com.* v. *Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Reade* v. *Commercial Ins. Co.* 3 Johns. 357, 3 Am. Dec. 495; *People* v. *Platt*, 17 Johns. 195, 8 Am. Dec. 382; *Hooker* v. *Cummings*, 20 Johns. 90, 11 Am. Dec. 249; *Chalker* v. *Dickinson*, 1 Conn. 384, 6 Am. Dec. 250; *Munson* v. *Baldwin*, 7 Conn. 168; *Adams* v. *Pease*, 2 Conn. 481; *Op. Atty. Gen.* 1 Har. & McH. 564; *Johnson* v. *McIntosh*, 21 U. S. 8 Wheat. 577, 597 (5: 689, 694); *James* v. *Gould*, 6 Cow. 376; 5 Cruise, Dig. p. 45, § 10, title 54, *King's Grant;* Com. Dig. 108, title, *Navigation*.

The principle that the colonies might change the common law of England in respect to rights of this nature has never been denied.

Corfield v. *Coryell*, 4 Wash. C. C. 384.

A grant of the soil with the right of a several fishery, in an arm of the sea by a colonial governor, ratified and confirmed by act of a colonial assembly, conveyed an exclusive right to the oyster fisheries in the waters covered by the grant.

Brookhaven Trustees v. *Strong*, 60 N. Y. 72; *Rogers* v. *Jones*, 1 Wend. 238, 19 Am. Dec. 493; *People* v. *Lowndes*, 130 N. Y. 455.

The statute (Penal Code, § 441) was passed with the view to discriminate between those persons who were and those who were not residents of the state.

This is a lawful exercise of legislative power over the common property of the citizens of the state.

McCready v. *Virginia*, 94 U. S. 391 (24: 248).

The plaintiff in error has failed to show any right to continue to use these lands by adverse possession or by reason of any easement claimed to be gained therein.

Livingston v. *Peru Iron Co.* 9 Wend. 511; *Smith* v. *Burtis*, 9 Johns. 180; *Jackson* v. *Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Hoyt* v. *Dillon*, 19 Barb. 651; *Robinson* v. *Kime*, 70 N. Y. 152; *Doe* v. *Thompson*, 5 Cow. 371; *Thompson* v. *Burhans*, 79 N. Y. 99; *Higginbotham* v. *Stoddard*, 9 Hun, 1, 72 N. Y. 94.

Theodore S. Lowndes acquired no easement in the premises by his occupation.

Ward v. *Warren*, 82 N. Y. 265; *Nicholls* v. *Wentworth*, 100 N. Y. 455; *Munson* v. *Reid*, 46 Hun, 399; *Thomas* v. *Marshfield*, 12 Pick. 240; *Kellogg* v. *Thomson*, 66 N. Y. 88.

A tolerated or permissive user will not mature into a title by prescription.

Dodge v. *McClintock*, 47 N. H. 387; *Polly* v. *McCall*, 37 Ala. 20; *Pierce* v. *Cloud*, 42 Pa. 113; *Slater* v. *Jepherson*, 6 Cush. 129; *Stevens* v. *Hollister*, 18 Vt. 294; *Parker* v. *Parker*, 1 Allen, 245; *Stevens* v. *Taft*, 11 Gray, 35; *Morrison* v. *Chapin*, 97 Mass. 76; *Morris* v. *Callanan*, 105 Mass. 133; *Coburn* v. *Hollis*, 3 Met. 128; *Wheeler* v. *Spinola*, 54 N. Y. 387; *Roberts* v. *Baumgarten*, 110 N. Y. 380; *Parker* v.

Wallis, 60 Md. 15, 45 Am. Rep. 703; *Townsend* v. *Reeves*, 44 N. J. L. 525.

Prescription only raises a legal presumption of title, which may be rebutted by other evidence.

Corning v. *Gould*, 16 Wend. 531; *Campbell* v. *Wilson*, 3 East, 294; *Burbank* v. *Fay*, 65 N. Y. 57; *Knickerbocker Ice Co.* v. *Shultz*, 116 N. Y. 388; Best, Presumptions, 103.

Title was conveyed under the ceding act of the state.

Charles River Bridge Proprs. v. *Warren Bridge Proprs.* 7 Pick. 344, 36 U. S. 11 Pet. 420 (9: 773); *Langdon* v. *New York*, 93 N. Y. 144.

No act was ever passed by the state allowing these lands to be taken and cultivated for oyster culture. The appellant held his oysters only under the common law right.

Fleet v. *Hegeman*, 14 Wend. 46; *Brinckerhoff* v. *Starkins*, 11 Barb. 248; *State* v. *Taylor*, 27 N. J. L. 117; *McCarty* v. *Holman*, 22 Hun. 53.

At common law the right of a person, as between himself and the state to plant oysters on premises within the state, was, at most, a license; the state having the legal right at any time to terminate and withdraw the license.

Post v. *Kreischer*, 32 Hun, 49, 103 N.Y. 110.

The state may exclude citizens of another state from using its lands under water to plant oysters therein.

McCready v. *Virginia*, 94 U. S. 391 (24: 248); *Smith* v. *Maryland*, 59 U. S. 18 How. 71 (15: 269); *Haney* v. *Compton*, 36 N. J. L. 507; *Chambers* v. *Church*, 14 R. I. 398, 51 Am. Rep. 410.

The board of supervisors of Suffolk county, New York, passed an act for the protection of the fisheries within the waters of Suffolk county, forbidding all persons other than the inhabitants of said county from engaging therein. In *Smith* v. *Levinus*, 8 N. Y. 472, this class of legislation was held valid.

People v. *Thompson*, 30 Hun, 457; *Sutter* v. *Derveer*, 47 Hun, 366.

An oyster fishery is a property right, originally in the sovereignty, and where granted away by the sovereign power it is vested in the grantee, and the legislature of a state may protect this property right by prohibiting nonresidents from taking or planting oysters within its limits.

Patterson, Federal Restraints on State Actions, chap. 11; Gould, Waters, chaps. 1, 2; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Smith* v. *Maryland*, 59 U. S. 18 How. 71 (15: 269); *McCready* v. *Virginia*, 94 U. S. 391 (24: 248); *Manchester* v. *Massachusetts*, 139 U. S. 259 (35: 164); *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 (11: 565); *State* v. *Melbury*, 3 R. I. 138; *Haney* v. *Compton*, 36 N. J. L. 507; *McCready* v. *Com.* 27 Gratt. 985; *Russell* v. *Russell*, 15 Gray, 159.

An oyster fishery will be protected as against non residents under state authority.

Smith v. *Maryland*, *supra*; *Sherlock* v. *Alling*, 93 U. S. 99 (23: 819); *Brookhaven Trustees* v. *Strong*, 60 N. Y. 56; *Rogers* v. *Jones*, 1 Wend. 251, 19 Am. Dec. 493; *Hallock* v. *Domini*, 69 N. Y. 238; *Paul* v. *Hazelton*, 37 N. J. L. 106; *Averill* v. *Hull*, 37 Conn. 321; *Gallup* v. *Tracy*, 25 Conn. 10.

Ejectment is maintainable in this case.

Southampton Trustees v. *Mecox Bay Oyster Co.* 116 N. Y. 1.

The construction of the patents and ceding act was one for the court.

Brookhaven Trustees v. *Strong*, 60 N. Y. 72.

Mr. Justice **Brewer** delivered the opinion of the court:

The questions in this case are mainly of a local character in respect to which the settled rule of decision in the courts of the state is controlling. They relate to the form of the action, the title of the plaintiff to submerged lands to Huntington Bay, and the special defenses of the defendant.

By section 914, Revised Statutes, the practice, forms, and mode of proceedings in actions at law in the Federal courts are required to conform as nearly as may be to those in the state courts.

The present action is one in the nature of an action of ejectment, and to secure to the plaintiff the undisturbed control of the tract in controversy. In the state of New York there is but one form of action, the plaintiff being required by the statutes of that state to set forth in his petition the facts upon which he bases his cause of action, and the relief is given according to the facts as stated and proved.

In a certain sense these submerged lands are not in the actual possession of any one, but section 1502 of the Code of Civil Procedure of New York provides for just such an exigency. It reads: "Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein at the time of the commencement of the action."

*The defendant claiming the right to oc- [19 cupy this submerged land for the cultivation of oysters, must be deemed to have been in the actual possession thereof, or, if not, as exercising acts of ownership thereupon and claiming an interest therein. Under those circumstances he was properly made a defendant in an action to secure to the plaintiff the immediate possession of the premises; such an action is recognized as appropriate in New York. *Southampton* v. *Mecox Bay Oyster Co.* 116 N. Y. 1, and cases cited in the opinion.

With respect to the matter of title, there are involved not merely the construction of public grants and charters, but also the extent and purposes to and for which the title and control of submerged lands may be passed away from the state to towns and individuals. The question is of the rights attaching to certain lands within the territorial limits of the state, and whatever becomes a settled rule of real property by the decisions of its courts is conclusive on this court. *Bondurant* v. *Watson*, 103 U. S. 281, 289 [26: 447, 450]; *Burgess* v. *Seligman*, 107 U. S. 20, 33 [27: 359, 365]; *Gage* v. *Pumpelly*, 115 U. S. 454 [29: 449]; *Hardin* v. *Jordan*, 140 U. S. 371, 382, 402 [35: 428, 433, 440]; *Shively* v. *Bowlby*, *ante*, p. 331.

The title of the plaintiff rests primarily on the three charters referred to in the complaint, and which were admitted in evidence. Those charters are grants of both territory and corporate franchises. The description in the first, that from Governor Nicolls, is as follows:

"All ye Lands that already have been or hereafter shall bee Purchased for and on the behalfe of the said Towne of Huntington whether from the Natives Proprietors or others within the Limitts and Bounds herein exprest (vizt) that is to say from a Certaine River or Creeke on the west comonly called by the Indyans by the Name of Nackaquatack and by the English the Coldspring to Stretch Eastward to Nasaquack River on the North to bee Bounded by the Sound runing betwixt Long Island and the Maine and on ye South by the Sea Including there Nine Severall Necks of Meadow Ground all wch Tract of Land together with the sd Necks thereunto Belonging wthin the Bounds and Limitts aforesaid and all or any Plantacon there upon are to belong to the 20] said Towne of *Huntington as also all Havens Harbours Creekes Quarryes Woodland Meadowes Pastures Marshes Waters Lakes ffishing Hawking Hunting and ffowling And all other Proffitts, Commodityes, Emolumts, and Hereditants to the said Land and prmisses within the Limitts and Bounds aforementioned described belonging or in any wise appertaining To have & to hold the said Lands and Necks of Lands Hereditants and prmisses with their and every of their Appurtenances and of every Part & Parcell thereof to the said Patentees and their Associates to the proper use and behoofe of the said Patentees and their Associates their Heires Successors and Assignes forever; And I do Likewise hereby Confirme and Graunt unto the said Patentees and their Associates their Heires Successors and Assignes all the Priviledges belonging to a Towne within this Governmt and that the Place of their prsent Habitacon shall continue and retaine the Name of Huntington by wch name it shall bee distinguisht and knowne in all Bargaines and Sales Deedes Records and Writings."

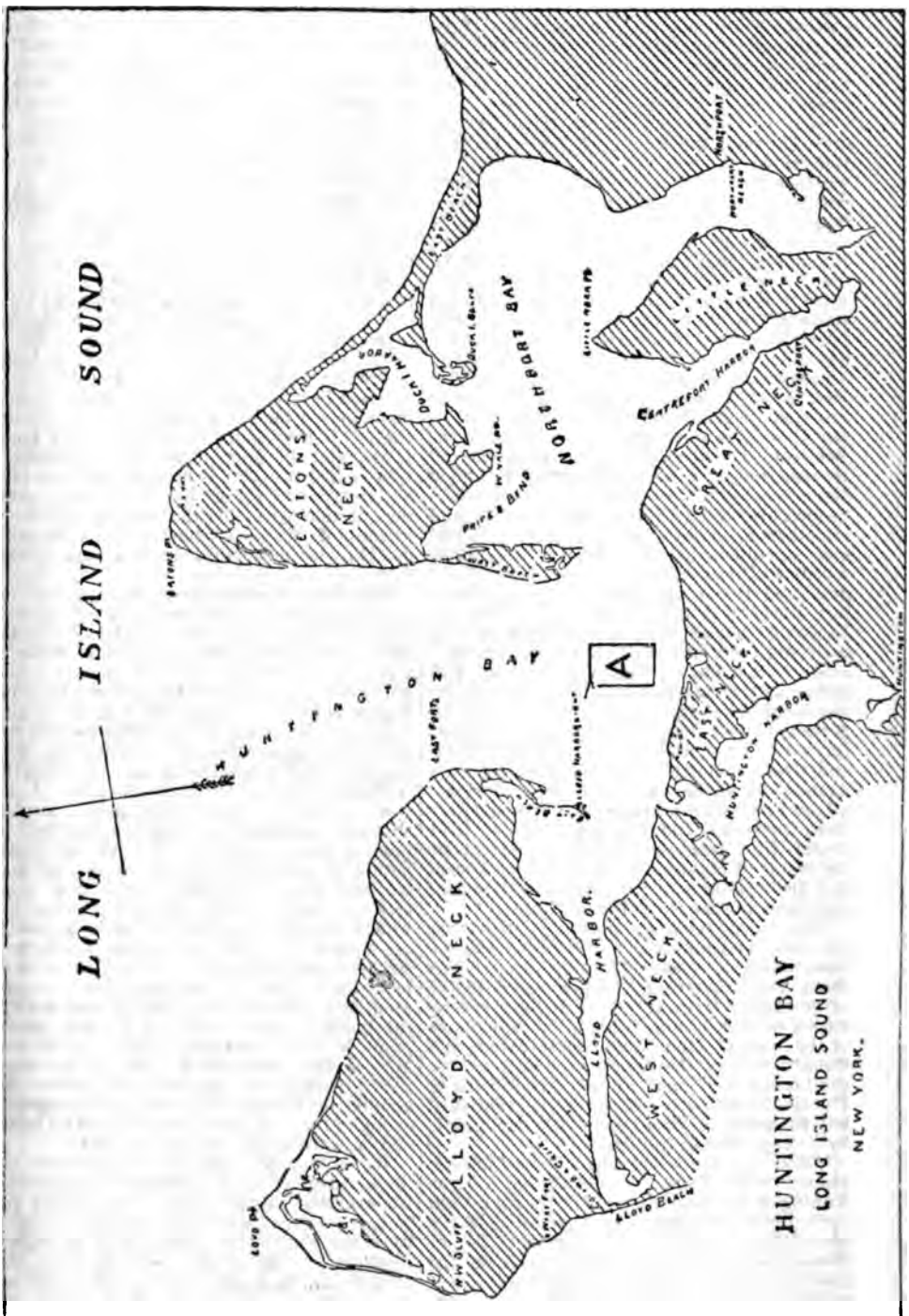
The second charter, that from Governor Dongan, is a confirmation of the first, and the description is substantially the same. The third, from Governor Fletcher, refers to the prior charter from Governor Nicolls, and recites a petition of the freeholders, inhabitants of the town of Huntington, for a "Grant and Confirmation of the Premisses so only as that the Limitts & Bounds of the sayd Towne of Huntingtone shall not be as above mentioned but as hereafter Expressed," and then grants by a description as follows:

"Bounded on the West by a River Called & known by the Name of Cold Spring a Lyne Runing South from the Head of the sayd Cold Spring to the South Sea & on the North by the Sound that Runns between our sayd Isld of Nassaw and the maine Continent & on the East by a Lyne Runing from the West syde of a Pond called & known by the Name of fresh Pond to the West syde of Whitmans Dale or Hollow and from thence to a River on the South syde of our sayd Island of Nassaw on the East syde of a Neck called Sumpawwawins and from the sayd River Runing South to the sayd South Sea Togither with all and Singular the Houses Messuages *Tenements Buildings [21 Mills Mill dammis fenceing Inclosures Gardens Orchards fields Pastures Feedings Woods Underwoods Trees Timber Comon of Pasture Meadows Marshes Swamps Plaines Rivers Rivoletts Waters Lakes Ponds Brooks Streams Beaches Quarries Creeks Harbors Highways & Easements fishing fowleing hunting and hawking Mines Mineralls (Silver and Gold Mines Excepted) & all other franchises Profits benefits Commoditys & Hereditaments whatsoever to the sayd Tract of Land within the Limits and Bounds next above mentioned belonging or in any ways appertaining or there with all used Accepted Reputed or taken to belong or in any ways Appertaine to all intents and Purposes and Constructions w'tsoever and also all & Singular the Rents Arrearages of Rents Issues and Profits of the sayd Tract of Land & Premisses heretofore due and Payable."

It will be seen from these quotations that the boundary on the north, as given in the Nicolls charter, is the "sound running betwixt Long Island and the Maine," and in the Fletcher, "the Sound that Runns between our sayd Isld of Nassaw and the maine Continent." And the question is whether the tract in controversy is south of this north boundary line. The map on following page will help to a clear understanding of the question.

The tract in controversy, marked "A" on this map, is within the limits of what is named thereon "Huntington Bay." The contention of the defendant is that that body of water is a part of the Sound, and that, therefore, the north boundary granted to the town of Huntington runs to the south of the tract in controversy. Referring to the words used to describe the appurtenances to this grant, it is urged that, although the general term "waters" is found therein, its place alongside of the words "rivers, rivoletts, lakes, ponds, brooks, streams," indicates that it refers exclusively to interior waters, and not to anything in the nature of a harbor, bay, or haven; and that when we turn to the terms which may properly be construed as referring to exterior waters, only the two, "creeks" and "harbors," are found; that this Huntington Bay is not, strictly speaking, a harbor, in that it is not landlocked and a place of absolute safety for shipping, being entirely open *and exposed on [22 the northerly side; that this, being a public grant, is to be construed strictly against the grantee; that, inasmuch as bays are not mentioned, bays are not granted; and that the description of the Sound as the north boundary excludes that body of water, with all its inlets and bays, from the scope of the grant.

We are unable to concur in these views. If the language in the description of boundaries is clear, that should control, and should not be narrowed and limited by any mere ambiguity in the subsequent statement of the appurtenances to the grant. Or, to state the proposition in another form, whenever we are considering the matter of boundary we naturally turn to the words by which the boundary is described, and accept those words as controlling, and do not look to those by which the scrivener attempts to define that which is to pass with the granted premises as


LONG ISLAND SOUND
HUNTINGTON BAY
LONG ISLAND SOUND
NEW YORK.
A
LLOYD NECK
WEST NECK
EAST NECK
GREAT NECK
LITTLE NECK
EATONS NECK
NORTHPORT BAY
CENTREPORT HARBOR
HUNTINGTON HARBOR
LLOYD HARBOR
LLOYD BEACH
PRIPE'S BEND
DUCK I. HARBOR
EAST FORT
LOYD PO
N.W. BLUFF

appurtenant thereto, to see what is omitted therefrom, or what is uncertain therein. For when in the preparation of any instrument the attention is directed to a particular subject, it is to be expected that language expressing the exact thought of the writer in respect thereto will be selected, and the ordinary force and scope of that language should not be destroyed by words and phrases used in another portion of the instrument in the description of some other matter. As said by the supreme court of Kansas, in *Long* v. *Culp*, 14 Kan. 412, 414: "It is also a rule of construction that when one section of a statute treats specially and solely of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto. Not because one section has more force as a legislative enactment than another, but because the legislative mind having been, in the one section, directed to this matter must be presumed to have there expressed its intention thereon rather than in other sections where its attention was turned to other things. *Griffith* v. *Carter*, 8 Kan. 565."

The northern boundaries in all these charters is given as "the Sound." That was then, and is now, a well-known body of water. It opens into the Atlantic Ocean, but is separate and distinct therefrom. Into it flow many rivers, and open *many bays, harbors, and inlets; but the fact of a connection between them and it does not make them a part of the Sound. If the words describing the appurtenances were omitted from this grant, should not its boundaries be understood to be the same as now? So the question is not whether this body of water in which the tract in controversy is situated is strictly a harbor or a bay, but whether it is neither, and only a part of the Sound. If it was then known as an independent body of water, by whatsoever name called, that is enough to eliminate it in tracing the boundary of the grant. That it was so known is not open to question; it was not, therefore, a part of the Sound, and the boundary of the grant ran on the north of it.

While not perhaps of much significance it may be noticed that in the first charter, that from Governor Nicolls, the description of the appurtenances is "havens, harbors, creekes," etc. The word "haven" has perhaps a broader signification than "harbor." At any rate, the use of both words in the same grant suggests that all bodies of water which might come within the reach of either term were intended to be included in the grant. In Webster the first definition given to the word "haven" is "a bay, recess, or inlet of the sea, or the mouth of a river, which affords good anchorage and a safe station for ships." While this bay might not be a place of safety against all storms coming from any direction, it was protected on three sides, and to that extent was "a safe station for ships."

In the case of *Rogers* v. *Jones*, 1 Wend. 237, 19 Am. Dec. 493, the controversy was in respect to the property in the town immediately west of the town of Huntington, to wit, Oyster Bay. An examination of a map of Long Island and the Sound shows that the bay of Oyster Bay is no more of a harbor than Huntington Bay. It is just as open on the northerly side. The town of Oyster Bay had a charter similar to that of the town of Huntington, the northern boundary being "the Sound," and the grant being "with all the woodland, plains, meadows, pastures, quarries, marshes, waters, lakes, rivers, fishing, hawking, hunting, and fowling, and all other profits and emoluments to the tract belonging." The action was one *to recover a penalty for taking [24 oysters contrary to a by-law of the town. The facts, as stated in the record, were as follows:

"On April 8, 1825, Rogers, the defendant below, being a citizen of the state of New York, did fish and oyster in the waters of the bay or harbor of Oyster Bay, and took and carried away 100 oysters. The place where the oysters were taken was adjacent to and within one mile of Long Island Sound, opposite the village or town of Oyster Bay, nearer Lloyd's Neck than any other land, within about one hundred yards of the beach on the said neck, and where the water in the bay is at least twenty feet deep at low water. On April 11, 1825, the suit was commenced before the justice by Jones, who was, at the time, the supervisor of the town."

Comparing the maps of the two bays, it is obvious that the *locus in quo* in that case was as properly to be considered within the limits of Long Island Sound as that in the present case. It is true no discussion of the point here made is found in the opinion there filed, and, therefore, it is not a direct adjudication. It seems to have been assumed that the tract being within the limits of the bay was south of the Sound, and, therefore, within the boundaries of the grant, and the question considered and determined was whether the grant carried the land under water, together with the exclusive right of fishing in such water, and it was held that it did.

A case also in point is *Brookhaven Trustees* v. *Strong*, 60 N. Y. 56. That action was, as stated, one "brought to recover damages for taking oysters from the Great South Bay which extends along the south side of Long Island, separated from the ocean by the Great South Beach, and to establish the exclusive right of the town of Brookhaven to the oyster fisheries in that portion of said bay lying between Huntington, East Gut, and Long Point."

"The bay is a sheet of water some fifty miles long and in the widest part five miles wide. The tide ebbs and flows throughout its whole extent, and it is navigable for vessels drawing from seven to eight feet of water. Plaintiffs claimed to be the owner of the bay within the limits above mentioned, *and of [25 an exclusive right of fishery therein. Defendant admitted the taking of the oysters, but denied the exclusive right claimed by plaintiffs and alleged that the place where they were taken was within the bounds of the town of Islip and was part of the navigable waters of the state, and that he being a resident of the town of Islip had a right to take the oysters."

The south boundary of the grant made in 1666 to the town of Brookhaven was "the sea or main ocean," and it was held that the grant included this bay, the court saying: "Nor can the objection that the bay was not included in

the grant be sustained. The general boundary is the ocean, which includes the beach, and of course the bay."

There is nothing in the case of *Robins* v. *Ackerly*, 91 N. Y. 98, 104, which makes against the conclusion we have expressed. In that case the question was as to oyster beds in Northport harbor, a body of water adjacent to Huntington Bay. That harbor, as appears from the map, is land-locked, and this fact was referred to in the opinion as among the matters indicating that it was within the grant to the town of Huntington. While the court refers to that as an additional reason for the conclusion reached, it does not make that the turning point. We quote its language:

"The northern boundary of the town is the Sound. This includes, we think, Northport harbor where the oyster beds in question are located. The language of the grant includes 'all havens, harbors, creeks,' as well as 'fishing, hawking, hunting and fowling.' In the Brookhaven case the south boundary was the ocean, and there was a sandy flat or beach between the ocean and the bay, and the question was raised that the South Bay was not within the grant. This court held that this objection could not be sustained, and that the southern boundary, which was the ocean, included the beach and of course the bay, etc. The patent under which the plaintiff claims is bounded on the north by the Sound, adjacent to the sound is Eaton's Neck and Eaton's Neck Beach, and south of this is Northport harbor. By analogy, both Eaton's Neck and Eaton's Neck Beach are within the patents and necessarily 26] *the harbor also. The boundary by the sound includes all the land south of the Sound. That this was intended is indicated by the use of the words in the grant, 'harbor, havens,' etc. That Northport harbor was included within the limits of the boundaries was proved by the undisputed evidence of the surveyor and others. It was also proved that Eaton's Neck Beach was leased by the town. It should also be noticed that Northport harbor is land locked, and has always been used and distinguished as a harbor.

Each of these three cases from the highest court of the state of New York treats that which is named as the boundary on the north or south, the sound or the ocean, as referring directly to the body of water known by such name, and not as including waters opening into or connected with it.

Further, there is independent testimony tending to show that this Huntington Bay was called indiscriminately "bay" or "harbor" at the time of the original grant. Thus, in the grant made by Governor Nicolls, on June 22, 1667, of Eaton's Neck to George Baldwin, the description is "a Certain Parcell or Neck of Land Commonly called Eaton's Neck lying and being in the East Riding of Yorkshire upon Long Island on the North side of the said Island to the East of Huntington Bay where striking out into the Sound it is thereby bounded to the North East and South and on ye West with Huntington Harbour;" and in a conveyance of the same land made by Baldwin, on July 11, 1668, the description is "neck of Land commonly called and known by the name of Eaton Neck lying on the East side of Huntington Harbour as is Specified in the patent granted for that Neck of land." There is also other testimony to the effect that this body of water has been known as "Huntington Bay" as far back as any memory extends, or any records are found; and whether bay or harbor, it was a distinct body of water, always so known and called.

No question exists as to the validity of these ancient grants, or that they were broad enough to include oyster rights in the waters within them. The subsequent legislation of the colony and the state affirms their validity. Thus, on May 6, 1691, *the colonial legislature [27 passed an act, entitled "An Act for Settling, Quieting and Confirming unto the Cities, Towns, Manors, and Freeholders within this Province their several Grants Patents and Rights respectively." The first section enacted:

"That all the Charters, Patents and Grants made given, and granted, and well and truly executed under the Seal of this Province, constituted and authorized by their late and present Majesties, the Kings of England, and registered in the Secretary's office, unto the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and also to the several and respective freeholders within this Province, are and shall forever be deemed, esteemed, and reputed good and effectual Charters, Patents, and Grants authentick in the Law, against their Majesties, Their Heirs, and Successors, forever."

And in the second section it was provided:

"And be it further Enacted by the Authority aforesaid, That all the Charters, Patents, and Grants made, given, and granted, as aforesaid unto all and every the several and respective Corporations or Bodies Politick of the Cities, Towns, and Manors, and their successors, and also unto all and every the respective Freeholders, their Heirs and Assigns, forever, within this Province, are, to all Intents and Purposes whatsoever, hereby ratified and confirmed."

Section 36 of the first constitution of the state of New York contained this provision:

"And be it further ordained: That all grants of land within this state, made by the King of Great Britain, or persons acting under his authority, after the fourteenth day of October, 1775, shall be null and void; but that nothing in the Constitution contained shall be construed to affect any grants of land, within this state, made by the authority of the said King, or his predecessors, or to annul any charters to bodies politic by him, or them, or any of them, made prior to that date."

A similar one is found in section 18 of article 1 of the constitution of 1846. See upon this question of validity, in addition to the authorities heretofore quoted, *People* v. *Van Rensselaer*, 9 N. Y. 291, 346.

*Again, it is worthy of note that that [28 fact is apparent from the testimony in this case, which was noticed by the court of appeals as significant in the case of *Brookhaven* v. *Strong*, 60 N. Y. 56, 71, to wit, a long continued exercise and control over these submerged lands on the part of the town. Several entries taken from the records of the proceedings of the town were offered in evidence. One, dated

June 1, 1795, is as follows: "Whereas sundry person are making a practice of taking and carrying away clams and oysters from the harbors on the north side of the town of Huntington, for the prevention of which be it enacted and ordained by the trustees of the freeholders and commonalty of the town of Huntington, and it is hereby enacted and ordained by the authority of the same, that it any person or persons, after the 10th day of June, 1795, shall take and carry away out of any of the harbors of the north side of the township of Huntington any clams or oysters he or they, or any of them so offending, shall forfeit the sum of 40s. for every offense contrary to the true intent and meaning of this act, and shall be prosecuted," etc.; one substantially similar, of date, June 20, 1796. Subsequently, in 1803, 1810, 1818, 1823, 1828, 1833, 1838, 1844, and 1849 by-laws were passed, aimed with more or less directness of expression at restraint upon the "fishing, clamming, oystering," catching oysters, clams, and fish in the waters of the town of Huntington. It is not meant by this to imply that any of these by-laws specifically named Huntington Bay as a part of the waters belonging to the town of Huntington; all that is meant to suggest is that there was during those years a continued assertion of the right on the part of the town to control the catching of oysters in the waters of the town. Obviously, the planting of oysters was not then a matter much thought of, but from 1855 the occupation of the submerged lands for the purpose of the cultivation of the oysters seems to have attracted the attention of the town authori ies. Thus, on April 3, 1855, at a town meeting, this resolution was passed:

"*Resolved*, That all persons be prohibited from putting down stakes in any of the harbors of the town of Huntington to mark the lines of the oyster beds that will in any way obstruct fishing with nets, under the penalty of $12.50."

29] *On April 7, 1857, at a town meeting, the trustees were authorized "to make rules and regulations for the planting of oysters, receive applications, and grant permission to the inhabitants" of the town for planting oysters. On April 4, 1871, the town record contains this recital:

"At a town meeting, resolved that the trustees of this town be authorized, empowered, and directed to lease the lands immediately suitable for oyster beds in the bays and harbors belonging under the waters of the town of Huntington. Before doing so they shall take proper counsel therein as to the best and safest manner of leasing said grounds. None but residents have the privilege to said lease, and those residents having oysters already planted be entitled to the first privilege, and the trustees be required to give public notice for two weeks before adopting the resolution for the terms and manner of leasing."

And in the town records are found, subsequently to these entries, by-laws and resolutions of a similar import.

Still further, on May 10, 1888, the legislature of New York passed an act which is as follows:

"Section 1. All the right, title, and interest which the people of the state of New York have, if any, in and for the lands outside of and beyond low water mark under the waters of Huntington Bay, in the town of Huntington, Suffolk county, southerly of a line drawn from a granite monument now set near high water mark on the northerly point of Eaton's Neck, and west of the United States life saving station to a locust monument now set on Lloyd's Neck, which line runs on a course south fifty nine degrees, twenty minutes and twenty-five seconds west, and which is the line claimed by the trustees of the town of Huntington as the northerly line of their grants under colonial patents, is hereby ceded to the present trustees of the town of Huntington, Suffolk county, and their successors in office, for the purpose of oyster cultivation. Provided, nothing in this act shall be held to interfere with the rights and powers of the commissioners of the land office to grant all the right, title, and interest of the state to lands under water in said bay, to the owners *of [30 adjacent uplands for purposes of commerce or beneficial enjoyment, and nothing herein contained shall be construed as interfering with the rights of riparian owners; subject, however, and without prejudice to the legal rights, if any, of such persons as now have oysters planted on the lands aforesaid." N. Y. Laws, (111th Sess.) 1888, p. 494.

In respect to this cession the court of appeals in *People* v. *Lowndes*, 130 N. Y. 455, 461, said: "If the *locus in quo* was not within the colonial patent or grant it was the property of the state, and passed to the trustees of the town of Huntington by the legislative act of cession of May, preceding the time of the alleged offense." That was a case in which the defendant was prosecuted for a violation of section 441 of the penal code of the state of New York, which is as follows: "A person who, not being at the time an actual inhabitant and resident of this state, plants oysters in the waters of this state, without the consent of the owner of the same, or of the shore, or gathers oysters or other shellfish from their beds of natural growth, in any such waters on his own account, or for his own benefit, or the benefit of a non-resident employer, is guilty of a misdemeanor, punishable by imprisonment not exceeding six months, or by a fine not exceeding one hundred dollars, or both;" and the place at which the offense was charged to have been committed was in Huntington Bay. That case was, however, decided on the question of the sufficiency of the indictment, and perhaps, therefore, the quotation may be considered as simply dictum, but whether dictum or not, we think it is correct. Either the title to these submerged lands passed by virtue of the colonial grants to the town of Huntington, or else it was in the state of New York (*Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 [10: 997]; *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 [11: 565]; *Shively* v. *Bowlby*, *ante*, p. 331), and this act, whose validity seems not to be questioned, cedes all the right, title, and interest of the state in these lands to the town, so far at least as is necessary for the purpose of oyster cultivation.

It is clearly exclusive in its scope. Such is the plain import of its terms. Even if the lan-

31] guage were less clear, reliance *might be had on the rule of construction in respect to such grants laid down by the court of appeals. *Langdon* v. *New York*, 93 N. Y. 129, 144. "But when the sovereign grants land under water, which cannot in its natural state be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant, so as to make it effectual for some purpose. Such a grant may be made to give an exclusive right of fishery, or of navigation, or to enable the grantee to fill up the land for wharves and docks or other buildings. The purpose may be plainly expressed in the grant; if it be not, then the intent of the parties must be ascertained from the nature and situation of the land granted and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent."

Proper notice to quit was served upon the defendant, and hence it follows that the judgment was rightfully entered against him, unless he has shown some affirmative title or right in himself. He pleads possession and use of the premises for the purposes of oyster cultivation for more than twenty years, but in order to create a title springing out of possession such possession must be adverse and exclusive, and of that the defendant makes no pretense. There was in evidence an application made by him on October 10, 1887, to the commissioner of fisheries of the state of New York for a perpetual franchise for planting and cultivating shellfish on the premises, which application was denied, and in respect to it he testified:

"The land described in that exhibit are the land embraced in this suit. These are the lands I occupy now. I did not get any grant on that application. The town put in a demurrer. When I commenced to plant oysters on these grounds, I claimed that the bottoms were owned by the state. I do yet. I don't claim to own the ground at all. In the year 1867 I planted probably—well, I never measured. I staked off a square what I thought would be competent to hold 3000 bushels or 2500, the amount I had money enough to buy and plant it on it, indiscriminate of the number of acres. I didn't plant more than 3000 bushels then. I 32]did not plant *more than ten acres in 1867. I don't think I planted more than ten acres in 1868."

In other words, all that he claims is that he had an implied license from the state, but such license (if one existed) was subject to revocation, and was revoked by the notice served upon him by the plaintiff, to whom the state had ceded all his rights.

These are the material questions in the case, and in the decision of them there was no error. Therefore the judgment is affirmed.

Mr. Justice **White** was not a member of the court when this case was argued, and took no part in its decision.

ANTHONY F. SEEBERGER, Collector of Customs for the Port of Chicago, *Plff. in Err.*,

v.

DANIEL CASTRO.

(See S. C. Reporter's ed. 32-38.)

Action for illegal duties—tobacco scraps.

1. A purchaser from the importer, of imported goods, in bond, pending an appeal to the Secretary of the Treasury from an adverse ruling of the collector as to the amount of duties payable thereon, who afterwards, upon the affirmance of the collector's ruling pays the duties, can recover for such duties as are illegally assessed and paid thereon.
2. Clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured, in the process of such manufacture, not fit for any use except for cigarettes and smoking tobacco, are not manufactured tobacco within the meaning of the Tariff Act of 1883, and are not liable to a duty of forty cents per pound.

[No. 296.]

Submitted March 19, 1894. Decided April 16, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment in favor of the plaintiff, Daniel Castro, against the defendant Anthony F. Seeberger, Collector, for duties illegally exacted on certain importations of tobacco. *Affirmed.*

Statement by *Mr. Justice* **White:**

The defendant in error (plaintiff below) sued to recover duties which, he claimed, had been illegally exacted on certain importations of tobacco. The case, by stipulation, was submitted without the intervention of a jury. The court found *the facts to be as follows: [33 The Rayner & Baxter Cigar Company imported the tobacco in question, which consisted of "clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture, the said clippings and pieces not being fit for any use in the condition in which the same are imported, and their only use being to be manufactured into cigarettes and smoking tobacco." The collector assessed upon the tobacco a duty of forty cents per pound, under section 2502 of the Act of 1883, chapter 121, which took effect on March 3, 1883, including it within the terms of the fifth paragraph of Schedule F of that Act, which reads as follows: "Tobacco, manufactured, of all descriptions, and stem tobacco, not specially enumerated or provided for in this Act, forty cents per pound."

The importer seasonably protested, contending that the tobacco was not dutiable under the above paragraph of Schedule F, but was so under the seventh paragraph of the same, which reads as follows: "Tobacco, unmanufactured, not specially enumerated or provided

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest, protest how made, and its effect, see note to Greely v. Thompson, 13: 397.

for in this Act, thirty per centum ad valorem."

From an adverse ruling of the collector an appeal was duly brought to the Secretary of the Treasury. Pending this appeal, the importer sold the tobacco, in bond, to the plaintiff below, who, upon the affirmance of the collector's ruling by the Secretary, paid the duties, and in due time brought this suit to recover.

Upon the facts thus found the defendant asked the court to rule, first, that the plaintiff, as purchaser pending the decision of the Secretary, could not maintain the suit; second, that the defendant was, as a matter of law, entitled to a judgment. Reserving these questions, which were adversely decided, the defendant brings the case here.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for plaintiff in error.

No brief filed for defendant in error.

34] **Mr. Justice* **White** delivered the opinion of the court:

That a stranger, suing solely on an assignment of a claim from those who did not see fit to prosecute it themselves, cannot recover duties averred to have been illegally assessed is settled by *Hager* v. *Swayne*, 149 U. S. 242 [37: 719.] That case, however, has no application to the present one because the facts of the two are different. Indeed, in *Hager* v. *Swayne*, reference was made to this case as then reported. *Castro* v. *Seeberger*, 40 Fed. Rep. 531, and we said: "Castro had purchased the merchandise of the importer while it was in bond, and pending an appeal, and after the decision of the appeal paid the duties assessed in order to obtain possession of the property, and thereupon brought the suit, . . . the purchaser obtained an interest in the thing itself"—thus plainly distinguishing between the case of an assignment of a claim, as exemplified in *Hager* v. *Swayne*, and the case of an assignment of the thing, such as is here involved.

Whether such tobacco as that with which we are here concerned is manufactured, in the sense of the word as used in the Tariff Act of 1883, is a question which has given rise to some contrariety of opinion. Attorney General Brewster, on January 25, 1884, held that it was, reaching his conclusion by a comparison of the provisions of the Tariff Act with those of certain internal revenue laws, holding that the two were *in pari materia*, and hence that the classification of tobacco scraps as manufactured tobacco in the internal revenue laws must be taken to indicate the intention of Congress to include them under the head of manufactured tobacco in the tariff law. 17 Ops. Atty. Gen. 616. On the other hand, in *Cohn* v. *Spalding*, 24 Fed. Rep. 19, decided May 26, 1885, the Circuit Court for the Northern District of Illinois decided that scrap tobacco was not manufactured within the meaning of the Tariff Act of 1883. And in a still later case, which arose under the provisions of the Tariff Act of 1890 (*Sheldon* v. *United States*, 55 Fed. Rep. 818) it was held by the Circuit Court of Appeals for the Seventh Circuit that scraps like those now 35] *in question were manufactured tobacco within the meaning of that Act, the court calling attention to the fact that the scraps had a commercial value, and were the subjects of importation in the way of business.

It seems to us, however, that both the meaning of the word "manufactured" and the analogy of the internal revenue provisions require us to hold that these scraps are not manufactured tobacco. The court below found in this case that the scraps were "clippings from the ends of cigars and pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture; that said clippings and pieces are not fit for any use in the condition in which the same are imported, and that their only use is to be manufactured into cigarettes and smoking tobacco." It is thus evident that the clippings are the mere waste resulting from a process of manufacture, and not in themselves manufactured articles. In *Lawrence* v. *Allen*, 48 U. S. 7 How. 785, 794, 795 [12: 914, 917], the process of manufacturing was defined to be "making an article entirely by hand or machinery into a new form, capable of being used and designed to be used in ordinary life." A like view of what constitutes an article of manufacture had been previously announced by the Court of King's Bench: "The word 'manufacture' has been generally understood to denote either a thing made which is useful for its own sake and vendable as such," etc. *Rex* v. *Wheeler*, 2 Barn. & Ald. 349. In *Holden* v. *Clancy*, 58 Barb. 590, the test of whether an article was manufactured is thus defined: "A manufacture is defined as the process of making anything by art, or of reducing materials into a form fit for use by the hand or by machinery; and it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum or refuse of various kinds of manufactories is more or less valuable for certain purposes, and may be, and often is, the subject of sale; but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material. This is not the object of the process, and its quality is wholly subordinate and disregarded, when attention to it would interfere with the most profitable mode or material to *be used in the process[36 which is the main object of the manufacturer." Tested by either of these definitions, the tobacco in question is unmanufactured. To speak of it as "partly manufactured," and deduce a contention therefrom, is simply to assume the question at issue. It is equally unsound to divide the finding of facts so as to make it designate two distinct kinds of tobacco, thus: "First, 'clippings from the ends of cigars;' and, second, 'pieces broken from the tobacco of which cigars are manufactured in the process of such manufacture.'" The words "in process of such manufacture" qualify the whole sentence.

Resort to the provisions of the internal revenue laws regarding tobacco seems to us to strengthen rather than to militate against our conclusion. Various provisions of these laws have been brought to our attention: Rev. Stat. 3244, subd. 9, 3338; and the Act of March 1, 1879, chapter 125, section 14 (20 Stat. at L. 345) providing a substitute for Revised Statutes, § 3362. These are asserted to be *in pari materia*, and to show that the tobacco in

question was manufactured, within the meaning of the tariff statute, without regard to the general understanding of the word manufacture. We think the position unsound. The internal revenue laws referred to sought to accomplish two objects: First, the taxation of all forms of manufactured tobacco, including also the waste or scrap arising therefrom; and, second, the complete accounting by the manufacturer for all the product of his factory, including the waste. As waste was necessarily embraced in both objects, it was included in the provisions of the laws relied on. A detailed examination of the statutes will accentuate these views. The first of these provisions is that of section 61 of the Act of July 20, 1868, which reads as follows: "That upon tobacco and snuff which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected the following taxes: . . . On all refuse, scraps, and sweepings of tobacco, a tax of sixteen cents per pound." Here is an obvious distinction taken between tobacco, etc., "manufactured and sold" on the one hand, and "refuse, scraps, and sweep-
37] ings" on the other, *albeit the tax is the same on both. Its object, too, is plainly to tax tobacco of the various kinds named, in connection with their sale and removal "for consumption and use." The context of the section enforces this view. The tax is upon all tobacco manufactured, sold, or removed from the factory; and the provision as to refuse, scraps, etc., necessarily contemplates the regulation of the business of the factory, and not the grading of the tobacco.

The next section relied upon is section 62 of the same Act, which is as follows: "That . . . all manufactured tobacco shall be put up and prepared by the manufacturer for sale, or removal for sale or consumption, in packages of the following description, and in no other manner: . . . all smoking tobacco, all fine cut shorts which is passed through a riddle of 36 square meshes to the square inch, and all refuse scraps and sweepings of tobacco, in packages containing 2, 4, 8, and 16 ounces each." 15 Stat. at L. 152, 153. This section evidently has the same object as the first. The fact that it directs the manner in which the scraps and refuse shall be put up in the factory affords no evidence of a legislative determination that the scraps themselves are manufactured articles. Nor does section 59 of the same Act justify the interpretation which is sought to be placed upon it. On the contrary, it distinguishes scraps by fair implication from both manufactured and partially manufactured tobacco. Its language is:

"Every person whose business it is to manufacture tobacco or snuff for himself, or who shall employ others to manufacture tobacco or snuff, whether such manufacture shall be by cutting, pressing, grinding, crushing or rubbing of any leaf or raw tobacco, or otherwise preparing raw or leaf tobacco or manufactured or partially manufactured tobacco, or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco, resulting from any process of handling tobacco, shall be regarded as a manufacturer of tobacco."

The interpretation of this section, which would hold that scraps were manufactured tobacco, would render the provision *of the [38 section which relates to them absolutely useless. It would be a construction which would read out of the section by necessary implication, as unnecessary, the provision as to the waste or scrap tobacco found therein. Manufactured tobacco and partially manufactured tobacco had been already provided for. The waste or clippings must have been considered neither manufactured nor partially manufactured, since they were specially provided for after the manufactured and partially manufactured tobacco had already been regulated by the terms of the section. It follows, therefore, that if, under the rule of *pari materia*, we interpret the provision of the Tariff Act of 1883 along with the provision of the internal revenue acts, thus quoted, we could not hold the scraps or waste to be a manufactured article, unless we said that that which is neither manufactured nor partially manufactured was yet a manufactured article. We think the context of these sections makes it clear that their general purpose and object was to regulate the manufacture and disposition of all classes of tobacco, and that they conform by a fair construction and interpretation to the view that the scraps are neither a manufactured nor a partially manufactured article. We are here dealing with the waste or the scraps not from the internal revenue point of view, but as an article of commerce, separate from the manufacturer and the factory.

The judgment below is affirmed.

JESSE SPALDING, Collector for the District of Chicago, *Plff. in Err.*,
v.
DANIEL CASTRO.

(See S. C. Reporter's ed. 38, 39.)

Case followed—instruction to jury.

1. Seeberger v. Castro, *ante*, p. 624, followed.
2. Although an instruction to a jury may have been incorrect as a general proposition, yet if it was correct when applied to the case in hand, the judgment will not be reversed by reason of it.

[No. 297.]

Submitted March 19, 1894. Decided April 16, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment in favor of Daniel Castro, plaintiff, against Jesse Spalding, Collector, defendant, for duties illegally exacted on imported goods. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for plaintiff in error.

No brief filed for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

This case is covered by that of the same person against Seeberger, collector, just decided, *ante*, p. 624. The tobacco was like that imported in the former case, and was likewise assessed.

There was due protest by the importer, seasonable appeal to the Secretary of the Treasury, and, on his adverse ruling, a timely suit. The case was tried by a jury. The court instructed the jury that if they believed from the evidence that the tobacco in question required to have labor expended upon it in order to fit it for consumption, then it was unmanufactured tobacco, as claimed by the plaintiff, etc. Excepting to this ruling the case was brought here. Whatever may have been the correctness of the instruction as a general proposition, it was correct when applied to the case in hand. *Evanston* v. *Gunn*, 99 U. S. 660 [25: 306].

The judgment is affirmed.

39] S. D. WILSON, Treasurer of Routt County, *Plff. in Err.*,
v.
THE HALEY LIVE STOCK COMPANY.

(See S. C. Reporter's ed. 39-48.)

Waiver of exception—action for taking personal property—failure of proof—damages.

1. Defendant waives his exception to a refusal to direct a verdict in his favor at the close of plaintiff's evidence by proceeding to introduce testimony on his own behalf.
2. An action for taking and detaining personal property can only be maintained where plaintiff was the owner or entitled to the possession of the property at the time of the taking.
3. Where a cause of action, in its entire scope and meaning, is not proven, it is not a case of variance merely, but one of entire failure of proof.
4. In trespass for taking property, money paid to obtain its return is damages and cannot be recovered back where the plaintiff fails to maintain his action for the trespass.

[No. 832.]

Submitted March 30, 1894. Decided April 16, 1894.

IN ERROR to the Circuit Court of the United States for the District of Colorado, to review a judgment in favor of plaintiff, the Haley Live Stock Company, against S. D. Wilson, Treasurer, etc., *et al.*, defendants, for damages for the forcible seizure of a quantity of cattle, and the extortion from the plaintiff of certain moneys as a condition precedent to defendant's surrendering possession of the cattle to the plaintiff. *Reversed and case remanded for further proceedings.*

Statement by *Mr. Justice* **Brown:**

This was an action by the Haley Live Stock Company against Wilson and five others to recover damages for the forcible seizure on July 27, 1888, of 700 head of cattle, and the extortion from the plaintiff of $12,725.50 as a condition precedent to the defendants surrendering possession of the cattle to the plaintiff.

The answer of Wilson and Breeze, two of the defendants, denied the incorporation of the plaintiff, as well as all the allegations of the complaint and set up in defense that Wilson, as treasurer of Routt county, and Breeze as his assistant, seized these cattle under a warrant for taxes for the year 1884 against one Ora Haley, by which warrant defendant Wilson was commanded to make the said sum of $12,725.50 out of the personal property of Haley, and by virtue whereof he distrained upon these cattle, and detained the same from July 27 to August 21, when Haley voluntarily paid the amount due. During this time defendant Wilson was enjoined by Haley from selling them, and the cattle were properly cared for and in better condition than when seized. A similar answer was filed by the other defendants.

Upon the trial it appeared that articles of incorporation of the Haley Live Stock Company, under the laws of Iowa, signed by Ora Haley and Samuel Hass, were filed for record in the county recorder's office of Pottawattamie county, Iowa, on July 24, 1888; in Carbon county, Wyoming, on July 30; and in Routt county, Colorado, on August 10; and in the office of the secretary of state of Iowa on August 29, though nothing appears to have been filed in the office of the secretary of state of Colorado. The articles provided for a capital stock of $300,000, divided into 3000 shares; that the corporation should begin business on August 1, 1888, and that Haley should be superintendent and manager of the company.

*The cattle were seized on July 27, and 41 released on August 21, upon payment of $12,725.52. At this time Wilson, as treasurer, executed the following receipt:

"Yampa, Routt Co., Colo., Aug. 21, 1888.

"Received of Wilson Rankin for Ora Haley a certified check of Frank X. Aicher, on the German National Bank of Denver, Colorado. . . . This payment, it is understood, is paid in full settlement for the taxes of Ora Haley for the year 1884 under protest, and to release cattle now distrained for said taxes."

Haley testified that the Haley Live Stock Company became the owner of these cattle about the 24th of July by purchase from one Timothy Kinney; that Haley organized the company with a capital stock of 3000 shares, of which he owned 2990, the remaining ten shares being owned by four others; that the consideration for the cattle "was somewhere near the capital stock of the corporation;" that he, Haley, originally owned the cattle and had sold them to Kinney for about $300,000, taking his note and a chattel mortgage for the amount; that subsequent to this seizure Kinney brought suit in equity to enjoin the sale of the cattle for the taxes, upon the hearing of which suit both Haley and Kinney testified that the cattle were Kinney's property at the time of the seizure; that the sale to Kinney was bona fide; but that it was understood from

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NOTE.—*As to exception, when must be taken to be available on review*, see note to Phelps v. Mayer, 14: 643.

As to what particularity in exceptions is necessary in order to review in appellate court, see note to Moore v. Bank of Metropolis, 10: 172.

That in equity cases, admission of illegal evidence is not, of itself, ground of reversal or of bill of exception, see note to Field v. United States, 9: 94.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, see note to Parks v. Turner, 13: 882.

the beginning that just as soon as the company was formed it was to take the property, Haley being advised "that that was a better method to get a corporation and have the property conveyed to it from a third party;" that the cattle were transferred to the company for the purpose of litigating the taxes in the Federal court. Haley further testified that "the minute the corporation had formed and was in shape to acquire title to it, it was the understanding between Hass, Kinney and myself that that property was to be the property of the Haley Live Stock Company again."

"Q. Then the delivery was a mental operation, was it not?

"A. Yes; I expect it was.

42] *"Q. You heard your affidavit read, made on the 4th of August, in which you testified that that property belonged to Timothy Kinney and was then in his possession. Was that true or was it false?

"A. Well, it was. He was one of the possessors. There had been no formal delivery of the property; only this understanding with the corporation."

It further appeared that, about 1885, he obtained an injunction against the collection of this tax, which was dissolved; that he then obtained a second injunction, which was dissolved by the supreme court, and the suit dismissed (*Breeze* v. *Haley*, 10 Colo. 5) that he then obtained a third injunction, which was again dissolved, and the suit dismissed (*Breeze* v. *Haley*, 11 Colo. 351) that he thereafter obtained a fourth and a fifth injunction, both of which were dissolved by the district court of Arapahoe county, Colorado; that he took one of these cases to the Supreme Court of the United States (*Haley* v. *Breeze*, 144 U. S. 130 [36: 373]) and that he obtained a release of the cattle under all these injunctions, except the last one.

The testimony of Wilson Rankin for the plaintiff was to the effect that he was in charge of the cattle at the time they were seized; that at the time of the payment he demanded a receipt in the name of the Haley Live Stock Company, which was refused, and a receipt taken in the name of Haley; that at the time of the seizure he was working for Kinney and knew nothing about the Live Stock Company; that he got a cheque from Haley, and that the first time he ever mentioned to Wilson or any one else the name of the company was when he asked for the receipt.

Defendants offered testimony tending to support the allegations of their answer; produced the tax roll in evidence; and showed that the Live Stock Company was never heard of by them until the day the taxes were paid and the cattle released.

The court submitted to the jury the question whether the money was paid by the Haley Live Stock Company or by Mr. Haley himself. The jury returned a verdict for $5266.92, upon which judgment was entered, and defendants 43] sued out this writ of error, assigning as error certain questions arising upon the admission of testimony and the charge of the court.

Messrs. **Daniel E. Parks and H. B. Johnson,** for plaintiff in error:

The question of the validity of this tax had twice been before the supreme court of Colorado.

Breeze v. *Haley*, 10 Colo. 5, 11 Colo. 351.

These records should have been admitted under the pleadings as they stood, and without any special plea of *res adjudicata*.

Campbell v. *Rankin*, 99 U. S. 261 (25: 435); *Mutual L. Ins. Co.* v. *Harris*, 97 U. S. 331 (24: 959).

The adjudication in *Breeze* v. *Haley*, 10 Colo. 5, was conclusive, not only as to all matters actually litigated, but as to all such matters as might have been brought forward and litigated in that cause.

Breeze v. *Haley*, 11 Colo. 351; *Stark* v. *Starr*, 94 U. S. 477 (24: 276).

The payment of Haley's taxes, even if made by the company, would not give a cause of action, even against Haley.

McGee v. *San Jose*, 68 Cal. 91; *Brown* v. *Chesterville*, 63 Me. 241; *Wilkes* v. *Harper*, 1 N. Y. 596; 18 Am. & Eng. Enc. Law, 187.

As this money was paid voluntarily, it cannot be recovered back.

18 Am. & Eng. Enc. Law, 215.

In the absence of compulsion, a payment under protest is nevertheless, voluntary payment.

Lamborn v. *Dickinson County Comrs.* 97 U. S. 181 (24: 923); *Union Pac. R. Co.* v. *Dodge County Comrs.* 98 U. S. 541 (25: 196).

Mere irregularities in procedure give no cause of action.

Cooley, Taxn. 808; *Hanson* v. *Haverhill*, 60 N. H. 218; *Bailey* v. *New York Cent. & H. R. R. Co.* 89 U. S. 22 Wall. 604 (22: 849).

It was the duty of the lower court to deny its jurisdiction, and it is the duty of this court to do so.

Nashua & L. R. Corp. v. *Boston & L. R. Corp.* 136 U. S. 356 (34: 363).

The case is not distinguishable from any other case where property is conveyed to an individual for the purpose of litigation in the Federal courts for the benefit of a party not entitled to invoke their jurisdiction.

Lanier v. *Nash*, 121 U. S. 404 (30: 947); *Morris* v. *Gilmer*, 129 U. S. 315 (32: 690); *Little* v. *Giles*, 118 U. S. 596 (30: 269); *Barry* v. *Edmunds* 116 U. S. 550 (29: 729); *Farmington* v. *Pillsbury*, 114 U. S. 138 (29: 114); *Cosgrove* v. *Amador & S. Canal Co.* 118 U. S. 58 (30: 72).

Where the change of title is made for the sole purpose of enabling the real owner to litigate in the Federal courts it will not sustain jurisdiction.

Hancock v. *Hillegas*, 2 U. S. 2 Dall. 380 (1: 424); *Marfield* v. *Levy*, 4 U. S. 4 Dall. 33 (1: 854); *Jones* v. *League*, 59 U. S. 18 How. 76 (15: 263); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 (28: 462); *King Iron Bridge & Mfg. Co.* v. *Otoe County*, 120 U. S. 225 (30: 625); *Grace* v. *American Cent. Ins. Co.* 109 U. S. 278 (27: 932); *Blacklock* v. *Small*, 127 U. S. 96 (32: 70); *Williams* v. *Nottaway*, 104 U. S. 209 (26: 719); *Metcalf* v. *Watertown*, 128 U. S. 586 (32: 543).

The charge declared that the original treasurer's roll was void for want of the dollar mark. This was error.

State v. *Eureka Consol. Min. Co.* 8 Nev. 15; *Chickering* v. *Faile*, 38 Ill. 312; *Elston* v. *Kennicott*, 46 Ill. 187; *Jenkins* v. *McTigue*, 22 Fed. Rep. 148; *Chamberlain* v. *Taylor*, 36 Hun, 24;

Sawyer v. *Gleason*, 59 N. H. 140; *American Tool Co.* v. *Smith*, 14 Abb. N. C. 378, affirmed in 96 N. Y. 670; *Cahoon* v. *Coe*, 52 N. H. 518, 524; *Collins* v. *Welch*, 38 Minn. 82; *Eppinger* v. *Kirby*, 23 Ill. 521, 76 Am. Dec. 709; *Ensign* v. *Barse*, 107 N. Y. 329; *Spokane Falls* v. *Browne*, 3 Wash. 84; *New Orleans* v. *Day*, 29 La. Ann. 416; *Hopkins* v. *Young*, 15 R. I. 48.

The omission of the dollar mark is at most a mere irregularity, error, or omission which is cured by our statute.

Buck v. *People*, 78 Ill. 566; *Thatcher* v. *People*, 79 Ill. 606; *Bers* v. *People*, 83 Ill. 493; *Fisher* v. *People*, 84 Ill. 496; *Lyle* v. *Jacques*, 101 Ill. 644.

Where part of a tax is legal and part is illegal, the legal part will be sustained if the parts are capable of being distinguished.

O'Kane v. *Treat*, 25 Ill. 557; *Briscoe* v. *Allison*, 43 Ill. 291; *State* v. *Allen*, 43 Ill. 456; *Allen* v. *Peoria & B. Valley R. Co.* 44 Ill. 85; *People* v. *Nichols*, 49 Ill. 517; *Mix* v. *People*, 72 Ill. 241; *Genther* v. *Butler*, 36 Iowa, 604; *Parker* v. *Sexton*, 29 Iowa, 421; *Eldridge* v. *Kuehl*, 27 Iowa, 160; *Corning Town Co.* v. *Davis*, 44 Iowa, 638; *Sully* v. *Kuehl*, 30 Iowa, 275; *Hurley* v. *Powell*, 31 Iowa, 64; *Upton* v. *Kennedy*, 36 Mich. 215; *Silsbee* v. *Stockle*, 44 Mich. 561; *Wilson* v. *Seavey*, 38 Vt. 221-230.

An action to recover taxes paid under protest will not lie against the officer who collected the same by virtue of a tax warrant, as such warrant has the force and effect of a judgment.

Mulford v. *Sutton*, 79 N. C. 276; *Dickens* v. *Jones*, 6 Yerg. 483, 27 Am. Dec. 488; *Crutchfield* v. *Wood*, 16 Ala. 702; *Lewis County* v. *Tate*, 10 Mo. 650; *Haffin* v. *Mason*, 82 U. S. 15 Wall. 671 (21: 196); *Erskine* v. *Hohnbach*, 81 U. S. 14 Wall. 613 (20: 745); *Bailey* v. *New York Cent. & H. R. R. Co.* 89 U. S. 22 Wall. 604 (22: 840); Mechem, Pub. Off. § 690, and cases cited.

Mr. **W. T. Hughes**, for defendant in in error:

Perishable property, beef, cattle, were mischievously seized, and were held to vex, harrass and injure, and to secure a release of these, the money was paid.

Sasportas v. *Jennings*, 1 Bay, 470; *Spaids* v. *Barrett*, 57 Ill. 290, 11 Am. Rep. 10; *Lafayette & I. R. Co.* v. *Pattison*, 41 Ind. 312.

Money had and received will lie for the recovery of a void tax at common law.

Lynde v. *Melrose*, 10 Allen, 49; *Chapman* v. *Brooklyn*, 40 N. Y. 372; *Feyser* v. *New York*, 70 N. Y. 497, 26 Am. Rep. 624; Burroughs, Taxn. 440; Cooley, Taxn. 566.

A statute in Colorado expressly allows such recovery.

Hurd v. *Hamill*, 10 Colo. 174.

The tax in this case was void; its foundation was the tax roll.

This is the judgment for taxes in Colorado, and the judgment for taxes must be certain.

Lawrence v. *East*, 20 Ill. 338, 71 Am. Dec. 274.

In such proceedings the construction should be beneficent for the taxpayers.

State v. *Eureka Consol. Min. Co.* 8 Nev. 15; *Sawyer* v. *Gleason*, 59 N. H. 140; *Cahoon* v. *Coe*, 52 N. H. 518, 524; *Jenkins* v. *McTigue*, 22 Fed. Rep. 148; *Chamberlain* v. *Taylor*, 36 Hun, 24; *American Tool Co.* v. *Smith*, 14 Abb. N. C. 378, 32 Hun, 121; *Ensign* v. *Barse*, 107 N. Y. 329; *Elston* v. *Kennicott*, 46 Ill. 202; *Tilton* v. *Oregon Cent. Military Road Co.* 3 Sawy. 22; *Woods* v. *Freeman*, 68 U. S. 1 Wall. 398 (17: 543); *Braly* v. *Seaman*, 30 Cal. 610; *People* v. *San Francisco Sav. Union*, 31 Cal. 132; *Tidd* v. *Rines*, 26 Minn. 201; *Randolph* v. *Metcalf*, 6 Coldw. 400.

Every presumption is against inferior and statutory tribunals.

Piper v. *Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *Runkle* v. *United States*, 122 U. S. 543 (30: 1167); *Gomer* v. *Chaffe*, 6 Colo. 314.

Powers vested by a constitution in designated officials cannot be exercised by other and different officials.

People v. *Maynard*, 14 Ill. 420; *Dennett's App.* 32 Me. 508, 54 Am. Dec. 602; *Newland* v. *Marsh*, 19 Ill. 376.

Curative statutes only apply to immaterial error, not material error, or nullities.

People v. *Seymour*, 16 Cal. 332, 76 Am. Dec. 521.

A ministerial officer is protected by his process.

Savacool v. *Boughton*, 5 Wend. 170, 21 Am. Dec. 181; *Grace* v. *Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Erskine* v. *Hohnbach*, 81 U. S. 14 Wall. 613 (20: 745); *Haffin* v. *Mason*, 82 U. S. 15 Wall. 671 (21: 196).

It is necessary under all systems of pleadings to show a statutory fact.

Russell v. *Mann*, 22 Cal. 182; *Williams* v. *Hingham & Q. Bridge & Turnp. Corp.* 4 Pick. 341; *United State* v. *Morris*, 23 U. S. 10 Wheat. 246 (6: 314).

Collecting a tax on a description which is no description constitutes the collector a trespasser *ab initio*.

Six Carpenters' Case, 1 Smith, Lead. Cas. (7th Am. ed.) 274-279, *notes*; *Malcolm* v. *Spoor*, 12 Met. 279, 46 Am. Dec. 675.

Regularity of process is necessary to protect a tax collector.

Cooley, Taxn. (3d ed.) 800, and cases cited; Mechem, Pub. Off. 690; 1 Dill. Mun. Corp. 237, *note*; *State* v. *McNally*, 74 Me. 210.

Aider by verdict or pleading over, never supplies the absence of material allegations.

Reg v. *Waters*, 1 Den. C. C. 356; *Reg* v. *Waverton*, 17 Q. B. 562.

There can be no parol levy of taxes; they depend on a record, rightly made, made by the right officials.

Moser v. *White*, 29 Mich. 59, 60; *Re Powers*, 29 Mich. 504; *Iverslie* v. *Spaulding*, 32 Wis. 395; *Polk* v. *Rose*, 25 Md. 153, 89 Am. Dec. 773.

Process must have come into the collector's hands with regularity upon its face.

Henry v. *Bell*, 75 Mo. 194; *Leachman* v. *Dougherty*, 81 Ill. 324.

Res adjudicata must be pleaded in Colorado.

Hax v. *Leis*, 1 Colo. 187; *Breeze* v. *Haley*, 11 Colo. 351; *Bank of United States* v. *Beverly*, 42 U. S. 1 How. 151 (11: 82).

New and affirmative matter must be pleaded.

De Votie v. *McGerr*, 14 Colo. 577.

Opinions of courts—reasons for a judgment have nothing to do with showing what was adjudicated.

Cohens v. *Virginia*, 19 U. S. 6 Wheat. 399 (5: 290); *Uhlfelder* v. *Levy*, 9 Cal. 608, 615;

Union Pac. R. Co. Stewart, 95 U. S. 284 (24: 432).

Mr. Justice **Brown** delivered the opinion of the court:

We shall not find it necessary to dispose of all the errors assigned to the action of the court below, as many of them are not properly presented by the record.

1. Upon the conclusion of the plaintiff's testimony, defendants moved the court to direct a verdict in their favor upon several grounds, among which were that the organization of the plaintiff corporation was fraudulent, and solely for the purpose of invoking the jurisdiction of the Federal court, that the property in question was never conveyed to the plaintiff until after the trespass was committed, and therefore it could not sue for the same; that the pretended conveyances from Haley to Kinney and from Kinney to plaintiff were without consideration and fraudulent; and there had been no delivery of the property to the plaintiff prior to the alleged trespass. The court denied this motion, and the defendants excepted. They did not, however, stand upon their exceptions, but proceeded to introduce testimony in their own behalf, and thereby, as we have repeatedly held, waived their exceptions. *Bogk* v. *Gassert*, 149 U. S. 17, 23 [37: 631, 634]. Nor did they renew their motion upon the conclusion of the entire testimony, as they might have done. This disposes of the third assignment of error, "that the court erred in overruling the motion of the defendants, made at the conclusion of the evidence of plaintiff, to instruct the jury to find a verdict for defendants." As the fourth, fifth, and sixth assignments are only to the opinion of the court in denying such motion, they must share the fate of the third. 44] In addition to this, *however, the reasons given by the court for its action upon the principal motion are not the proper subjects of exception. If the exception was improperly overruled, the reasons given by the court for its action are of no consequence.

2. There was an exception taken, however, to the following extract from the charge, which is also assigned as error, namely: "That if you believe from the evidence that this money was paid over by the Haley Live Stock Company, and not by Mr. Haley himself, that then the plaintiff would have the right to recover it back as having been exacted under circumstances which showed no authority upon the part of Mr. Wilson to get it."

This charge must be taken in connection with the pleadings in the case, and can only be justified upon the theory that, consistently with the allegations of the complaint, plaintiff had a right to recover, if the money paid to obtain the release of the cattle was paid by the Haley Live Stock Company, and not by Mr. Haley himself. It is true that this portion of the charge was excepted to upon the ground that it assumed the invalidity of the tax proceedings; but, as it went to the foundation of the action, we think it may be construed as raising the same question that was raised at the conclusion of the plaintiff's testimony, viz. the right to recover upon the allegations of the complaint, and the admitted facts of the case.

The gist of the complaint is contained in the 5th paragraph, which is as follows: "That on or about July 27, 1888, the defendants, by force and arms, seized and took from the plaintiff about seven hundred head of beef cattle, which were bunched up and were being driven to market by plaintiff, and that, after seizing and taking from plaintiff said cattle, defendants drove said cattle great distances, and kept them bunched together, and greatly injured said cattle, and caused them to deteriorate and lose flesh, until on August 21, 1888, plaintiff was compelled to pay defendants a sum demanded by them of plaintiff to wit, $12,725.50, as a condition precedent to defendants surrendering possession of said cattle to plaintiff."

This is, in its nature, a count in trespass, *de bonis asportatis*, *for the taking and detain [45 ing of personal property, and can only be supported upon the theory that plaintiff was either the owner of the cattle, or entitled of right to the possession of them at the time of the trespass complained of. 1 Chitty, Pl. 189.

The allegation that plaintiff was compelled to pay defendants a large sum of money to obtain the release of the cattle is, to all intents and purposes, an allegation that plaintiff suffered this amount of damages by reason of the unlawful seizure of its cattle, in addition to the damages suffered in driving said cattle great distances, keeping them bunched together, and causing them to deteriorate and lose flesh. Now, there is no evidence which would justify a jury in finding that plaintiff was the owner or entitled to the possession of the cattle until some time after the 27th of July, when the trespass is alleged to have been committed. By the articles of incorporation of the Haley Live Stock Company it was not authorized to begin business until the first day of August, 1888; and although these articles were filed in the county recorder's office of Pottawattamie county, Iowa, as early as July 24, they were not filed for record in the state of Colorado until August 10, fourteen days after the trespass was committed. In addition to this it appears that, in the suit in replevin instituted by Kinney against these same defendants, Wilson and Breeze, to obtain possession of these cattle, Haley, purporting to act as agent for Kinney, made affidavit on August 4 that Kinney was the owner of and was then lawfully entitled to the possession of the cattle in question.

Notwithstanding this, Haley swore that the Live Stock Company, of which he himself was practically the sole incorporator, became the owner of these cattle on the 24th of July, by purchase from Kinney, though he admits there was no formal delivery or transfer of possession. The truth seems to be that the company was organized for the sole purpose of bringing this suit as a nonresident; that Haley swore that the cattle became the property of the company on or about July 24 simply because the company filed its articles of incorporation in Pottawattamie county, Iowa, upon that day; that no *purchase was ever act-[46 ually made of these cattle by the company, at least until long after the date of the seizure, and, as Haley admits, the delivery and sale were only a mental operation, and if the company ever took title at all, it was long after the date of the alleged trespass.

Clearly there was nothing in any of these

transactions that could give to the company the right to sue for the trespass committed in the seizure of these cattle on July 27. The circuit court held that the plaintiff had not acquired the title or possession at that time, and hence could not maintain an action for the seizure of the cattle and the loss accruing from that act. The court was, however, of opinion that if it could assume that the plaintiff paid the money for Kinney, or whoever was the owner of the cattle at the time, to secure the release of them, with the view of acquiring property in them, it might maintain an action for the money paid for that purpose; that the fact that the plaintiff was a stranger to the proceeding to collect the taxes was not material; and that, if the taxes were void, a stranger paying the amount for the use of the person against whom it was levied would be able to recover the money. We concur in its opinion that the plaintiff could not maintain an action for the trespass; but we think it was in error in holding that the plaintiff might continue the action for the recovery of the money paid to obtain the release of the cattle. As before stated, this was a mere item of the damages occasioned by the seizure. The gist of the action was the trespass, and if the plaintiff was not able to maintain that action, it fell to the ground, and carried with it all the damages incidental thereto. We are not called upon to determine whether, under the code of civil procedure of the state of Colorado, the court might or might not have permitted the action of trespass to be turned into one for money had and received, and the plaintiff to recover upon the theory that the cattle had, before the payment of the money become its property, and that such payment was made for the purpose of obtaining its release, and was, therefore, not voluntary. It is sufficient to say that we know of no system of pleading which enables a party to declare in trespass *de* 47] *bonis asportatis*, and *without at least an amendment of his complaint, recover as upon a count for money had and received.

By section 78 of the Colorado Code of Civil Procedure it is provided that "if, upon the trial of an action before the court or jury, the evidence shall vary from the allegations of the pleadings, and either party is surprised thereby, he shall be allowed, on motion and showing cause therefor, and on such terms as the court may prescribe, to amend his pleadings to conform to proofs." No such amendment, however, was made in this case. While, undoubtedly, under the system of code pleading, a technical variance between the allegations and the proof is not deemed material, unless the adverse party is prejudiced thereby, still, where a cause of action or defense is not proven, not merely in some particular, but in its entire scope and meaning, it is treated by the authorities of those states, not as a case of variance merely, but as an entire failure of proof. See *Volkening* v. *DeGraaf*, 81 N. Y. 268, 12 Jones & S. 424; *Decker* v. *Saltzman*, 59 N. Y. 275. In *Degraw* v. *Elmore*, 50 N. Y. 1, it is held distinctly that the code does not authorize a recovery where the complaint alleges facts showing a cause of action in tort, by proving on the trial a cause of action in contract. To the same effect are *Ross* v. *Mather*, 51 N. Y. 108; *Walter* v. *Bennett*, 16 N. Y. 250; *Belknap* v. *Sealey*, 14 N. Y. 143, 67 Am. Dec. 120; *Bernhard* v. *Seligman*, 54 N. Y. 661; *Barnes* v. *Quigley*, 59 N. Y. 265; *Farmer* v. *Cram*, 7 Cal. 135.

If in fact the cattle continued to be the property of Kinney or Haley up to the time the money was paid, it is difficult to see upon what theory a recovery could be permitted at all, since in such case the payment by the Haley Live Stock Company would be wholly voluntary. *Lamborn* v. *Dickinson County Comrs.* 97 U. S. 181, 185 [24: 926, 928]. If, upon the other hand, the cattle had become the bona fide property of a bona fide corporation, it is possible that such corporation might sustain an action for money paid for the release of its property, even though it were organized for the purpose of carrying the litigation into the Federal courts. *Seeberger* v. *Castro*, *ante*, p. 624. The difficulty in this connection is to find any tangible *evidence that [48 the Live Stock Company paid this tax, or had any money with which to pay it. The proof was that Haley borrowed of one Aicher the money to pay these taxes, giving him his own notes for the amount, while Aicher gave to him a cheque which he indorsed personally and handed to the county treasurer. The name of the Live Stock Company was not used in the transaction, and at this time it had opened no books, had no money and no account at a bank. In fact, the Haley Live Stock Company seems to have been a mere *alias* for Haley. The fact that Haley may have intended to sell the cattle as the property of the company and pay his note to Aicher from the proceeds, does not put the company in the position of an original payer.

We think the court was in error in submitting to the jury the question who paid these taxes, both because the pleadings did not justify it and because there was no proper evidence that plaintiff paid them. The judgment must, therefore, be reversed, and the case remanded for further proceedings in conformity with this opinion.

UNITED STATES, *Appt.*
v.
SIDNEY S. PRIDGEON.

(See S. C. Reporter's ed. 48-64.)

Horse stealing in Oklahoma — indictment — valid sentence — Act of Feb. 15, 1888 — courts of Oklahoma — sentence how far legal — habeas corpus.

1. Horse stealing on November 12, 1890, in the Indian country, within the boundaries of Oklahoma

NOTE.—*As to jurisdiction of United States courts over common law offenses*, see note to United States v. Coolidge, 4:124.

As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of, see note to United States v. Hamilton, 1:490.

As to what questions may be considered on habeas corpus, see note to Ex parte Carll, 27:288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12:581.

territory, as defined by the Act of Congress of May 2, 1890, was not a crime against the United States, punishable under the Act of Congress of February 15, 1888.

2. An indictment in the District Court for the First Judicial District of Logan County, Oklahoma territory, and for the Indian country attached thereto, for judicial purposes, found at the September term, 1890, for horse stealing, is not fatally defective on collateral attack by writ of habeas corpus in that it lays the venue of the offense "at and within that part of the territory of Oklahoma attached for judicial purposes to Logan county," with a description of territory which includes part of Oklahoma and part of the Cherokee Outlet not in Oklahoma, and avers the same to be "then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America."

3. The sentence of the District Court for the First Judicial District of Logan County, Oklahoma territory, and for the Indian country attached thereto, for judicial purposes, on a conviction under an indictment for horse stealing, and the commitment of the prisoner in accordance therewith, are not void by reason of the fact that they included as part of his punishment during his imprisonment in the Ohio penitentiary, confinement at hard labor.

4. The Act of February 15, 1888, was superseded in Oklahoma territory by the Act of May 2, 1890, adopting the criminal code of Nebraska as a provisional code for the territory.

5. The courts created for the territory of Oklahoma sit as territorial courts to administer the laws of the territory and as courts of United States to administer the laws of the United States.

6. A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable.

7. Under a writ of habeas corpus unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge.

[No. 1070.]

Submitted Mar. 13, 1894. Decided Apr. 16, 1894.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, of questions for the decision of this court in a proceeding by habeas corpus, issued by the United States Circuit Court for the Southern District of Ohio, Eastern Division, upon which that court discharged the petitioner, Sidney S. Pridgeon, from confinement under a conviction for horse stealing in the District Court for the First Judicial District of Logan County, Oklahoma, and from which decision the United States appealed to the said Circuit Court of Appeals. *Questions answered in the negative.*

See same case below, 57 Fed. Rep. 200.

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, Jr.,** *Solicitor Gen.*, for appellant.

Messrs. **D. K. Watson,** *A. H. Johnson* and *E. C. Irvine* for appellee.

Mr. Justice **Jackson** delivered the opinion of the court:

At the September term, 1890, of the District Court for the First Judicial District of Logan County, Oklahoma territory and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States of America, the appellee, Sidney S. Pridgeon, was regularly indicted for horse stealing by the grand jurors of the United States of America, within and for Logan county and that part of the Indian country attached thereto for judicial purposes, after having been first duly sworn, impaneled, and charged to inquire of offenses against the laws of the United States committed therein. He was thereafter tried and convicted of the offense with which he was charged, and the court thereupon, on February 12, 1891, entered judgment upon the conviction as follows, that "the said Sidney S. *Pridgeon, for the said of [50 fense by him committed, be imprisoned in the Ohio state penitentiary at Columbus (and confined at hard labor) for the term of five years, said term to begin at 12 o'clock M. February 12, 1891, and to pay the costs of this prosecution, amounting to the sum of two hundred and thirty two dollars and fifty-three cents, and to stand committed until the amount of said costs shall have been fully paid."

In pursuance of this sentence Pridgeon was transported to and confined in the Ohio state penitentiary, in which the usual discipline for prisoners confined therein includes "hard labor."

On July 7, 1893, Pridgeon applied to the United States Circuit Court for the Southern District of Ohio, Eastern Division, for a writ of habeas corpus to be discharged from the custody of the warden of the state penitentiary, alleging in his petition that he was wrongfully restrained of his liberty, first, because the court which tried, convicted, and sentenced him had no jurisdiction in the premises; and, second, that the sentence imposed was beyond the power and jurisdiction of the court, and therefore void. Upon the hearing of the petition, the circuit court, without passing upon the question of jurisdiction of the court which imposed the sentence, held that the prayer of the petitioner should be granted, for the reason that the sentence should have been for imprisonment alone, and that the imposition of "hard labor" as a part of the punishment rendered the whole sentence void, and thereupon the petitioner was discharged. *Re Pridgeon*, 57 Fed. Rep. 200. From this decision the United States appealed the case to the United States Circuit Court of Appeals for the Sixth Circuit. That court, in view of the important questions arising upon the record, and the doubt which it entertained as to the correct decision thereof, certified to this court the following questions:

"First. Was horse stealing on November 12 1890, in the Indian country, within the boundaries of Oklahoma territory, as defined by the Act of Congress passed May 2, 1890, a crime against the United States, and punishable under the Act of Congress passed February 15, 1888, denouncing horse stealing in the Indian territory?

*"Second. (Assuming the first question [51 is answered in the negative.) Was the indictment against Pridgeon fatally defective on collateral attack by writ of habeas corpus in that it lays the venue of the offense 'at and within that part of the territory of Oklahoma attached for judicial purposes to Logan county,' with a description of territory which includes part of

Oklahoma and part of the Cherokee Outlet not in Oklahoma, and avers the same to be 'then and there Indian country, and a place then and there under the sole and exclusive jurisdiction of the United States of America ?'

"Third. Are the sentence of Pridgeon and his commitment in accordance therewith void by reason of the fact that they included as part of his punishment during his imprisonment in the Ohio penitentiary confinement at hard labor?"

Assuming that the first question certified has reference to such parts of the Indian country as were embraced within the boundaries of Oklahoma territory, and formed a part thereof, as defined and established by the Act of May 2, 1890 (26 Stat. at L. 81) it admits of little or no doubt that this question must be answered in the negative. Indeed, the Solicitor General, on behalf of the United States, frankly and properly concedes that the Act of February 15, 1888 (25 Stat. at L. 33) (the first section of which provides "that any person hereafter convicted in the United States courts having jurisdiction over the Indian territory, or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass, or mule, when said theft is committed in the Indian territory, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than fifteen years, or by both such fine and imprisonment, at the discretion of the court") was superseded by the Act of May 2, 1890, with respect to so much of the Indian territory as was included within the boundaries and made a part of the Oklahoma territory.

The Act of May 2, 1890, which created the territory of Oklahoma out of part of the Indian territory, after defining the territorial limits of the new territory, and vesting the executive power thereof in a governor; the legislative power in the governor, and a legislative assem-[52] bly; the judicial power in *a supreme court, district courts, probate courts, and justices of the peace, provided by the 11th section thereof, that certain named chapters and provisions of the Compiled Laws of the state of Nebraska, in force Nov. 1, 1889, including part 3, entitled the Criminal Code, "in so far as they are locally applicable, and not in conflict with the laws of the United States or with this Act, are hereby extended to, and put in force in, the territory of Oklahoma until after the adjournment of the first session of the legislative assembly of said territory."

This provision of the Act had the effect of establishing for the territory of Oklahoma, until the first meeting and adjournment of its legislature, the criminal code of Nebraska. Among the criminal laws thus provisionally put in force in Oklahoma until after the adjournment of the first session of the legislature were sections 117 and 498 of the Nebraska Criminal Code, which provides that the punishment for horsestealing shall be imprisonment in the penitentiary for not more than ten years and for not less than one year, and "in all cases when any person shall be convicted of any offense, by this code declared criminal and made punishable by imprisonment in the penitentiary, the court shall declare in their sentence for what period of time within the respective periods prescribed by law such convict shall be imprisoned at hard labor in the penitentiary."

This criminal code remained in force from May 2, 1890, until December 24, 1890, when the first territorial legislature of Oklahoma adjourned. It thus clearly appears that the only law by which horse stealing within the territorial limits of Oklahoma, as defined by the Act of May 2, 1890, could be punished on November 4, and 12, 1890, the dates of the offense for which Pridgeon was indicted, was the above criminal code of Nebraska which Congress adopted for the territory. Larceny being a crime of local nature, it can hardly be supposed that Congress intended that the provisions of the Act of February 15, 1888, prescribing punishment for horse stealing in the Indian territory, should remain in force in the territory of Oklahoma after the erection of the territorial government, *and the special adop- [53] tion of the criminal code of Nebraska for the territory until after the adjournment of its first legislature; or that the general provision of the Revised Statutes, section 5356, relating to larceny "upon the high seas, or in any place under the exclusive jurisdiction of the United States," should apply to that territory.

We are, therefore, clearly of opinion that the Act of February 15, 1888, was not in force in the territory of Oklahoma on November 4 and 12, 1890, but had been superseded by the provisions of section 11 of the Act of May 2, 1890, adopting the criminal code of Nebraska as a provisional code for the territory, and it follows that the first question certified by the circuit court of appeals must be answered in the negative.

But, it is suggested on behalf of the United States, that the provisional and temporary adoption by Congress of the Nebraska criminal code for the territory of Oklahoma had the effect of making larceny or horse stealing an offense against the United States, punishable on the Federal side of the courts of the territory. The supreme court of the territory has held that the criminal code of Nebraska, established by Congress, was to be treated as if it had been enacted by the territorial legistature, and was to be dealt with as if the crimes, thereby declared, were crimes not against the United States, but against the territory. Thus in *Ex parte Larkin*, 11 L. R. A. 418, 1 Okla. 53, 57, Green, *Ch. J.*, says: "It was intended by Congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the territory and to the legislative assembly as a code of laws enacted by the legislative assembly."

If, as suggested by counsel for the government, section 11 of the Act of May 2, 1890, could be treated as establishing the provisional criminal code therein mentioned, as a law of the United States, and as creating offenses against the Federal government, pending the first session and adjournment of the Oklahoma legislature, so as to make horse stealing during *that time a crime, not against the territori- [54] al government, but against the United States, the proceeding on the Federal side of the court

was entirely lawful, the sentence of five years, as well as the imposition of "hard labor," being authorized by the Nebraska criminal code as above quoted.

It was certainly competent for Congress to have adopted the criminal code of Nebraska so as to make horse stealing a crime against the United States in the Oklahoma territory, just as by section 5391, Revised Statutes, it has adopted the penal code of the states in respect to offenses committed in forts, dock yards, navy yards, and other places ceded to the United States, where the offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States.

But we are of opinion that the supreme court of the territory in *Ex parte Larkin* has taken the proper view of the effect of section 11 of the Act of May 2, 1890, in holding that the laws of Nebraska were adopted as a territorial code, and this being so, a court of the United States did not have jurisdiction of the offense of horse stealing within the territorial limits of Oklahoma under the Act of May 2, 1890, or by virtue of the Nebraska criminal code, provisionally adopted for the territory.

It is contended by the appellee that inasmuch as the Act of February 15, 1888, did not apply to the territory of Oklahoma, and inasmuch as section 11 of the Act of May 2, 1890, did not adopt the criminal code of Nebraska as a law of the United States, so as to make horse stealing in the territory an offense against the United States, the District Court for the Judicial District within and for Logan County, Oklahoma territory, sitting as a court of the United States, had no jurisdiction over the offense charged against Pridgeon. This position, however, is not well taken. The boundaries of Oklahoma territory, as defined by the Act of May 2, 1890, creating a temporary government therefor, did not include the Cherokee Outlet. The 1st section of that Act provides that "whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished, and the Pres-
55] ident *shall make proclamation thereof, said outlet shall thereupon and without further legislation become a part of the territory of Oklahoma." By the 9th section of the Act, after defining the judicial power, and creating the courts for the territory, and defining their jurisdiction, original and appellate, it was provided that the territory should be divided into three judicial districts, and that a district court should be held in each county thereof by one of the justices of the supreme court, at such time and place as may be prescribed by law, and "the territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the supreme court may determine; . . . and each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States."

In pursuance of the authority conferred upon it, of attaching territory not embraced in organized counties to organized counties for judicial purposes, the supreme court of the territory, on October 6, 1890, entered an order, of which the following only is material: "It is ordered by the court that all of that part of the Cherokee Outlet which lies between the line dividing ranges three (3) and four (4) west of the Indian meridian, and the line dividing ranges six (6) and seven (7) east of the Indian meridian, except township twenty (20) of ranges one (1) two (2) three (3) and four (4) east of the Indian meridian; and all of the lands occupied by the Kansas, Tonkawa, Ponca, Otoe, and Missouri tribes of Indians; and all of that part of land occupied by the Osage Indians which lies west of the line between ranges six (6) and seven (7) east of the Indian meridian; and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships fourteen (14) and fifteen (15) north of ranges one (1) two (2) three (3) four (4) five (5) and six (6) east of the Indian meridian, is hereby attached to county number one (1) (Logan) for judicial purposes."

A comparison of the foregoing with the Act of May 2, 1890, *shows that of the territory[56 attached to Logan county for judicial purposes, by the order of the court, part was in Oklahoma, as established by the Act creating the territory, and part was in the Cherokee Outlet, not embraced within the boundaries of Oklahoma.

The part of the Cherokee Outlet so attached to Logan county for judicial purposes being "all that part of Cherokee Outlet which lies between the line dividing ranges three and four, west of the Indian meridian, and the line dividing ranges six and seven, east of the Indian meridian, except townships twenty of ranges one, two, three, and four, east of the Indian meridian," which part is outside of the boundaries of Oklahoma territory.

It was further provided by section 9 of the Act of May 2, 1890, that "in addition to the jurisdiction otherwise conferred by this Act, said district courts shall have and exercise exclusive original jurisdiction over all offenses against the laws of the United States committed within that portion of the Cherokee Outlet not embraced within the boundaries of said territory as herein defined;" and further, that "for all judicial purposes, as herein defined, such portion of the Cherokee Outlet not embraced within the boundaries of the territory of Oklahoma shall be attached to, and be a part of, one of the judicial districts of said territory as may be designated by the Supreme Court." The section also provided that "all acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond the limits of the territory of Oklahoma as herein defined, as to all causes of action or offenses in said territory, and in that part of Cherokee Outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the supreme and district courts in said territory."

By section 10 of the Act "all offenses committed in said territory, if committed within any organized county, shall be prosecuted and tried within said county, and if committed within territory not embraced in any organized

county, shall be prosecuted and tried in the county to which such territory shall be attached for judicial purposes."

It admits of no question that under these pro-
57] visions *the District Court for the First Judicial District within and for Logan County, Oklahoma territory, and for the Indian country attached thereto for judicial purposes, sitting as a district court of the United States, had jurisdiction of offenses committed against the laws of the United States in the Cherokee Outlet, which by the statute and the action of the supreme court was attached to Logan county, Oklahoma, for judicial purposes. It is clear equally that in respect to the Cherokee Outlet so attached to Logan county, that it was at the passage of the Act of May 2, 1890, and continued to be, Indian country, coming within the provisions of the Act of February 15, 1888, and that the offense of horse stealing committed therein on November 4 and 12, was an offense against the United States. The provisions of the 9th section, already referred to, clearly establish the correctness of this conclusion, and the contention on the part of the appellee that the Act of March 1, 1889 (25 Stat. at L. 783) establishing a United States court for the Indian territory, and extending the jurisdiction of the United States courts over the Indian territory, which was divided and annexed for judicial purposes to the district of Kansas and to the eastern judicial district of Texas, has no application to that portion of the Cherokee Outlet referred to in the 9th section of the Act of May 2, 1890, attached to Logan county for judicial purposes. Neither is the Cherokee Outlet covered by section 29 of the Act of May 2, 1890, it being expressly declared by section 9 of that Act that "for all judicial purposes as herein defined such portion of the Cherokee Outlet not embraced within the boundaries of the terri ory of Oklahoma shall be attached to, and be a part of, one of the judicial districts of said territory, as may be designated by the supreme court;" and further, that "all acts and parts of acts heretofore enacted, conferring jurisdiction upon United States courts held beyond and outside the limits of the territory of Oklahoma as herein defined, as to all causes of action or offense in said Territory, and in that part of the Cherokee Outlet hereinbefore referred to, are hereby repealed, and such jurisdiction is hereby given to the supreme and district courts in said territory."

58] *This language clearly shows that that portion of the Cherokee Outlet not embraced within the boundaries of the territory of Oklahoma, but attached thereto for judicial purposes, was Indian country within the provisions of the Act of February 15, 1888, and the offense of horse stealing committed therein was within the exclusive jurisdiction of the District Court of the First Judicial District of Oklahoma territory, sitting as a court of the United States.

The courts created for the territory of Oklahoma are clearly dual in their nature. They sit as territorial courts to administer the laws of the territory and as courts of the United States to administer the laws of the United States. *Ex parte Crow Dog*, 109 U. S. 556, 559 [27: 1030, 1031]; *Ex parte Gon-Shay-ee*, 180 U. S. 348, 349 [32: 973, 975].

The indictment charges the offense to have been committed in that part of Oklahoma attached to Logan county for judicial purposes, and described as follows: "All that part of the Cherokee Outlet which lies between the line dividing ranges three and four west of the Indian meridian, and the line dividing ranges six and seven, east of the Indian meridian, except townships twenty of ranges one, two, three and four, east of the Indian meridian, and all of the lands occupied by the Kansas, Tonkawa, Oteo, and Missouri tribes of Indians, and all that part of the land occupied by the Osage Indians which lies west of the line between ranges six and seven, east of the Indian meridian, and all that part of the Iowa and Kickapoo and Sac and Fox countries which lies north of the line which divides townships fourteen and fifteen north of ranges one, two, three, four, five and six, east of the Indian meridian, in said territory."

This description embraces that portion of the Cherokee Outlet lying west of the Indian meridian, and also a portion of the territory of Oklahoma, being the same as that attached to Logan county for judicial purposes by the order of the supreme court of the territory on October 6, 1890; so that in this description we have partly Oklahoma territory and partly Indian territory; but the indictment proceeds to aver that the offense was committed "at and within that part *of the territory attached [59] for judicial purposes to Logan county as aforesaid, which said part of said territory was *then and there Indian country*, and a place and district of country then and there under the sole and exclusive jurisdiction of the United States of America."

This averment in the indictment has reference alone to the Cherokee Outlet, for the Outlet was the only Indian country not included in Oklahoma territory, embraced within the order of the supreme court, and was the only place and district of county attached to Logan county for judicial purposes that was under the sole and exclusive jurisdiction of the United States. The indictment may, therefore, be fairly construed as charging the offense as having been committed in that portion of the Cherokee Outlet attached to Logan county for judicial purposes.

But, whether this be so or not, it is very clear that there is nothing on the face of the indictment to show affirmatively that the District Court for the First Judicial District, within and for Logan county, Oklahoma territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a district court of the United States, did not have jurisdiction of the offense for which Pridgeon was convicted, so as to render its sentence void on collateral attack. If the indictment does not fairly and sufficiently aver that the offense in question was committed in the Cherokee Outlet, it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court. It may be, that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offense was committed, within the rule laid down in *McBride* v. *State*, 10 Humph. 615, but it cannot be properly held

that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The habeas corpus proceeding being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offense of which the court had no [60]*jurisdiction, so that its sentence was void. This does not appear in the present case, and the second question certified must, therefore, be answered in the negative.

It being established that the court which sentenced Pridgeon had jurisdiction of his person and of the offense under the Act of February 15, 1888, and that the indictment upon which he was tried and convicted is not void upon its face, so as to be open to collateral attack, is the sentence imposed, and the commitment in accordance therewith, void by reason of the fact that "hard labor" was included as a part of the sentence during the term of imprisonment in the Ohio penitentiary?

It admits of no question that the sentence, so far as it imposed imprisonment for the term of five years in the Ohio penitentiary, was regular and proper, and open to no objection. The question, therefore, narrows itself down to this, Was the sentence imposing that term of imprisonment rendered void by the addition of "hard labor" during his confinement?

In *Ex parte Karstendick*, 93 U. S. 396, 399 [23: 889, 890], the claim was made on behalf of the petitioner that "where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment is in excess of the power conferred." *Mr. Chief Justice* Waite, speaking for the court, answered this contention by saying: "We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have been just referred to place it within a sentence where labor is exacted as a part of the discipline and treatment of the institution or not, as it pleases. Thus a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever varying circumstances of the cases which come before them. If the offense [61] is flagrant, the penitentiary, with its *discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law."

In the subsequent case of *Ex parte Mills*, 135 U. S. 263, 266 [34: 107, 108], *Mr. Justice* Harlan said: "An offense which the statute imperatively requires to be punished by imprisonment 'at hard labor,' and one that must be punished by 'imprisonment,' but the sentence to which imprisonment the court may, in certain cases and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are each 'punishable' by imprisonment at hard labor. The former offense certainly must be thus punished; and as the latter may, in the discretion of the court, be so punished, it may also, and not unreasonably, be held to be 'punishable' by imprisonment at hard labor."

Under the rule announced in these cases, while the Act of February 15, 1888, does not specifically authorize the imposition of "hard labor" as a part of the sentence of imprisonment, still it was competent for the court to sentence the party convicted to imprisonment in a penitentiary where "hard labor" is a part of the usual discipline; so that the provision for "hard labor" in the sentence is nothing more or less than a sentence to simple imprisonment in the Ohio penitentiary, subject to its rules, regulations, and discipline, and if the sentence had been imposed in this form it could not justify the release of the prisoner on habeas corpus under the rule above announced. It is doubtful whether upon a writ of error the prisoner would have been entitled to a modification of his sentence by striking out the "hard labor" portion thereof. By section 5539, Rev. Stat., it is provided that "whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory."

*Suppose the five years' sentence had em-[62] bodied the provision of this section—which it could lawfully have done—it would have carried with it, in point of fact, "hard labor" as a part of the discipline of the Ohio penitentiary? This being so, it is difficult to see upon what principle it can be held that the sentence of imprisonment is vitiated and rendered void for expressly including the element or feature of "hard labor," which would have been otherwise implied in the sentence of simple imprisonment.

In *Re Coy*, 127 U. S. 757 [32: 280], *Mr. Justice* Miller, speaking for the court, said: "An imprisonment under a judgment cannot be unlawful, unless that judgment is an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

Without undertaking to review the authorities in this and other courts, we think the principle is established that where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence.

Many well considered authorities, in England as well as in this country, hold that where there is jurisdiction of the person and of the offense the excess in the sentence of the court beyond the provisions of law is only voidable

in proceeding upon a writ of error. *Ex parte Lange*, 85 U. S. 18 Wall. 163 [21: 872]; *Sennott's Case*, 146 Mass. 489, 493; *People* v. *Kelly*, 97 N. Y. 212; *People* v. *Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People* v. *Jacobs*, 66 N. Y. 8; *Ex parte Shaw*, 7 Ohio St. 81. 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *Re Graham*, 74 Wis. 450; *Elsher* v. *Shrigley*, 80 Iowa, 30; *Ex parte Max*, 44 Cal. 579.

Under a writ of habeas corpus the inquiry is 63]addressed not *to errors but to the question whether the proceedings and the judgment rendered therein, are for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge.

It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion. By section 761, Rev. Stat., "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case [in habeas corpus] by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void. In the present case the five years' term of imprisonment, to which Pridgeon was sentenced, cannot properly be held void because of the additional imposition of "hard labor" during his confinement.

Thus in *Re Swan*, 150 U. S. 637, 653 [37: 1207, 1211], it is stated that "even if it was not within the power of the court to require payment of costs, and its judgment to that extent exceeded its authority, yet he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence as it was within the power of the court to impose."

We have not deemed it necessary to review or to attempt to reconcile the authorities on the question, for the reason that while all concede that neither irregularities nor error, so far as they were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the functions of a writ of error in relation to proceedings of a court within its jurisdiction—they differ widely as to what constitute error, and what should be regarded as rendering the judgment or proceedings void.

We are clearly of opinion that the third question certified should be answered in the negative.

64] *In answering this third question we have not considered it either necessary or proper to express any opinion as to what would have been the proper action of the circuit court in dealing with the petitioner's application. Whether the writ of habeas corpus should have been denied, and the petitioner put to his writ of error, or whether, after the allowance of the writ of habeas corpus he should have been recommitted to the custody of the warden of the Ohio penitentiary, with directions to carry out and enforce only that portion of the sentence imposing imprisonment for five years, according to the rules, regulations, and discipline of the institution. These are matters which the circuit court of appeals should settle and dispose of under the appeal of the United States from the judgment of the circuit court discharging the prisoner.

We accordingly direct that each of the three questions certified from the United States Circuit Court of Appeals from the Sixth Circuit be answered in the negative, and be so certified to that court.

THE STEAMSHIP MARTELLO, *Appt.*, *v.* ICHABOD WILLEY ET AL.

(See S. C. Reporter's ed. "*The Martello*," 64-77.)

Excessive speed of steamship—duty of steamship in a fog—presumption of fault—mechanical fog horn—burden of proof.

1. The speed of a steamship of six miles an hour in a dense fog is excessive, while she is emerging from the harbor of New York in a neighborhood where she is likely to meet vessels from many points of the compass.
2. It is the duty of a steamship hearing the fog-horn of another vessel in close proximity, in a dense fog, but unable to ascertain her course and position, to stop and reverse her engines so as to bring her to a standstill.
3. A sailing ship is presumed to be in fault for a collision with another ship in a fog, by reason of her not having a mechanical fog horn as required by the Revised International Regulations.
4. The presumption attends every fault connected with the management of a vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship, that such fault or omission contributed to the collision.
5. Where a ship has failed to comply with a statutory requirement, in a collision with another vessel, the burden rests upon her of showing that such fault could not have contributed to the collision.

[No. 293.]

Argued March 15, 16, 1894. Decided April 16, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, reversing a decree of the district court and adjudging the steamship Martello, to have been wholly in fault for

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NOTE.—*As to collision, measure of damages for*, see note to Smith v. Condry, 11: 35, and to Williamson v. Barrett, 14: 68.

As to collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting; instances, see note to St. John v. Paine, 13: 537.

As to collision; vessel overtaking another, see note to The Abbotsford v. Johnson, 25: 168.

As to collision; rules for avoiding; steamer meeting steamer; instances, see note to Williamson v. Barrett, 14: 68.

As to collision; damages where two vessels are at fault for injury to a third, see note to The City of Hartford v. Rideout, 24: 930.

a collision between the vessel Freda A. Willey and said steamship, and for damages and costs in favor of the libelant, Ichabod Willey. *Reversed and case remanded for further proceeding.*

Statement by *Mr. Justice* **Brown:**

This was a libel and cross-libel for a collision between the American barkentine Freda A. Willey and the British steamship Martello, which occurred on the 8th day of May, 1887, at 8 o'clock in the morning, about two miles to the northward and eastward of the Sandy Hook lightship, in a fog, and resulted in the sinking of the barkentine.

The district court found both vessels to have been in fault for excessive speed, and entered a decree dividing the damages and costs. On appeal to the circuit court this decree was reversed, and the Martello adjudged to have been wholly in fault, and a decree entered for the original libelants in the sum of $23,943.43, from which decree the owners of the Martello appealed.

Pursuant to the statute the circuit court, on July 31, 1889, made and filed the following findings of fact and conclusions of law, viz:

"1. The Martello is a British steamship of 2489 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, owned by the respondents and appellants, Charles Henry Wilson and Arthur Wilson, and is one of the Wilson line of steamers plying between New York and Hull and other foreign ports.

"2. The Martello left her dock in Jersey City on Saturday afternoon, May 7, 1887, laden with a miscellaneous cargo of merchandise, bound for Hull, England. The weather was so foggy that she could not go down the channel, but anchored for the night in Gravesend Bay.

"3. The Martello got under way from Gravesend Bay about 6 A. M. Sunday, May 8, 1887, and started for sea in command of Captain Francis E. Jenkins, the senior captain of the New York service of the line, and in charge of Pilot Joseph Henderson. The weather was thick, but sufficiently clear to enable the buoys marking the channel to be seen. She proceeded down the swash channel and thence through Gedney's channel to sea.

66] *"4. When about half a mile to the westward of the perch-and-ball buoy, *i. e.*, about north from the black buoy No. 1, her engine was stopped for the purpose of slowing the vessel until the pilot could be discharged; that being done, the engines were at 7.10 A. M. moved slow ahead.

"5. About 40 minutes after discharging the pilot the horn, one blast of a sailing vessel, was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the cro'nest, about 100 feet abaft the stern, the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel.

"6. At that time the steamer was heading E. S. E.; the wind was about E. by N., blowing a five to six knot breeze; the fog had grown denser and vessels could not be seen over a quarter of a mile away; the whistle of the steamer had been blown regularly at intervals of thirty seconds or less, and her speed was about 5½ to 6 knots an hour; three knots an hour would give her good steerage way.

"7. About a minute or two after hearing the horn the officers of the Martello saw the barkentine Freda A. Willey looming in sight through the fog.

"8. On April 24, 1887, the barkentine Freda A. Willey left Pensacola, bound through Long Island Sound for New Haven, with a cargo of yellow pine lumber, and on Sunday, May 8, about 8 o'clock A. M. she was bound into the harbor of New York.

"9. The Willey, with all her sails set, can make ten knots an hour; with the wind, as found in the sixth finding, the Willey, if going at less than four knots an hour, would not have steerage way sufficient to give her master thorough control of her tack, wear, or manage her as occasion might require.

"10. About 4 A. M. of May 8 she was sailing with her mainsail, spanker, main-staysail, upper and lower fore-topsails, fore-topgallant sail, and three jibs; at 5 A. M. the wind freshened and she took in her royal; at 7 A. M., the wind freshening, her fore-sail was hauled up.

"11. There was on deck of the Willey, before the collision, *Cobb, able seaman; on the [67 lookout, Mathlin, able seaman; at the wheel, Ludvinger, second mate, and Willey, captain, about her deck; the rest of the crew were below; she was heading north, close-hauled on the starboard tack, sounding her horn at intervals of one or two minutes and making about four knots an hour.

"12. While thus proceeding she thrice heard the steam whistle of a steamer, answering promptly each time with a single blast of her horn; at this last signal the Martello appeared in sight, bearing about four points on the port bow and a quarter of a mile away.

"13. As soon as the Willey loomed in sight of those on the Martello, as indicated in the seventh finding, the first officer of the steamship called out hard-a-port, and the lookout reported a vessel on the starboard bow; the captain immediately ordered the helm hard-a-port and the engines reversed full speed.

"14. The speed of the Martello under a hard-a-port helm and with engines reversed at full speed became gradually reduced, and at the time of the collision was about two knots an hour.

"15. The place of collision was about 1¾ miles about N. by E. from Sandy Hook lightship.

"16. As the vessels neared each other the first officer of the Martello called out to the barkentine, 'Luff, luff all you can,' but his call was not heard by those on the Willey.

"17. From the time of the hearing of the first whistle down to the time of the collision the steamer, except as stated in the sixteenth finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines. In consequence the Willey held her course as she was bound to do, but the steamer ran into her with great violence, the steamer's stem running into the port bow of the barkentine, cutting its way into her keel, knocking her stem over to starboard and driving her bow round to eastward.

"18. Had the steamer been going at three

knots an hour, had she stopped her engines as 68] soon as she heard the Willey's *horn and reversed when she sighted the barkentine, she would have stopped out of the Willey's course.

"19. The master of the barkentine was on deck; he had his vessel under control. If, when the steamer first sighted the barkentine, the master of the latter had been advised that the steamer was starboarding her wheel, he could have ported and avoided the collision. If, at that time, the steamer had ported her wheel the barkentine, keeping her course, would have crossed the steamer's bow in safety. If, at that time, the master of the barkentine had been advised that the steamer was reversing he could have ported and avoided the collision.

"*Conclusions of Law.*

"1. The Freda A. Willey was free from fault.

"2. The Martello was in fault for proceeding at an excessive rate of speed in a fog, and is solely responsible for the collision.

"3. There should be a decree for the Freda A. Willey and against the Martello in each case, with costs of the district and circuit courts."

Subsequently, in September 6, and upon request of counsel for the Martello the circuit court made the following additional findings of fact:

"16. Captain Jenkins has held a master's certificate since 1856. Pilot Henderson has been a New York and Sandy Hook pilot for nearly forty-two years.

"30. Article XIII. of the International Rules and Regulations for Preventing Collisions at Sea is as follows: 'Every ship, whether sailing ship or steamship, shall, in a fog, mist, or falling snow, go at a moderate speed.'

"31. The moderate speed required by this article is not a fixed rate of knots per hour, but something materially less than the vessel's full speed.

"32. The Willey at four o'clock on the morning of the collision was some twenty miles to the southward of the Sandy Hook lightship.

"35. The Willey at the time of the collision was carrying not less than 2191 square yards of canvas.

69] *"44. The ordinary course of outward bound European steamers after leaving Gedney's channel is about E. S. E., and therefore, across the course pursued by the barkentine.

"48. Article XIX. of the International Rules and Regulations for Preventing Collisions at Sea is as follows: 'In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam whistle, viz: one short blast to mean I am directing my course to starboard; two short blasts to mean I am directing my course to port; three short blasts to mean I am going full speed astern. The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made.'

"51. It was the duty of the barkentine, under the circumstances, and with danger imminent, to use all the means reasonably within her power to avert the collision.

"56. The crew of the barkentine consists of a captain, mate, second mate, five men before the mast, and the steward; nine in all."

Upon the further request of counsel for the Martello the following additional finding was made and filed July 30, 1890:

"104. The horn of the Willey on board of her and sounded at the time of the collision was not a horn sounded, or to be sounded by mechanical means, but was a tin fog-horn."

But the court refused to find as a conclusion of law therefrom that "the Willey was in fault for not having and using a horn sounded by mechanical means, as required by article 12 of the international rules for preventing collisions at sea."

Messrs. **J. Hubley Ashton** and *David Thomson*, for appellants:

The barkentine, Freda A. Willey, was in fault and solely responsible for the collision, by reason of her failure and neglect to have and use an efficient fog horn to be sounded by a bellows or other mechanical means.

Peters v. *The Dexter*, 90 U. S. 23 Wall. 69 (23:84); *The Pennsylvania* v. *Troop*, 86 U. S. 19 Wall. 125 (22:148); *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.* 136 U. S. 422 (34:403); *Belden* v. *Chase*, 150 U. S. 698, 699 (37:1226, 1227); *The Love Bird*, L. R. 6 Prob. Div. 80; *The Bolivia*, 49 Fed. Rep. 169; *The Trave*, 55 Fed. Rep. 117; *The Wyanoke*, 40 Fed. Rep. 702; *The Catalonia*, 43 Fed. Rep. 396; *The Energy*, 42 Fed. Rep. 301.

The barkentine was in fault for proceeding at an immoderate rate of speed in a fog, and for neglecting to take any measures to avoid the collision.

The Zadok, L. R. 9 Prob. Div. 117; *The Beta*, L. R. 9 Prob. Div. 134; *The Dordogne*, L. R. 10 Prob. Div. 6.

Mr. **William W. Goodrich**, for appellees:

If the Martello had stopped as she was bound to do as soon as she first heard the horn, that is about a minute or two before she saw the Willey, she could not have reached the Willey.

Fabre v. *Cunard SS. Co.* 1 U. S. App. 653, 53 Fed. Rep. 288; *The North Star*, 43 Fed. Rep. 807; *The Normandie*, 43 Fed. Rep. 160, note.

The circuit court properly held that the Willey was not in fault for not sounding a mechanical fog horn.

Bell v. *Bruen*, 42 U. S. 1 How. 187 (11:96); *United States* v. *Larkin*, 59 U. S. 18 How. 561 (15:487).

Prima facie, a vessel which does not obey any of the collision rules is at fault, but this only puts upon such vessel the burden of showing that her failure did not contribute to the collision.

The Pennsylvania v. *Troop*, 86 U. S. 19 Wall. 125 (22:148); *Shirley* v. *The Richmond*, 2 Woods, 58; *Cohen* v. *The Mary T. Wilder*, Taney, 567; *Farwell* v. *The John H. Starin*, 2 Fed. Rep. 100; *The Margaret* v. *The C. Whiting*, 3 Fed. Rep. 870; *The Buckeye*, 9 Fed. Rep. 666; *The State of Alabama*, 17 Fed. Rep. 854.

The steamer, on hearing the horn, should have stopped at once and reversed.

The Lepanto, 21 Fed. Rep. 651, 659; *The Louisiana* v. *Fisher*, 62 U. S. 21 How. 1, 6 (16: 29, 31); *The City of Atlanta*, 26 Fed. Rep. 461, 462; *The Ebor*, L. R. 11 Prob. Div. 25; *The Frankland*, L. R. 4 P. C. 529.

The Martello was proceeding at immoderate speed in a dense fog, and this was the proximate cause of the collision.

The Hammonia, 11 Blatchf. 414; *The City of New York*, 35 Fed. Rep. 609; *McCabe* v. *Old Dominion SS. Co.* 31 Fed. Rep. 238; *The Colorado* v. *The H. P. Bridge*, 91 U. S. 692 (23: 379); *The Pottsville*, 12 Fed. Rep. 633; *The Luray*, 24 Fed. Rep. 751; *The Eleanora*, 17 Blatchf. 88; *The Bolivia*, 1 U. S. App. 26, 49 Fed. Rep. 169.

The steamer was also at fault in not instantly stopping when she heard the barkentine's fog horn before she sighted her.

Fabre v. *Cunard SS. Co.* 1 U. S. App. 653, 53 Fed. Rep. 288; *The North Star*, 43 Fed. Rep. 807.

The barkentine was not proceeding at immoderate speed.

The Rhode Island, 17 Fed. Rep. 554; *The Colorado* v. *The H. P. Bridge*, 91 U. S. 692 (23: 379); *The John Hopkins*, 13 Fed. Rep. 185; *The Leland*, 19 Fed. Rep. 771; *The Elysia*, 4 Asp. Mar. L. Cas. 540; *The Victoria*, 3 W. Rob. Adm. 49; *The Pepperell*, 1 Swab. Adm. 12; *The Westphalia*, 4 Ben. 404; *The Nacoochee*, 24 Blatchf. 99.

The duty to check speed and change direction devolved upon the steamer alone, and the barkentine was bound to hold her course.

The Northern Indiana, 3 Blatchf. 99.

Mr. Justice **Brown** delivered the opinion of the court:

(1) The circuit and district courts agreed in 70] holding the *Martello to have been in fault for too great speed. In this conclusion we concur.

By the finding of the circuit court that, at the time the horn of the barkentine was heard upon the steamer, the latter was proceeding at a speed of from five and a half to six knots an hour, we are relieved from the necessity of examining the somewhat conflicting testimony upon the question of the steamer's speed. While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass. Under such circumstances, and in such a fog that vessels could not be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerage way, which the court finds in this case to be three miles an hour. *Culbertson* v. *The Southern Belle*, 59 U. S. 18 How. 584 [15: 493]; *McCready* v. *Goldsmith*, 59 U. S. 18 How. 89 [15: 288].

Further than this, however, the court found (7) that "about a minute or two after hearing the horn the officers of the Martello saw the barkentine Freda A. Willey looming in sight through the fog," and that (13) "as soon as the Willey loomed in sight of those on the Martello, as indicated in the seventh finding, the first officer of the steamship called out 'Hard-a port,' and the lookout reported a vessel on the starboard bow; the captain immediately ordered the helm hard-a-port and the engines reversed full speed." These findings, taken together, indicate that the Martello took no action to avoid the collision until after she saw the Willey looming up in the fog, which was a minute or two after hearing the horn. Under the circumstances, we think the steamer did not act with sufficient promptness. By Article 12, subdivision (6) of the "Revised International Regulations for Preventing Collisions at Sea," prescribed by Act of Congress of March 3, 1885 (23 Stat. at L. 438, 440) "a sailing ship under way *shall make with her fog horn,[71 at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when the wind is abaft the beam three blasts in succession." The wind at this time was E. by N. and blowing a five to six knot breeze. One blast of the horn, heard upon the steamer's starboard bow, indicated that the sailing vessel was approaching upon her starboard tack, from a direction which would unavoidably take her across the bow of the steamer, unless the speed of the latter were sufficient to carry her beyond the point at which the courses of the two vessels intersected, before the sailing vessel reached that point. The steamship, however, had no right to speculate upon this contingency. Hearing the horn as she did, and being thus apprised of the bearing and course of the approaching vessel, being, as she must necessarily have been, in doubt as to her distance from the steamship, it was the duty of the latter at once to stop, until, by repeated blasts of the horn, she could assure herself of the exact bearing, speed, and course of the approaching vessel. The necessity of instantly stopping, or at least of a reduction of speed to the lowest point consistent with the maintenance of steerage way, in the presence of an unknown danger, is one which the masters of steam vessels are slow to appreciate; but the courts have had occasion to enforce it so often, it can, as a matter of law, be no longer considered doubtful. The sound of a fog horn upon either bow, if the blast be such as to indicate that the approaching vessel is upon a course crossing that of the steamer, is obviously such a danger. As we had occasion to observe of a somewhat similar collision in *The City of New York* ("*Alexandre* v. *Machan*") 147 U. S. 72, 84 [37: 84, 89]: "Upon hearing the fog horn of the barque only one point on her starboard bow, the officer in charge should at once have checked her speed, and, if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located, or the vessels came in sight of each other. . . . There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by *a change of the helm, without taking [72 the additional precaution of stopping until its location is definitely ascertained." *The Hypo-*

dame v. *Chapin*, 78 U. S. 6 Wall. 216 [18: 794]; *The Sarah Watson* v. *The Sea Gull*, 90 U. S. 23 Wall. 165, 177 [23: 90, 93]; *The Kirby Hall*, 8 Prob. Div. 71; *The Ceto*, L. R. 14 App. Cas. 670.

Indeed, the American and English courts are in perfect accord with regard to the duty of the steamer under such circumstances, and we are simply applying to the Martello the law of her own flag as well as ours in holding her to have been guilty of negligence. Thus in *The Kirby Hall*, 8 Prob. Div. 71, it was held to be the duty of a steamship, hearing the steam whistle of another steamship in close proximity, in a dense fog, but unable to ascertain her course and position, to stop and reverse her engines so as to take all way off of her, and bring her to a standstill. So in *The John McIntyre*, 9 Prob. Div. 135, it was held that while the master of a steamship was not at once bound the moment he heard a whistle, wherever it might be, to stop and reverse his engines; yet, if, in a dense fog, he hears the whistle or fog-horn of another vessel more than once on either bow and in the vicinity from such a direction as to indicate that the other vessel is nearing him, it is his duty to at once stop and reverse, so as to bring his vessel to a standstill. In *The Dordogne*, 10 Prob. Div. 6, it was said to be the duty of a steamer, on hearing the first whistle, to reduce her speed, and as the vessels get nearer, to bring the ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse the engines. See also *The Frankland*, L. R. 4 P. C. 529; *The Ceto*, L. R. 14 App. Cas. 670; *The Ebor*, 11 Prob. Div. 25; *Bibby* v. *Leetham* [1894] App. Cas. 1.

This case is much like that of *The Colorado* v. *The H. P. Bridge*, 91 U. S. 692 [23: 379],—a collision in Lake Huron, in a dense fog, between a propeller and a barque, in which the propeller, though moving only at the rate of from five to six miles an hour, was held to have been in fault in not bringing down her speed to a slower rate, and in giving conflicting orders to the wheel before the position and course of the barque had been ascertained.

73] *(2) The Willey is also charged to have been in fault, not only for excess of speed, as to which we express no opinion, but for a failure to provide herself with a mechanical fog horn, as required by article 12 of the Revised International Regulations, which reads as follows: "A steamship shall be provided with a steam whistle or other efficient steam sound signals, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog-horn, to be sounded by a bellows or other mechanical means, and also with an efficient bell. . . . A sailing ship shall be provided with a similar fog-horn and bell."

The finding of the circuit court that the Willey was not provided with a mechanical fog horn was made under somewhat peculiar circumstances. The opinion of the court was delivered, and the usual findings of fact filed on July 31, 1889. On the 6th of September, upon request of counsel for the Martello, the court made certain additional findings; but neither in the findings originally requested by the Martello, nor in the findings actually made by the court, nor in the request for additional findings to the number of nearly one hundred was any allusion made to the failure of the Willey to provide herself with a mechanical fog horn; but nine months after the last findings had been made, and in July, 1890, the court made an additional finding that "the horn of the Willey on board of her and sounded at the time of the collision was not a horn sounded or to be sounded by mechanical means, but was a tin fog horn," refusing, however, to find as a conclusion of law therefrom that the Willey was in fault. In view of this lapse of time, and of the fact that the case had been tried upon the theory that the Willey had carried a sufficient horn, we think it was within the discretion of the court to have refused this finding; but as it appears upon this record as a fact in the case, we are compelled to accord it its proper weight.

Some question was made with regard to the meaning of the words, "similar fog horn," required upon sailing vessels; but, if steamships must be provided with a horn "sounded by a bellows or other mechanical means" and sailing ships with a *"similar fog horn," it [74 follows necessarily that it must be sounded in a similar manner. Indeed as the horn of a steam vessel is usually sounded by steam, we think it is probable that in the use of the word "bellows" sailing vessels were contemplated. Such has been the construction given to the statute, both in this country and in England. *The Love Bird*, 6 Prob. Div. 80; *The Wyanoke*, 40 Fed. Rep. 702; *The Catalonia*, 43 Fed. Rep. 396; *The Bolivia*, 1 U. S. App. 26, 49 Fed. Rep. 169.

There can be no doubt that the Willey was guilty of a statutory fault in the failure to provide herself with the fog horn prescribed by the international regulations, and the presumption is that this fault contributed to the collision. This is a presumption which attends every fault connected with the management of the vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good steamship. In *The Pennsylvania* v. *Troop*, 86 U. S. 19 Wall. 125 [22: 148], it was said that "in such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." In this case a barque was condemned for ringing a bell as a fog signal while under way, although in a case arising out of the same collision the Judicial Committee of the Privy Council held that, inasmuch as it appeared that the fog horn would not have been heard a sufficient distance to have enabled the steamer to avoid the danger, the barque should not be condemned for a technical failure to comply with the statute. 3 Mar. L. Cas. 477, 23 L. T. 55. In other words, both courts proceeded upon the same legal principle; but in the English court the evidence was considered sufficient to show that the sounding of a bell instead of a fog horn could not have contributed to the collision. To the same effect are *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.* 136 U. S. 408, 422 [34: 398, 403; *Belden* v. *Chase*, 150 U. S. 674, 699 [37: 1218, 1227]; *The Fanny M. Car*

vill, L. R. 13 App. Cas. 455, in which the Court of Appeals observed that "if you can show that there is a defect in the lights, that vessel 75] must be held to blame, *unless she can show that the defect which exists in her lights could not by any possibility have contributed to the collision." See also *The Duke of Buccleuch*, 15 Prob. Div. 86 [1891] App. Cas. 310.

While no case appears to have arisen in the highest court, either of this country or of England, where this presumption was applied to the absence of a mechanical fog horn, several cases have come before the lower courts in in which the requirement has been held to be obligatory and a non-compliance to create a presumption of fault. *The Love Bird*, 6 Prob. Div. 80; *The Bolivia*, 1 U. S. App. 26. 49 Fed. Rep. 169, 170; *The Trave*, 55 Fed. Rep. 177; *The Wyanoke*, 40 Fed. Rep. 702; *The Catalonia*, 43 Fed. Rep. 396; *The Energy*, 42 Fed. Rep. 301.

Can it be said in this case that the absence of a mechanical fog horn could not by any possibility have contributed to the collision? We think not. Upon the contrary, it seems to us not improbable that it did. It is apparent that the reason the regulations prescribed a horn blown by mechanical means is that a louder and more prolonged blast can be blown by that method than by the power of the lungs. The evidence is undisputed that the officers of the Martello heard but one blast of the Willey's fog horn before she hove in sight, and that this (her appearance) was only a minute or two after hearing the horn. The finding is that "about forty minutes after discharging the pilot the horn, one blast of a sailing vessel, was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the cro'nest about 100 feet abaft the stern (stem) the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel."

6. "At that time the steamer was heading E. S. E.; the wind was about E. by N., blowing about a five to six knot breeze, etc."

11. "She (the Willey) was heading north, close-hauled on the starboard tack, sounding her horn at intervals of one or two minutes, and making about four knots an hour."

12. "While thus proceeding she thrice heard the steam whistle of a steamer, answer-76]ing promptly each time with a *single blast of her horn; at this last signal the Martello appeared in sight, bearing about four points on the port bow and a quarter of a mile away."

The gist of this is that while the horn was sounded at intervals of from one to two minutes, and the steamer was to the leeward of the barkentine, but one blast was heard, while three signals of the Martello's whistle were heard upon the barkentine. Now, if the barkentine had been provided with a more powerful horn, it appears to us not only possible but probable that more than one blast would have been heard, and the steamer thus apprised of the course and distance of the barque, and of the fact that she was approaching her upon a course that would carry her across the bows of the steamer.

While we hold it to have been a fault upon the part of the steamer not to have stopped when she heard the horn, there was certainly some excuse for her failure to do so, and the master might not unreasonably have supposed that he would hear a second blast before the vessel hove in sight, and thus be able to gauge more accurately her course and distance. Had the officer of the Martello, however, failed to stop or check her speed after hearing two or three blasts of the horn gradually drawing nearer, his neglect would have been so much grosser than it actually was, that we cannot presume he would have been guilty of it.

In this particular *The Love Bird*, 6 Prob. Div. 80, which was a case of collision between the barque Pansewitz and the screw steamship Love Bird, is directly in point. Two blasts of the fog horn were admitted to have been heard upon the steamer. Counsel for the barque argued that, if the steamer had stopped when she first heard the trumpet, there would have been no collision, and hence that the absence of a mechanical fog horn did not contribute to the disaster. On the other hand, it was argued for the steamer that, when she first heard the trumpet of the barque, she was so near to her that it was impossible to avoid her. Sir Robert Phillimore held that the testimony showed there were three blasts heard on board the steamer nearly ahead; that she proceeded on *her course, neither stopping nor reversing [77 her engines, which it was clearly her duty under the circumstances to have done. He found, however, that the barque had not sustained the burden of showing "that by no possibility could the presence of a fog horn have prevented the collision, for it might possibly have given more warning to the other vessel.' He, therefore, condemned the barque, although the collision occurred within three days after the act requiring a mechanical fog horn came into operation, and although the barque had left her port of departure (Dieppe) before the act took effect. It is true that this case was decided by a single judge, and does not seem to have been appealed, but the opinion seems to us to be founded upon sound legal principles.

After these vessels came in sight of each other they were so far *in extremis* that it would probably be unjust to impute fault to either of them. The action of the Martello in reversing her engines at full speed was obviously a proper one. Perhaps if, instead of putting her helm hard-a-port she had put it hard-a-starboard and the barkentine had at the same time luffed and come into the wind, the vessels might have escaped each other, or have come together with a glancing blow which would not have proved disastrous. But we impute no fault to the barkentine for her non-action in that particular, as she was entitled to hold her course, at least until she received a signal from the steamer to luff.

But as we think the barque has failed to sustain the burden of proving that the want of a mechanical fog horn could not have contributed to the collision, the decree of the court below must be reversed, and the case remanded for further proceedings in conformity with this opinion.

[78] VANDY M. WEST, *Plff. in Err.*,
v.
WILLIAM L. CABELL.

(See S. C. Reporter's ed. 78-88.)

Warrants of arrest—constitutional requirement—Texas law—description of the person.

1. By the common law, warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested; a warrant that does not do so will not justify the officer making the arrest.
2. By the 4th Amendment of the United States Constitution no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
3. In Texas a warrant must specify the name of the person whose arrest is ordered, if it be known; if not known, then some reasonable definite description must be given of him.
4. The private intention of the magistrate is not a sufficient substitute for the constitutional requirement of a particular description in the warrant of the person for whose arrest it is issued
5. A warrant to arrest James West for murder will not authorize the marshal to arrest Vandy M. West, and for the arrest and imprisonment of the latter on such warrant, by one of his deputies, the marshal and his sureties are liable upon his official bond.

[No. 258.]

Submitted Feb. 2, 1894. Decided April 16, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment for the defendants, in an action brought by Vandy M. West, plaintiff, against William L. Cabell *et al.*, upon a bond given by Cabell, Marshal of the United States, as principal, and by the other defendants as his sureties, conditioned for the faithful performance of his duties as Marshal; the breach alleged being that one of the deputies of Cabell unlawfully arrested and imprisoned the plaintiff upon a warrant issued by a commissioner, to arrest the body of James West, upon a charge of murder, the plaintiff being not described in the warrant, to plaintiff's damage $10,000. *Reversed, and case remanded with directions for a new trial.*

Statement by *Mr. Justice* **Gray**:

This was an action, brought November 5, 1887, by Vandy M. West against William L. Cabell and six other persons, upon a bond, dated May 19, 1886, given by Cabell, the marshal of the United States for the Northern District of Texas, as principal, and by the other defendants, as his sureties, with condition that Cabell, "by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal." The breach alleged was that Edward W. Johnson, one of the deputies of Cabell, on August 16, 1887, unlawfully arrested and imprisoned the plaintiff upon a warrant issued by a commissioner of the circuit court of the United States "to arrest the body of James West" upon a charge of murder of John Cameron in the Indian country in the western district of Arkansas; to the damage of the plaintiff in the sum of $10,000.

The answer denied the allegations of the petition; and alleged that the arrest and imprisonment were upon a valid warrant issued by the commissioner, charging the plaintiff with the crime of murder.

At the trial, there was evidence tending to prove the following facts: The plaintiff's name was Vandy M. West, and he was never known or called by any other name. He resided and did business as a grocer at Mineral Wells, Texas, having come there from Colorado in December, 1886; and had for many years before his arrest borne a good character as a peaceable *man, and was not the murderer of [79] Cameron. On August 16, 1887, having gone with a wagon load of wheat to Weatherford, twenty miles from his home, he was there arrested by Johnson upon the warrant above mentioned; and protested against the arrest, on the ground that he was the wrong man that his name was not James West, but Vandy West, and that he was innocent of the crime charged, and offered to make proof of his identity, if permitted to go with Johnson to his home, or to wait for an answer to a telegram; but Johnson refused to permit him to do either, and carried him, against his will, in a hack and in irons, sixty miles to Graham, and there lodged him in the jail of Young county, and immediately informed the commissioner of the arrest. On the next day, the commissioner issued and placed in the hands of Johnson a subpœna for William Sturdevant, who resided sixty miles off at Henrietta, and on whose information principally Johnson had made the complaint on oath against James West, on which the warrant was issued. Sturdevant was then too ill to travel; but on September 1, 1887, and after seeing the plaintiff in jail, he appeared before the commissioner, and stated on oath that the plaintiff was not the West who killed Cameron. Because of the absence of Johnson, who was serving civil process elsewhere, the plaintiff was detained in jail, and was never brought before the commissioner, until September 5, 1887, when Johnson returned, and by order of the commissioner, discharged him. No order was ever issued by the commissioner for the arrest or commitment of the plaintiff, other than the warrant aforesaid, and a verbal order to Johnson, when he reported the arrest, to hold the prisoner until the commissioner was ready to try him.

The defendants offered oral evidence tending to show that the warrant by virtue of which the arrest was made was issued for the arrest of the plaintiff, although by a wrong name; that Johnson, upon whose complaint the warrant was issued, had made inquiries from different sources concerning the identity of the plaintiff with the West who was charged with the murder of Cameron; and that the commissioner, upon the complaint made to him, issued the warrant for the arrest *of [80] James West, but intending it for the arrest of the plaintiff. The plaintiff objected to the introduction of this testimony, because, the warrant commanding the arrest of James West, it was not competent to show by parol testimony that the plaintiff, who bore another name, was

the person for whose arrest the warrant was intended by the commissioner issuing it. But the court overruled the objection, and admitted the testimony; and the plaintiff excepted to its admission.

The commissioner, being called as a witness for the defendants, testified that he had no personal acquaintance with V. M. West, and that the only time he ever saw him was when he discharged him from imprisonment, and did not at that time know him to be V. M. West; that Johnson, at the time of making the complaint, informed him that "he had located a man by the name of West near Mineral Wells, who was charged with murder in the western district of Arkansas," and that he had written to the United States marshal for that district, and received a reply from him; that the commissioner had no other knowledge "of the charge against West," and of his own knowledge "did not know of any other West living at or near Mineral Wells," and "from the information received from Johnson, the West living at or near Mineral Wells was the one the warrant was issued for." On cross-examination, the commissioner testified that he "put the name James West in the warrant of arrest, because James West was the man complained against."

Johnson testified that in the spring of 1887, Sturdevant informed him that "James West, sometimes called Bud West, who had killed John Cameron in the Indian territory, in 1886, was at or near Mineral Wells, Palo Pinto county, Texas:" and gave him "a personal description of the West who killed said Cameron," and he then wrote to the United States marshal of the western district of Arkansas, who replied that he did want West for the murder of Cameron; that Johnson then went to Palo Pinto county to investigate the matter, and there examined the tax books, and submitted to the sheriff of the county the description given by Sturdevant of the West who killed Cameron, and ascertained that the [81] plaintiff was *the only West in the county, and in personal appearance corresponded to Sturdevant's description; that, before he made the complaint, he informed the commissioner of these facts; and that "in that section of the country it was frequently the case that men were known by other than their correct names, so much so that witness attached but little importance to the name by which a man was called."

The plaintiff requested the court to instruct the jury "that the warrant for the arrest of James West will not authorize the arrest of Vandy M. West, though Vandy M. West may have been the party intended, he not being named or described in the warrant."

The court refused so to instruct the jury; and instructed them as follows: "There is no proof in this case, tending to show that the plaintiff was ever known by the name of James West, or by any other name than V. M. West and Vandy West. There is proof tending to show that for a number of years and in various places he has been always known by the name of Vandy West. The defendants claim, however, that the plaintiff is the man for whose arrest the warrant was issued, and it has been suggested to you in the argument of the defendants' counsel that Ed. Johnson, being the man who made the complaint, knew what man he had in his mind when he made the complaint. It is not material what was in the mind of Johnson when he made the complaint, but what was in the mind of the commissioner when he issued the warrant; *and if you believe from all the evidence that the plaintiff is the man for whose arrest the commissioner issued the warrant, you will find that the defendants are not liable for damages on account of the mere fact of the arrest.* If, in making the arrest, or in holding the prisoner, any harsher means were used than were reasonably necessary for taking and safely keeping him, considering the gravity of the charge, the defendants would be liable for any damages thereby occasioned the plaintiff."

The plaintiff excepted to the refusal to give the instruction requested, and to that part of the instructions given which is above printed in italics; and, after verdict and judgment for *the defendants, tendered a bill of exceptions, and sued out this writ of error. [82]

Mr. **I. W. Stephens** for plaintiff in error.

Mr. **A. H. Garland** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action upon a marshal's bond in the usual *form, the condition of which [83] was that the marshal, by himself and his deputies, should faithfully perform all the duties of his office, and upon which any person injured by a breach of the condition might maintain an action. Rev. Stat. §§ 783, 784; *Lammon* v. *Feusier*, 111 U. S. 17 [28: 337]. The breach relied on by Vandy M. West, the plaintiff in this case, was his arrest, against his protest, by a deputy of the marshal, under a warrant issued by a commissioner, commanding the arrest of "James West," and not otherwise designating or describing the person to be arrested, upon a complaint of the deputy marshal, charging James West with the murder of John Cameron. The defense was that the arrest of the plaintiff under that warrant was lawful. At the trial, it appeared that the plaintiff had never been known or called by the name of James West, or by any other name than his own. Notwithstanding which, the court, against the objections and exceptions of the plaintiff, admitted oral testimony of the commissioner and of the deputy marshal that the warrant was issued and intended for the arrest of the plaintiff; and instructed the jury that, if they believed that the plaintiff was the man for whose arrest the commissioner issued the warrant, the defendants were not liable for damages on account of the mere fact of arrest.

By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest, the officer is killed, this is only manslaughter in the person whose liberty is invaded. 1 Hale, P. C. 577, 580; 2 Hale, P. C. 112, 114; Foster, Crown Law, 312; 1 East,

P. C. 310; 1 Chitty, Crim. Law, 39, 40; *Huckle* v. *Money*, 2 Wils. 205; *Money* v. *Leach*, 3 Burr. 1742, 1766, 1767; 1 W. Bl. 555, 561, 562; *Rex* v. *Hood*, 1 Mood. C. C. 281; *Hoye* v. *Bush*, 1 Man. & G. 775, 2 Scott, N. R. 86. Likewise, a warrant of arrest in a civil action, which does not name or describe the person to be arrested, is no justification of the officer. *Cole* v. *Hindson*, 6 T. R. 234; *Shadgett* v. *Clipson*, 8 East, 328; *Finch* v. *Cocken*, 2 Cromp. **86**|M. & R. *196, 1 Gale, 130, and 3 Dowl. P. C. 678; *Kelly* v. *Lawrence*, 3 Hurlst. & C. 1.

The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest. *Com.* v. *Crotty*, 10 Allen, 403, 87 Am. Dec. 669; *Griswold* v. *Sedgwick*, 6 Cow. 456, 1 Wend. 126; *Mead* v. *Haws*, 7 Cow. 332; *Holley* v. *Mix*, 3 Wend. 350, 354, 20 Am. Dec. 702; *Scott* v. *Ely*, 4 Wend. 555; *Gurnsey* v. *Lovell*, 9 Wend. 319; *Melvin* v. *Fisher*, 8 N. H. 407; *Clark* v. *Bragdon*, 37 N. H. 562, 565; *Johnson* v. *Riley*, 13 Ga. 97, 137; *Scheer* v. *Keown*, 29 Wis. 586; *Rafferty* v. *People*, 69 Ill. 111, 18 Am. Rep. 601.

In *Com.* v. *Crotty*, for instance, in which Morris Crotty and others were indicted and convicted for a riot in resisting the arrest of Crotty upon a warrant commanding the arrest of "John Doe or Richard Roe, whose other or true name is to your complainant unknown," the conviction was to set aside by the supreme judicial court of Massachusetts, upon the grounds that the warrant was insufficient, illegal and void, because it did not contain Crotty's name, nor any description or designation by which he could be known and identified as the person against whom it was issued, and was in effect a general warrant, upon which any other person might as well have been arrested, as being included in the description; and that "the warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it; he acted without warrant, and was a trespasser; the defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer; an officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose." 10 Allen, 404, 405, 87 Am. Dec. 669.

87] *The 4th article of Amendment of the Constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provision of section 1014 of the Revised Statutes, which authorizes an offender against the laws of the United States to be arrested and imprisoned or bailed, by a judge of the United States or a commissioner of the circuit court, in any state where the offender may be found, "and agreeably to the usual mode of process against offenders in such state," is necessarily subordinate to the declaration of the Constitution that all warrants must particularly describe the person to be seized.

The laws of the state of Texas in this regard are in conformity with this article of the Constitution of the United States. By the constitution of Texas, art. 1, § 9, "no warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation." And by the statutes of the state the warrant, as well as the complaint, "must specify the name of the person whose arrest is ordered, if it be known; if not known, then some reasonably definite description must be given of him;" and "the officer or person executing a warrant of arrest shall take the person whom he is directed to arrest forthwith before the magistrate." Tex. Penal Code, arts. 233, 236, 247; *Alford* v. *State*, 8 Tex. App. 545, 562; *Hays* v. *Creary*, 60 Tex. 445; *Formwalt* v. *Hylton*, 66 Tex. 288.

The only cases cited by the defendants in error, which have any tendency to support the rulings at the trial, were in Delaware, in which the Chief Justice dissented, and in Iowa and Arizona, whose statutes provided that "the warrant must specify the name of the defendant, and, if it be unknown to the magistrate, may designate him by any name;" and in none of those cases was any notice taken of opposing precedents *or constitutional injunction. [**88** *Bailey* v. *Wiggins*, 5 Harr. (Del.) 462, 60 Am. Dec. 650; *Allen* v. *Leonard*, 28 Iowa, 529, Iowa Code of 1860, § 4535; *Williams* v. *Tidball* (Ariz.) Oct. 24, 1885; Ariz. Comp. Laws of 1877, chap. 11, § 89.

In the case at bar, the effect of the rulings and instructions of the court was to give the jury to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant. For this reason, the judgment is reversed, and the case remanded with directions to set aside the verdict and to order a new trial.

UNITED STATES, *Appt.*,
v.
ROBERT S. SHIELDS.

(See S. C. Reporter's ed. 88-92.)

Fees of United States district attorney.

A United States district attorney whose place of abode is at a distance from the place at which court is held, is not entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court the following Monday morning, during the continuous session of the court.

[No. 1130.]

Submitted March 26, 1894. Decided April 16, 1894.

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

APPEAL from a judgment of the Court of Claims, in favor of Robert S. Shields plaintiff, against the United States, for services and mileage as United States District Attorney for the Northern District of Ohio. Reversed, with directions to render judgment for the United States, as to an item of $278.50 for mileage.

The facts are stated in the opinion.

Mr. **J. E. Dodge,** *Assistant Atty. Gen.*, for appellant.

Mr. **Charles C. Lancaster** for appellee.

Mr. Justice **Jackson** delivered the opinion of the court:

It appears from the record that Robert S. Shields was United States District Attorney for the Northern District of Ohio from July 1, 1885, to December 31, 1889. During this period 89] he *made up his accounts for services rendered by him, and also for mileage for traveling from his home in Canton to the place or holding the United States circuit and district courts. Part of these accounts were disallowed by the Treasury Department, whereupon Shields brought suit against the United States to recover the amount thus disallowed. Upon the hearing of the case the court below rendered judgment in favor of the claim of the appellee, and thereupon the United States requested an additional finding of fact. This request was granted, and it is upon the state of facts thus presented that the United States assigns error in the judgment of the court below.

The additional findings of fact read as follows: "The sum of $278.50 is mileage at ten cents per mile for travel performed by claimant as district attorney during the terms of the United States circuit and district courts in returning each Saturday during said terms to his home at Canton from Cleveland, the place of holding court, and going each Monday morning following to Cleveland to attend said courts on the business of the United States. The distance traveled each round trip was 116 miles. The accounting officers allowed and paid claimant $11.60 mileage for one trip only for each term of court, and they disallowed the above amount as unauthorized by law. The twenty-four round trips disallowed were performed between July 13, 1885, and September 27, 1885, and January 2, 1886, and March 28, 1886. The district attorney made no charge for intervening Sundays."

The only question now involved in the case is whether such an officer, whose place of abode is at a distance from the place at which court is held, is entitled to mileage for travel in going to his home every Saturday, and in returning to the place of holding court the following Monday morning, during the continuous session of the court?

The appellee relies, in support of his claim for mileage, and in affirmance of the judgment below on that part of section 824, Revised Statutes, which provides: "For traveling from the place of his abode to the place of holding any court of the United States in his district, or 90] to the place of any examination *before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning."

This provision of section 824 has been modified by section 7 of the Act of February 22, 1875 (Rev. Stat. Supp. 66) which, in respect to mileage for attorneys, marshals, and clerks, enacts that "from and after the first day of January, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

This being the provision of law in force as to mileage during the period covered by the claim of the appellee, can it be properly said that going to his home on Saturday afternoon and returning the Monday morning following was travel "actually and necessarily performed?" It certainly cannot be held to be travel necessarily performed in the public service. Mileage allowed to public officials involves the idea that the travel is performed in the public service, or in an official capacity. The appellee lived at Canton, Ohio, fifty-eight miles from Cleveland, where the court was held, and he made the journey to and from his home once a week for the purpose of spending Sunday with his family. If he is entitled to mileage for each one of these trips, made during the uninterrupted session of the court, it is difficult to see upon what principle he would not be entitled to mileage for a daily trip of that sort, which would enable him to spend each night of the week at home. Suppose that his place of abode had been ten, fifteen, twenty or twenty-five miles from Cleveland, and instead of going home Saturday afternoon and returning Monday morning, he had made the trip to his place of residence each afternoon of the court week and returned the following morning, could it be held that it was the true meaning and intent of Congress that he should be allowed mileage for these daily trips? We think clearly not. Section 824, and the above quoted Act of February 22, 1875, will not admit of a construction which would give the right to mileage under such circumstances. There is, in principle, no essential difference *between the claim for [91 mileage on a daily trip to and from the officer's home, and a weekly trip when performed for his own pleasure and convenience so as to spend Sunday at home. The travel, whether made daily or weekly, cannot be said to have been made in the character of a public official, or in the performance of a public service, but merely in a private and unofficial capacity.

The findings of fact in this case show that there was no interruption in the session of the court. Sunday was a non-judicial day, which did not interrupt the continuity of the term; besides, prior to the Act of March 3, 1887 (24 Stat. at L. 541) district attorneys were entitled to a per diem compensation of five dollars, including Sundays. This allowance clearly contemplated that an attorney, during the term of the court, might or would be detained on Sunday at the place where the court was held. It is true in the present case that the district attorney has made no claim for a per diem allowance for Sunday, but it certainly cannot be held that this left it optional with him to waive his per diem fee and take mileage to and from his home in lieu thereof as a matter of pleasure or convenience to himself, especially when the mileage exceeded the per diem al-

lowance. Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials.

The decision of the court below proceeded upon the authority of *United States* v. *Harmon*, 147 U. S. 268, 278 [37: 164, 168], in which there was a claim for mileage by a United States marshal, and it was held that "if the court sits for any number of days in succession he should continue in attendance, and is entitled to only one travel But if the court is adjourned over one or more intervening days, he is not obliged to remain at his own expense at the place of holding court, but may return to his home and charge travel for going anew to attend the term at the day to which it is adjourned. His right to charge travel for going to each special court or special term is, if possible, still clearer, and is scarcely contested."

92] *In that case the agreed statement of facts on which the case was submitted to the judgment of the circuit court showed only that the sum in dispute was charged for travel on days when said courts were held by an adjournment over an intervening day, and were not held on consecutive days. It did not appear whether such an adjournment included judicial or non-judicial days. The statement of facts, as well as the opinion of this court in that case, implied that there was an interruption in the term, and that the adjournment or suspension of the term was of such a character that the marshal would have been obliged to have remained at his own expense at the place of holding the court during the period of such interruption or adjournment, and from this fact it was considered that he might return to his own home and charge travel for going anew to attend the term at the day to which it was adjourned. In the present case there was, however, no cessation, interruption, or adjournment of the court for any judicial day of the term, but only from Saturday to Monday, leaving the district attorney entitled to his per diem allowance for remaining at the place of holding the court for the non-judicial day—Sunday. Such an adjournment as that cannot be considered as an interruption of the term, or as a suspension of the business of the court, so as to bring the present case within the rule laid down in *United States* v. *Harmon*, 147 U. S. 268 [37:164].

We are not inclined to extend the rule, there laid down, and apply it to the case under consideration, in which we are clearly of opinion that the mileage charged and allowed the district attorney for the twenty-four weekly trips, made during the term, is not sanctioned or supported by any fair construction of the law applicable to the question.

The judgment of the Court of Claims for the item of $278.50 is reversed and the cause remanded with directions to render judgment for the United States as to this item.

UNITED STATES, *Appt.*, [93
v.
A. KLINGENBERG.

(See S. C. Reporter's ed. 93-104.)

Review of decision of board of appraisers—jurisdiction of circuit court—collector's decision, when final.

1. The circuit court of the United States has jurisdiction to review the decision of the board of general appraisers reversing the action of the collector in estimating the value of and converting paper florins into the currency of the United States on importations of merchandise.
2. Under sections 14 and 15 of the Act of June 10, 1890, the right of review by the circuit court extends to all questions of law and fact in respect to which the board of general appraisers have appellate jurisdiction, except the decision of that board as to the dutiable value of merchandise.
3. The collector's action in estimating the value of florins in the invoices of imported merchandise is not subject to review and reversal by the board of general appraisers, and the U. S. circuit court has jurisdiction to so declare and reverse the board; if however the right of appeal to the board does exist, the circuit court has jurisdiction to review the decision of the board on the application of the collector.

[No. 1066.]

Submitted March 26, 1894. Decided April 23, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing, for want of jurisdiction, an application by the United States to review the decision of the board of general appraisers, reversing the decision of the Collector of the Port of New York, in estimating the value and converting paper florins into the currency of the United States on importations of merchandise. The question of jurisdiction was certified by the circuit court to this court. *Reversed, and cause remanded.*

The facts are stated in the opinion.

Mr. **Lawrence Maxwell, Jr.**, *Solicitor Gen.*, for appellant.

Mr. **W. Wickham Smith** for appellee.

Mr. Justice **Jackson** delivered the opinion of the court:

The question presented for our consideration by the record in this case is whether the Circuit Court of the United States for the Southern District of New York has jurisdiction to review the decision of the board of general ap-

NOTE.—*As to jurisdiction of United States courts over common law offenses*, see note to United States v. Coolidge, 4: 124.

As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute, see note to Schunk v. Moline M. & S.Co. 37: 256.

As to jurisdiction of United States circuit court dependent on residence of parties; proper place of suit, see note to Roberts v. Lewis, 36: 579.

As to lien of United States for duties, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest how made, and its effect, see note to Greely v. Thompson, 13: 897.

praisers reversing the action of the collector of the port of New York in estimating the value and converting paper florins into the currency of the United States on importations of merchandise, the invoices of which were expressed in paper florins of Austria-Hungary, from which country the importations were made.

The appellee, in July, 1892, imported certain merchandise, consisting of china and glass ware, from Austria-Hungary, which were entered for consumption at the port of New York on July 23, 1892. The invoices of this mer- [94] chandise were made *out in (paper) florins of Austria-Hungary, in accordance with the provisions of section 2 of the Customs Administrative Act of June 10, 1890 (26 Stat. at L. 131) which requires that "all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importations shall be made." No consular certificate giving the value of the paper florin accompanied the invoices or was produced by the importer. In reducing the currency of the invoices into money of account of the United States the collector of the port estimated the florin at $0.482, which was the value of the gold florin as proclaimed by the Treasury Department July 1, 1892. The importer duly protested against this action of the collector, because the invoices accompanying the merchandise were not expressed in gold florins, and because in estimating the value of the Austrian florin the collector should have adopted the silver florin as the standard value, as last proclaimed by the Secretary of the Treasury, which was $0.32; that the collector's adoption of the value of the gold florin as the standard necessarily increased the amount of duties to be paid on the importations.

The protest of the importer having been made in due time and form was transmitted by the collector to the board of general appraisers at the port of New York, who, after hearing testimony, decided that the collector should have estimated the florins of the invoices at $0.32 instead of at $0.482, and directed the reliquidation of the entry of the goods on that basis.

Thereupon the collector, on behalf of the United States, made application to the Circuit Court of the United States for the Southern District of New York for a review of this decision of the board of general appraisers. The petition set out the facts already stated, and claimed that the board of general appraisers was in error in holding that the reduction of the currency of the invoice into money of account of the United States should have been $0.32 to the florin, for the reason that by the estimate of the Director of the Mint, and the proclamation of the Secretary of the Treasury, made July 1, 1892, in conformity with section [95] 52 of the Tariff Act of *October 1, 1890 (26 Stat. at L. 567) it appeared that silver was "the nominal standard, paper the actual standard, the depreciation of which is measured by the gold standard," which, under the proclamation, was fixed at $0.482; that under the values fixed by this proclamation the board erred in reversing the decision of the collector, and in sustaining the protest of the importer in the premises.

The importer moved to dismiss the application of the collector on the ground that the decision of the board of general appraisers complained of could not be reviewed by the circuit court under section 15 of the Customs Administrative Act, because that decision related neither to the classification of the merchandise, nor to the rate of duty thereon. The circuit court being of opinion that it had no jurisdiction to enter upon, hear, and decide the questions presented by the collector's petition, granted the motion, and dismissed the application. The United States being dissatisfied with this ruling, the circuit court, under the provisions of section 5 of the Act of March 3, 1891, (26 Stat. at L. 827,) certified the question of its jurisdiction in the premises to this court.

It is insisted on behalf of the United States that the collector's decision as to the value of the florin, under the provisions of law and the proclamation of values made by the Secretary of the Treasury on July 1, 1892, was conclusive and not subject to review by the board of general appraisers. This position is rested upon the rule laid down in the cases of *Arthur* v. *Richards*, 90 U. S. 23 Wall. 259 [23:96]; *Cramer* v. *Arthur*, 102 U. S. 612 [26:259] and *Hadden* v. *Merritt*, 115 U. S. 25, 27 [29:333, 334].

By section 1 of the Act of March 3, 1873 (17 Stat. at L. 602) it was provided "that the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the Director of the Mint, and proclaimed on the first day of January by the Secretary of the Treasury." In pursuance of that Act the Director of the Mint having estimated the value of the franc of France at nineteen cents and three mills, and the Secretary of the *Treasury [96] having on January 1, 1874, proclaimed it, the question arose in the case of *Arthur* v. *Richards*, 90 U. S. 23 Wall. 259 [23: 96], whether goods invoiced in French francs and entered in a custom house here in March, 1873, were to be charged at this new valuation of the franc. It was said by *Mr. Justice* Bradley, who delivered the opinion of the court in that case, that "it seems to us . . . that the statute adopts the true method of computing the value of foreign money. The basis of our dollar of account . . . is the standard gold dollar of 25.8 grains, containing one tenth alloy. The actual coinage in circulation may be diminished in value by abrasion, and this may have some effect on the dollar of account. But the same thing is true in other countries as the assays at the mint have shown; and the true method of comparing their money of account with ours, when both are based on actual coin, is to compare the standard coins of the two countries in a perfect state, and to ascertain the actual amount of pure metal in each. This is the result at which Congress seems to have arrived, and, as we think, wisely. In making the comparison of the moneys of different countries their gold coins, if they have such, are employed for the purpose; gold having become the general medium of interna-

tional exchange, whilst silver is regarded more as a domestic coin, and is usually made a legal tender for only limited amounts. This practice, together with the rejection of the alloy from the estimate, is in accordance with the rules laid down on the subject by the most enlightened economists."

This first section of the Act of March 3, 1873, was carried into section 3564 of the Revised Statutes, and again came under consideration in *Cramer* v. *Arthur*, 102 U. S. 612 [26: 259], in connection with section 2903, Revised Statutes, providing for the case of invoices made out in a depreciated currency issued and circulated under authority of any foreign government, and pursuant to which section regulations were established declaring that where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, such value shall control in estimating cus-[97] tom duties, unless collectors have *been instructed otherwise, or unless a depreciation of the value of that currency, "expressed in an invoice from the standard of that currency, shall be shown by consular certificate thereto attached." There was a consular certificate in that case certifying the value of the Austrian florin, and the plaintiff sought to go behind the valuation estimated by the Director of the Mint, and proclaimed by the Secretary of the Treasury, but this was not permitted, for the reason that the value of the Austrian florin, as ascertained and fixed by the Director of the Mint and the proclamation of the Secretary of the Treasury, was as conclusive as though fixed by the statute itself, and all parties interested were conclusively bound thereby. *Mr. Justice* Bradley, speaking for the court, said: "The proclamation of the Secretary, and the certificate of the consul, must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties there must be an end to controversy somewhere. When Congress fixes the value by general statute, parties must abide by that. When it fixes it through the agency of official instrumentalities, devised for the purpose of making a near approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty."

In the subsequent case of *Hadden* v. *Merritt*, 115 U. S. 25 [29: 333], construing sections 2838 and 3564, the former requiring all invoices of merchandise subject to a duty *ad valorem* to be made out in the currency of the place or country from whence the importation shall be made, and that they shall contain a true statement of the actual cost of such merchandise in such foreign currency or currencies, without any respect to the value of the coins of the United States, or of foreign coins, by law, made current within the United States in such foreign place or country. Section 3564 [98] was in the same language as *section 1 of the Act of March 3, 1873, above referred to. It was held in that case that "the value of foreign coins, as ascertained by the estimate of the Director of the Mint and proclaimed by the Secretary of the Treasury, is conclusive upon custom house officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding to affect the rights of the government or individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function requiring skill and the exercise of judgment and discretion which precludes judicial inquiry into the correctness of the decision. If any error in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction, that is, to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority; and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty, and their action cannot be otherwise questioned."

Section 2 of the Customs Administrative Act of June 10, 1890, is a substantial reproduction of section 2838 of the Revised Statutes, in providing that all invoices of imported merchandise shall be made out in the currency of the place or county from whence the importations shall be made, or if purchased in that currency shall be a true statement of the amount actually paid therefore; and section 52 of the Tariff Act of October 1, 1890 (26 Stat. at L. 567) is a reproduction of section 3564, with the exception that it provides that the value of standard coins of foreign countries *shall [99] be estimated quarterly, instead of annually, by the Director of the Mint, and be proclaimed by the Secretary of the Treasury on the first day of January, April, July, and October of each year.

These provisions being substantially reenactments of former laws, must, upon well settled principles, be interpreted in the light of the decisions already referred to, and the estimate of the Director of the Mint, as proclaimed by the Secretary of the Treasury, fixing the values of foreign coin or currency in terms of the money of account of the United States, must be held equally conclusive both upon the government and the importer as under the former statutes.

In accordance with the provisions of section 52 of the Tariff Act of 1890, after the Director of the Mint had made his estimate of the value of foreign coins, the Secretary of the Treasury on July 1, 1892, issued his proclamation as to the "values of coins in terms of money of account of the United States, to be followed in

estimating the value of foreign merchandise exported to the United States on and after July 1, 1892, expressed in any such currencies." (Treas. Synopsis, 13,003.) That portion of the proclamation relating to Austria-Hungary gave the value of the gold florin at $0.482, and of the silver florin at $0.32 in terms of the United States gold dollar. In a foot-note to the proclamation is this statement: "Silver, the nominal standard; paper, the actual standard, the depreciation of which is measured by the gold standard."

Under and in pursuance of this proclamation of the Secretary of the Treasury, fixing the value of the Austria-Hungary silver and gold florins, and in the absence of a consular certificate as to the value of the paper florin, the question which was presented for the collector's action and decision was whether the paper florin of the invoices should be estimated on the basis of the value of the gold or the silver florin. The collector adopted the value of gold florin as the proper standard, while the importer insisted that the value of the silver florin, as proclaimed, should have been adopted as the standard.

100] *We are of opinion that the collector's action and ruling on the question was correct, for the reason that in the proclamation and the footnote attached thereto, silver was stated to be only the nominal standard, while paper was the actual standard, the depreciation of which was to be measured by the gold standard. It was not shown, however, that the paper florin of the invoices was actually depreciated, as compared with the gold standard, and the value was properly taken as that of the gold florin—the real standard with which it was to be compared—gold having become, as stated in *Arthur* v. *Richards*, 90 U. S. 23 Wall. 260 [23: 96] the general medium of international exchange, while silver was regarded more as a domestic coin. The collector was not authorized to presume that the paper florin was so depreciated as to be reduced to the value of the silver florin, which under the proclamation of the Secretary of the Treasury was only referred to as the nominal standard. If there had been a consular certificate with the invoices, showing that the paper florin was simply and merely of the value of the silver florin, the claim of the importer would have had some foundation upon which to rest, but in the absence of such a certificate the collector was clearly authorized in assuming that the currency of the invoices was equal in value to that of the real standard, which was the gold florin.

Section 52 of the Customs Administrative Act provides that the value of the foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of the coin of standard value, and the proper construction of the proclamation, in the absence of a consular certificate as to the value of the paper florin, required the collector to adopt the gold florin as the pure metal and the better standard, rather than the value of the silver florin, which was referred to as only a "nominal standard."

This being the proper construction to be placed upon the proclamation of July 1, 1892, we are of the opinion that the collector's action in adopting the value of the gold florin at the estimate fixed therein was not subject to review by the board of general appraisers, under the principle laid down in the *authorities already referred to. If the action of the collector was conclusive, **[101** certainly the circuit court of the United States had jurisdiction to pronounce the decision of the board reversing the collector's ruling, null and void.

But suppose the collector's construction of the law and the proclamation imposed on the importer a greater amount of duties than he was properly chargeable with, and that he had a right, after protest, to have that question reviewed on appeal by the board of general appraisers, is the decision of that board, reversing the collector's action, conclusive on him and on the United States, whom he represents? On the assumption that an appeal did lie from the collector's action to the board of general appraisers, the question as to the jurisdiction of the circuit court to review the adverse action of the board must depend upon the proper construction to be placed on sections 13, 14, and 15 of the Customs Administrative Act of June 10, 1890.

The 13th section of the Act relates solely to the appraisement of imported merchandise, and declares that the decision of the board of general appraisers "shall be final and conclusive as to the dutiable value of such merchandise," and directs the collector to ascertain, fix, and liquidate the amount of duties to be paid on such valuation.

Section 14 provides that the decision of the collector as to the "rate and *amount* of duties, . . . including all dutiable costs and charges, and as to all fees and exactions of whatever character, except duties on tonnage, shall be final and conclusive," unless the importer appeals to the board of general appraisers. This section clearly allows and provides for an appeal by the importer from the decision of the collector, as to both rate and amount of duties, as well as dutiable costs and charges, and as to all fees and exactions.

By section 15, so far as it relates to the matter in question, it is provided that "if the importer . . . or the collector . . . shall be dissatisfied with the decision of the board of general appraisers as provided for in section 14 of this Act, as to the *construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed* **[102** *thereon under such classification*, they, or either of them, may . . . apply to the circuit court . . . for a review of the questions of *law and fact* involved in such decision." This section further provides for certifying all the evidence taken before the general appraisers and their decision thereon (and for the taking of further testimony) which is made to constitute the record on which the circuit court is to hear and determine the questions of law and fact involved in the decision of the board of general appraisers. This section in express terms provides that the circuit court shall have jurisdiction to review, not merely questions of law and fact respecting the classification of imported merchandise and the rate of duty imposed thereon under such classification, but such right of review extends to the decision of the board upon all questions and matters in

respect to which an appeal will lie thereto under the provision of section 14. In other words, the right of review by the circuit court is coextensive with the right of appeal to the board as to all matters except the *dutiable value* of the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive.

Now, by section 14 of the Act, if the decision of the collector imposes an excessive amount of duties, under an improper construction of the law, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive as it is in respect to the *dutiable value* of the merchandise, and not being conclusive it is subject to review under the express provision of section 15.

The action of the collector in the present case did not relate either to the classification of the goods, or to the rate of duty imposed thereon, but, as conceded by counsel for the appellee, merely increased the amount of duties to be paid by the importer to the extent of the difference between $0.32, as the value of the silver florin, and $0.482, as the value of the gold florin, in the currency of account of the United States. This involved no dispute between the parties as to either classification or rate of duty; or the dutiable value of the imported merchandise. But it did involve the 103] proper construction *of the law, as embodied in section 52 of the Tariff Act of 1890, and the estimate of the florin as made by the Director of the Mint, and as proclaimed by the Secretary of the Treasury on July 1, 1892, made in pursuance thereof.

Now, it is claimed on behalf of the appellee that the rule laid down in *Ex parte Fassett*, 142 U. S. 479 [35: 1087], and in *Passavant* v. *United States*, 148 U. S. 214 [37: 426], sustains the action of the circuit court in declining to take jurisdiction for the purpose of reviewing the decision of the board of general appraisers in reversing the action of the collector. There is nothing in *Ex parte Fassett* even intimating that on the question here under consideration the circuit court has no jurisdiction to review the decision of the board of general appraisers. It was said in this case that "the appeal provided for in section 15 brings up for review in court only the decision of the board of general appraisers as to the construction of the law, and the facts respecting classification of imported merchandise, and the rate of duty imposed thereon under such classification." The question in that case was whether a British built pleasure steamer yacht, purchased in England by a citizen of the United States, and entered at the port of New York, was liable to duty as an imported article. The case did not in any way involve the question here under consideration.

In the subsequent case of *Passavant* v. *United States*, 148 U. S. 214 [37: 426], the only question presented for the consideration and determination of the court was whether the *dutiable value* of imported merchandise, as fixed and ascertained by the board of general appraisers, was subject to review in the circuit court. It was held that it was not, for the reason that by section 13 of the Act of June 10, 1890, the decision of the board of general appraisers was declared to be "final and conclusive" as to the dutiable value of such merchandise against all parties interested therein. This clear and explicit language of the statute left no room for construction, and the decision in *Passavant* v. *United States* went only to the point of holding that the *dutiable value* of imported merchandise, as fixed by the board of general appraisers, was conclusive, and not subject to review by the circuit court.

*Neither of these cases, in their facts [104 nor in the principles on which they proceed, is directly in point or controlling of the present case.

Under a proper construction of sections 14 and 15 of the Act of June 10, 1890, it cannot be held that the right of review by the circuit Court is limited and confined, as contended by the appellee, to the two subjects of classification and the rate of duty. By section 14 the collector's decision on rate and amount of duties, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage) may be the subject of appeal to the board of general appraisers. The subjects of review by the circuit court, provided for by section 15, extend to all questions of law and fact in respect to which the board of general appraisers have appellate jurisdiction, except the decision of that board as to the dutiable value of merchandise, which is provided for by section 13, and is made conclusive against all parties interested.

We, therefore, are of opinion, first, that the collector's action in estimating the value of the florin was not the subject of appeal to and reversal by the board of general appraisers, and if it was not it was proper for the circuit court to so declare, and reverse the board; secondly, if the right of appeal to the board did exist, then the circuit court of the United States had undoubted jurisdiction te review that decision on the application of the collector.

The action of the circuit court dismissing the bill for want of jurisdiction is accordingly reversed, and the cause remanded to be proceeded with in conformity with this opinion.

HENRIETTA LOUISE LUTZ ET [105 AL., *Plffs. in Err.*,
v.
DANIEL MAGONE, Collector, etc.

(See S. C. Reporter's ed. 105-109.)

Duty on saccharine—interpretation of revenue law—scientific designation.

1. Under the Tariff Act of 1883, saccharine is not entitled to free entry as an acid.
2. In the interpretation of the revenue laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word.
3. Where the popular idea of an article and its

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 13: 397.

actual use in the arts are diametrically opposed to its scientific designation, the latter should not prevail in fixing the duties payable thereon.

[No. 336.]

Argued April 3, 1894. Decided April 23, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of the defendant. Daniel Magone, Collector, in an action brought by the administrators of Louis Lutz, to recover duties alleged to have been illegally exacted upon importations of saccharine, made by said Lutz in 1887. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was an action by the administrators of Louis Lutz to recover duties alleged to have been illegally exacted by defendant upon certain importations of saccharine made by Lutz, in 1887, under the firm name of Lutz & Movius. The collector classified the article as a "chemical compound" under the Act of 1883 and as falling within the description of "all preparations known as essential oils, expressed oils, distilled oils, rendered oils, alkalis, alkaloids, and all combinations of any of the foregoing, and *all chemical compounds* and salts, by whatever name known, and not specially enumerated or provided for in this Act, twenty-five per centum ad valorem." The plaintiffs claimed that the importations were entitled to free entry as "*acids* used for medicinal, chemical, or manufacturing purposes, not specially provided for or enumerated in this Act." 22 Stat. at L. 494, 516.

On the trial the collector claimed that they were "proprietary preparations, to wit, all . . preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases or affections whatever affecting the human or animal body, . . . not specially enumerated or provided for in this Act, fifty per centum ad valorem." 22 Stat. at L. 494.

The case was tried before a jury, and upon the conclusion of the testimony, counsel for the defendant moved the court to direct the jury to find for the defendant, upon the ground (1) that the article was not an acid used for medicinal, chemical, or manufacturing purposes; **106**] (2) that, whether or not it was an *acid, it was a preparation or composition recommended to the public as a proprietary article; and (3) that, if it were not so dutiable, then that it was dutiable as a chemical compound by whatever name known. The court granted this motion, and thereupon the jury returned a verdict for the defendant, and the importer sued out this writ of error.

Mr. **Albert Comstock** for plaintiffs in error.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

Upon the trial evidence was given tending to show that saccharine was invented in 1879; that, although about three hundred times as sweet as sugar, it was chemically an acid; that its chemical name is orthosulphamin benzoic acid anhydrid, and the last step in its manufacture is the separation from orthosulphamin benzoic acid of the water therein contained; that it is a patented article, made by a known formula, and a dry white powder, sweet to the taste, worth from $13 to $15 per pound; that it is used as a sweetening agent in manufacturing purposes, such as soda water, liquors, wines, chewing tobacco, preserves, medicines, etc.; that it has no medicinal effect upon the human or animal system, and that its principal use is to sweeten articles of medicine or food in order to render them palatable. It was also shown that it possessed some of the inherent qualities of an acid, in the fact that it turned blue litmus paper red, and would neutralize an alkaline such as bi-carbonate of soda; that it was what is termed an "anhydrid" or anhydrous acid, which means an acid free from water. The plaintiffs also offered in evidence a treatise on chemistry, which gave the formula for the manufacture of saccharine, and classed it as an acid. This book was excluded upon motion of the defendant.

Defendant also gave evidence tending to show that, in neither of the three patents obtained by the inventor, was *saccharine [**107** called an acid; although it was spoken of as a compound. There was also put in evidence a circular of the plaintiffs purporting to describe the origin, manufacture, and use of saccharine, in which it was stated to be "neither a drug nor a food, but a neutral and indifferent substance," and "of paramount value whenever a bitter taste has to be neutralized or counteracted;" of particular value in medicine to disguise the bitter taste of alkaloids, such as quinine, morphine, etc., and especially "an invaluable boon to all persons inflicted with diabetes," for sweetening their food. It appears to be manufactured from toluene, which is itself a product of coal tar.

Plaintiffs relied for its classification as an acid upon the scientific definition of the article, which is rather that of an "anhydrid," defined by Webster as "an oxyd . . . capable of forming an acid by uniting with the elements of water," than a true acid. It is entirely well settled, however, that in the interpretation of the revenue laws, words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word. Customs officers are presumed to be acquainted with the ordinary meaning of words, and may also be presumed to have some familiarity with trade designations and the customs of dealers. They are not, however, supposed to be chemists, scientists, or professional men, nor to be conversant with the terms of particular arts. Thus in *Two Hundred Chests of Tea*, 25 U. S. 9 Wheat. 430 [6: 128], it was argued that the tea in controversy, imported as Bohea, was in reality simply Congo tea, and not Bohea; that the latter was a pure unmixed tea, known in China by an appropriate name; and that to this pure and unmixed Bohea tea the acts of Congress referred, and not to any other mixed tea, though known by the common designation of Bohea. It was held, however, to be unnecessary to enter upon this inquiry, "because Congress must be un-

derstood to use the word in its known commercial sense." "The object of the duty laws," said *Mr. Justice* Story, "is to raise revenue, and for this purpose to class substances accord-
108] ing to the general usage and known *denominations of trade. Whether a particular article were designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic." See also *Marvel* v. *Merritt*, 116 U. S. 11 [29: 550]; *Robertson* v. *Salomon*, 130 U. S. 412, 414 [32: 995, 996]; *Mason* v. *Robertson*, 139 U. S. 624, 627 [35: 293, 294]; *United States* v. *Breed*, 1 Sumn. 159, 164.

Particularly is this the case when the scientific designation contradicts so directly the popular idea of the article in question, as it does in the case of saccharine. To speak of a substance, as an acid, which is admitted to be three hundred times as sweet as sugar, is to confuse all our natural impressions with respect to the relative qualities of acidity and sweetness. These terms should be received in their ordinary acceptation. As acid is described by Webster primarily as "a sour substance," and chemically as "one of a class of compounds, generally, but not always, distinguished by their sour taste, solubility in water, and reddening of vegetable blue or violet colors;" giving also some other distinguishing characteristics. To class saccharine as an acid because it imparts a reddish color to litmus paper is to make an accidental and occult property of the article dominate its well known and popular quality of sweetness, for which it is exclusively used. In the Encyclopædia Britannica flint is said to be "a true acid, because, when it is heated along with soda or lime, it forms the new body commonly called glass, which is chemically a salt of silicic acid." It would be little less, however, than an abuse of terms to classify flint as an acid for revenue purposes. While saccharine may be defined by scientists as an acid anhydrid, having "an acid reaction," or simply as an acid, it is not so denominated in the dictionaries, but is defined as "a trade name for benzoic sulphinide," which latter is said to "have acid properties, and forms salts." (Webster.) We do not wish to be understood as holding that in no
109] case will the *scientific designation of an article by value in fixing its proper classification for duties, but that in a case where the popular idea of an article and its actual use in the arts are so diametrically opposed to its scientific designation the latter should not prevail.

Counsel for the government has laid great stress upon the proposition that even if saccharine were to be considered as an acid it is not used as an acid for medicinal, chemical, or manufacturing purposes, and, therefore, was not entitled to free entry under the paragraph relied upon. It is not perceived, however, that this argument lends any additional strength to the position of the government in this connection. It is used for manufacturing purposes, and if not used for such purposes, *as an acid*, it is because it is not in its nature an acid, and not because it may be used for some other purposes as such.

In the view we have taken of this case it is unnecessary to determine whether defendant was correct in classifying saccharine as a "chemical compound," or whether it falls within the description of "proprietary preparations." For the purposes of this case it is sufficient to hold that the article was not entitled to free entry as an acid. If there were any errors in the exclusion of testimony, as to which we express no opinion, there were none such as worked a prejudice to the plaintiffs.

The judgment of the court below is, therefore, affirmed.

J. D. HEGLER, *Plff. in Err.*,
v.
GEORGE FAULKNER ET AL.

(See S. C. Reporter's ed. 109-120.)

When list filed in Indian department is not evidence—instruction to jury.

1. A list filed in the Indian department, and which, or a copy of which, had been sent to the special agent to assign or allot the lands to Indians is not admissible in evidence in a legal controversy, to prove the age of one of said Indians.
2. Where the court left to the jury the question of what was a reasonable time for an infant to disaffirm his contract after attaining majority, the fact that the court added to the instruction the observation that "within a year or so would be a reasonable time," is not ground of reversal.

[No. 166.]

Submitted Dec. 13, 1893. Decided April 23, 1894.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of defendants, George Faulkner *et al.*, in a suit brought by J. G. Hegler, plaintiff, to recover the possession of certain land in the county of Richardson, and the rents and profits thereof. *Affirmed.*

See same case 127 U. S. 482 (32: 210).

Statement by *Mr. Justice* **Shiras:**

J. D. Hegler, a citizen of the state of Ohio, brought an action in the district court of Richardson county, Nebraska, on October 4, 1878, against George Faulkner, James Cottier, August Schoenheit, and Edwin S. Towle, citizens of the state of Nebraska, to recover from the defendants the possession of certain land situated in the county of Richardson, to which land the plaintiff, in his petition, claimed title, and also to recover the rents and profits of said property for the period of which such possession had, as alleged, been withheld. Upon motion of the defendants, the case was removed, on March 25, 1879, into the Circuit Court of the United States for the District of

NOTE.—*As to Indians and Indian tribes, their status and rights: jurisdiction and control over them*, see note to Worcester v. Georgia, 8: 483.

As to acts of infant, when void, and when voidable, see note to Tucker v. Moreland, 9: 345.

Nebraska, where the defendants filed an answer to the petition, on May 17, 1879, denying that the plaintiff then had, or had ever had, any title to the land in question, and asserting title thereto in themselves. The case was tried in the circuit court, before the court and a jury, and, a verdict having been found for the defendants, judgment in their favor was entered on January 10, 1885. The case was then brought to this court upon a writ of error sued out by the plaintiff, but because the record, as then filed, contained no petition or order for the removal of the case from the state court to the said circuit court, nor any statement of the citizenship of the parties, and because it did not appear, therefore, that the circuit court had had jurisdiction of the case, the judgment was reversed, and the case remanded for further proceedings. 127 U. S. 482 [32: 210]. Those defects in the record were afterwards cured, and on June 13, 1889, judgment was again entered in the court below in favor of the defendants, and the plaintiff again sued out a writ of error from this court.

On the trial the plaintiff introduced evidence tending to show that on April 15, 1859, George 111] Washington, a half-breed *Indian of the Iowa tribe, received from William M. Stark, special Indian agent, a certificate of allotment of the land in controversy, issued by virtue of the provisions of the Act of Congress of July 31, 1854, which gave effect to a treaty made on July 30, 1830, under which certain lands belonging to the tribes, which joined in the treaty, were set apart for the half-breeds of those tribes, by directing the President to cause the reserved tracts described in the treaty to be surveyed and allotted in fee simple to the persons entitled to receive them; that on April 16, 1859, George Washington conveyed the land so allotted to him to Houston Nuckolls; that Nuckolls conveyed the same on April 20 to A. S. Ballard; that Ballard conveyed to James McMillan on September 16, and that on October 13, 1859, McMillan conveyed to the plaintiff. On September 10, 1860, as the plaintiff's evidence further tended to show, George Washington received from the government a duly executed patent for the land.

The defendants also claimed to derive title from George Washington, the evidence on their behalf tending to prove that by deed, dated November 3, 1866, he conveyed the land to the defendants Schoenheit and Towle, and that on February 28, 1868, he executed another deed to the same parties for the same property.

For the purpose of showing that George Washington was of full age when he transferred the land to Nuckolls, the plaintiff offered in evidence a list bearing the heading, "Office of Indian Affairs," the date February 4, 1858, and containing the name, sex, age, degree of blood, and tribe of certain Indians. Upon this list was the name of George Washington, and opposite the name appeared the figures 20, in the column headed "Age." The agent, Stark, testified that this list was received by him from the Indian department, and that it contained the name of the half-breeds entitled to allotment of land in the reservation described in the treaty.

To show under what directions of the government the list was prepared, the plaintiff offered in evidence a letter from the Commissioner of Indian Affairs to Joseph L. Sharp, which *began with a statement of the pro- [112 visions of the treaty above referred to, and of the said Act of Congress, and proceeded as follows:

"To enable the President to comply with the Act it is necessary to ascertain the number and names of the half-breeds and mixed bloods entitled to participate. You have been appointed commissioner to act under the following instructions: To give notice for all persons interested to appear before you with their applications and evidence. Before commencing to take testimony consult with the Indian agents and chiefs of the tribes. In making report have regard not merely to proof applicants may submit, but also to information from above mentioned and other sources you consider reliable. You will be furnished by the superintendent of Indians affairs at St. Louis with all the information he may discover bearing on the subject. I direct that you prepare your report in full to embrace a list containing names of all applicants arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards, and such other facts as you consider useful and proper. In every case, whether admitted or rejected, give briefly your reasons. Transmit your report with evidence taken, to this office without delay. The several Indian agents for the particular tribes will be instructed to render you all proper assistance in the premises. Before commencing your duties take and subscribe an oath of office before some officer authorized to administer oaths that you will support the Constitution of the United States and faithfully discharge your duties as such commissioner, which transmit to this office."

Upon objection made by the defendant, the court excluded the portion of Stark's testimony relating to the list, and refused to admit the list or the letter of instructions to Sharp in evidence. To these acts of the court the plaintiff excepted, and likewise to certain instructions given and refused.

Messrs. **A. H. Garland** and **H. J. May,** for plaintiff in error:

A reasonable time for an infant to disaffirm is not a question of law, as held by the court, but a question of fact to be determined upon the circumstances of each case.

Jenkins v. *Jenkins*, 12 Iowa, 195; *Stout* v. *Merrill*, 35 Iowa, 47; 1 Greenl. Ev. (14th ed.) § 49.

Two years is an unreasonable time, but the court in this case erroneously instructed that, as a matter of law, a year or so was not unreasonable.

Wright v. *Germain*, 21 Iowa, 585.

At the time of the transactions involved herein, the law of Nebraska limiting the time for infants to sue after coming of age was as follows:

"§ 246. The above limitations of action for the recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their ma-

jority within which to commence such actions."

Neb. Sess. Laws (1st sess.) p. 81, § 246.

By analogy we can fairly say that, unless there be special circumstances taking the case out of the general rule, infants must disaffirm deeds within one year after becoming of age.

The branch of the executive department of the government having charge of Indian affairs, under the direction of the President made rules and regulations to enforce this provision of law, and did enforce it. This, in law, was the act of the President, of course.

Wilcox v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *Stone* v. *United States*, 69 U. S. 2 Wall. 537 (17: 767); *United States* v. *Clarke* ("*Confiscation Cases*") 87 U. S. 20 Wall. 109 (22: 323); *United States* v. *Farden*, 99 U. S. 19 (25: 269); *Wolsey* v. *Chapman*, 101 U. S. 769 (25: 920).

Every essential fact necessary to the finding or judgment, is presumed to have existed in the mind of the officer or tribunal when it was made and rendered.

Stanley v. *Albany County Suprs.* 121 U. S. 535 (30: 1000); *Williams* v. *Albany County Suprs.* 122 U. S. 154 (30: 1088); *Veach* v. *Rice*, 131 U. S. 293 (33: 163); *Thaw* v. *Falls* ("*Thaw* v. *Ritchie*") 136 U. S. 519 (34: 531).

All questions of age, breed, and of whatever else was required under the treaty to authorize the finding or judgment, are supposed to have been found, and cannot, under ordinary rules, be questioned in this way. It is *res adjudicata* in the highest and best sense of the term, and in every sense of it.

Johnson v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Martin* v. *Mott*, 25 U. S. 12 Wheat. 19 (6: 537); *Allen* v. *Blunt*, 3 Story, 745; *United States* v. *Bank of the Metropolis*, 40 U. S. 15 Pet. 377 (10: 774).

These papers from the Interior Department were competent as offered, and should have been received in evidence.

United States v. *Percheman*, 32 U. S. 7 Pet. 51 (8: 604); *United States* v. *Wiggins*, 39 U. S. 14 Pet. 334 (10: 481); *United States* v. *Davenport*, 56 U. S. 15 How. 7 (14: 577); *Culver* v. *Uthe*, 133 U. S. 655 (33: 776).

Messrs. **Isham Reavis** and *O. F. Reavis*, for defendants in error:

The only object in offering the list was to prove the age of George Washington at that time, the list was clearly incompetent for that purpose.

1 Greenl. Ev. § 483; Taylor, Ev. § 1429; *Mutual Ben. L. Ins. Co.* v. *Tisdale*, 91 U. S. 238 (23: 314); *Campbell* v. *Gordon*, 10 U. S. 6 Cranch, 176 (3: 190); *Stark* v. *Chesapeake Ins. Co.* 11 U. S. 7 Cranch, 420 (3: 391); *Connecticut Mut. L. Ins. Co.* v. *Schwenk*, 94 U. S. 593 (24: 294); *Chaffee* v. *United States*, 85 U. S. 18 Wall. 516 (21: 908).

Mr. Justice **Shiras** delivered the opinion of the court:

The plaintiff contended, in the court below, that the Indian, George Washington, was of full age on April 16, 1859, the date of the conveyance to Nuckolls, or, at all events, so represented himself to be, and that Nuckolls relied upon such representations, and purchased and paid for said land accordingly. These questions of fact were submitted by the court to the jury, and found by them in favor of the defendants.

The error assigned are to the action of the court in rejecting evidence offered by the plaintiff, and in refusing instructions asked for him. The first offer was that of an exemplification from the records of the Indian department of instructions given to one Joseph L. Sharp, dated May 14, 1856, under which Sharp acted as an agent for the United States in ascertaining the number and names of the half-breeds entitled to participate in the division of the lands granted by the treaty of Prairie du Chien. Among such instructions the agent was directed to prepare "a report in full to embrace a list containing names of all applicants, arranged by tribes and families and single persons, showing names, age, sex, relationship to the tribe, place of residence, who are orphans or wards." This was followed by an offer of a certified copy of a *census or list of half-breeds [116 entitled to lands, bearing the heading "Office of Indian Affairs," dated February 4, 1858, containing the name, sex, age, degree of blood, and tribe of certain Indians. Upon this list was the name of George Washington, and opposite the name appeared the figures "20" in the column headed "Age." The purpose of these offers was stated to be to show that George Washington was twenty years of age at the date February 4, 1858, and that he was, therefore, of full age when on April 16, 1859, he conveyed the land allotted to him to Houston Nuckolls. The court below regarded the evidence offered as inadmissible for that purpose, and the rejection of the offers is the subject of the first and second assignments of error.

As leading up to the controlling question, namely, the age of the half-breed George Washington, the offer of the instructions under which the agent acted in procuring information for his report would seem to be unobjectionable, but its rejection would not constitute reversible error unless the offer that followed was admissible. That was the offer to put in evidence a census or list filed in the office of Indian affairs, containing the names and ages of half-breeds, who, upon testimony presented to that office, were regarded as entitled to participate in the allotments or assignments of the lands awarded by the treaty. If the latter offer was not a proper one, then the rejection of the preceeding offer was immaterial.

Was, then, this list, filed in the Indian department, and which, or a copy of which, had been sent to William M. Stark, special agent to assign or allot these lands, admissible in evidence in a legal controversy, to prove the age of one of said Indians?

It is contended, on behalf of the plaintiff in error, that this list is in the nature of a finding or judgment of the executive department of the government, in matters committed specially to the president by Congress; that the allotment of these lands to the half-breeds was expressly devolved upon the President by Act of Congress (10 Stat. at L. 332) in order to carry out the treaty; that this Act of Congress was one making appropriation for the Indian department and for fulfilling *treaty stipula- [117 tions; that the department, under the directions

of the President made rules and regulations to enforce this provison of law, and did enforce it.

It is indeed, true that the President speaks and acts through the heads of the several departments, in relation to subjects that pertain to their respective duties, and that the allotment of these lands by the Indian department must be considered as made by the President in pursuance of the terms of the Act of Congress, and of the treaty. And it may be admitted that the decision of the special Indian agent, in identifying the Indian half-breeds entitled to participate, and in allotting the portion of each, would, in the absence of fraud, be conclusive. *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498-511 [10: 264-270].

Conclusiveness is a characteristic of the judgment of every tribunal acting judicially, whilst acting within the sphere of its jurisdiction, where no appellate tribunal is created. But such conclusiveness is restricted to those questions which are directly submitted for decision. In the case in hand, doubtless the identify of the half-breed George Washington, and his right to receive the land in question as his share of the lands appropriated by the treaty, were finally found. But neither the treaty, the Act of Congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians. It is true that, in the letter of instructions, the agent was directed to report as well the age as the sex and tribal relations of the claimants. But this was merely to enable the agent, when he came to allot the lands, to identify the persons entitled to participate. When the allotment was completed, and was followed, first, by a certificate, and, finally, by a patent, the purposes of the inquiry were fulfilled, and the list used to aid the government functionaries in the task of allotting the lands cannot be regarded as a record to be resorted to afterwards, in disputes between other parties, to prove the age of the Indians. No provision was made, in either the Act of Congress or the rules and regulations of the Indian department, to preserve the list as a muniment of title, much less as a public record admissible to prove merely incidental recitals based on hearsay. Such a **118** | *list does not come within the rule which permits, for some purposes, the use of "official registers or records kept by persons in public office, to write down particular transactions occurring in the course of their public duties or under their particular observation." 1 Greenl. Ev. § 483. "It must be remembered that official registers are not in general evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus, a parish register is evidence only of the time of a marriage and of its celebration *de facto*, for these are the only facts necessarily within the knowledge of the party making the entry. So a register of baptism, taking by itself, is evidence only of that fact. Neither is the mention of the child's age in the register of christenings proof of the day of its birth, to support a plea of infancy." 1 Greenl. Ev. § 493.

In *Mutual Ben. L. Ins. Co.* v. *Tisdale*, 91 U. S. 238 [23: 314], where the right of action depended on the death of a third person, it was held that letters of administration upon the estate of such person granted by the proper probate court, in a proceeding to which the defendant was a stranger, afforded no legal evidence of such death; and it was said: "The only ground for the admission of the letters of administration is, that granting them is a judicial act; but a judgment is not evidence of any matter to be inferred by argument therefrom, or which comes collaterally in question, or is incidentally cognizable"—citing the *Duchess of Kingston's Case*, 20 How. St. Tr. 355, and many others.

In *Connecticut Mut. L. Ins. Co.* v. *Schwenk*, 94 U. S. 593 [24: 294], it was held that an entry in the minute book of a lodge of Odd Fellows, of which the deceased was a member, made prior to the issue of a policy, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, was not admissible as evidence of such age.

We do not deem it necessary to discuss this question at greater length. Our conclusion is that the court below did not err in excluding the list offered. It was not an official record, intended as a mode of preserving the recollection of *facts, nor was it based upon the | **119** personal knowledge of the party making the entry. It was mere hearsay.

Error is assigned to the instructions given by the court to the jury on the subject of disaffirmance by George Washington within a reasonable time after becoming of age. The statutes of Nebraska on this subject are as follows: "Sec. 42. A minor is bound not only by contract for necessaries, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority and restores to the other party all money or other property received by virtue of the contract and remaining within control of the ward at any time after attaining his majority. Sec. 43. No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority or from his having engaged in business as an adult, the other party has good reason to believe the minor capable of contracting." Neb. Sess. Laws (2d Sess.) 1856, p. 165.

The instruction excepted to was in the following terms: "There might be some question about the rescinding of the contract within a reasonable time, but if the testimony should satisfy the jury that George Washington was but fifteen or sixteen years old, or thereabout, in 1859, when it is claimed he made the deed to Houston Nuckolls, then it would take until 1865 for him to attain his majority, and he would have to disaffirm the contract within a reasonable time after attaining his majority, and within a year or so would be a reasonable time."

The ground of the objection is the contention that a reasonable time for an infant to disaffirm is not a qestion of law, but a question of fact to be determined upon the circumstances of each case.

It cannot be fairly said that the court below treated the question as one of law and gave a binding instruction upon it. On the contrary, the question was left to the jury, with the observation that within a year or so would be a

reasonable time. The Nebraska statute contains the following section: "Sec. 246. The 120] above limitations of action for the *recovery of real property shall not apply to minors so far as to prevent them from having at least one year after attaining their majority within which to commence such actions." There is no substantial difference between "at least one year after attaining majority," and "within a year or so," and even if the remark of the learned judge be regarded as an instruction, it would seem, by analogy to the statute of limitations, to have been well founded.

The record discloses several other exceptions, but they do not seem to be relied on in the brief of the plaintiff in error. It is said that the charge contained inconsistencies and must have confused the jury. Such a statement is not entirely without foundation, but we think that upon the whole the case was fairly submitted. It is obvious that the case turned upon the question as to the age of George Washington at the time of the allotment and at the time of making the conveyance by him to Houston Nuckolls, under whom the plaintiff claims, and that question is treated in the briefs of both parties as the controlling one in issue.

With the list furnished by the department for the use of the agent out of the case, the weight of the evidence as to the minority of the half-breed at the time of his conveyance to Nuckolls was plainly with the defendants, and warranted the verdict of the jury in their behalf.

The judgment of the court below is affirmed.

CHARLES H. MORGAN, *Appt.*, *v.* FRED H. DANIELS.

(See S. C. Reporter's ed. 120-129).

Decision of patent office—priority of invention.

1. The decision of the patent office between contesting parties as to priority of invention, is controlling in a subsequent suit between the same parties, on the same question, unless the contrary is established by testimony which carries thorough conviction.
2. In a suit under U. S. Rev. Stat. § 4915, to establish the right to a patent, which has been refused, the decision of the patent office against the priority of plaintiff's invention to that of another claimant, will control, if the question of priority is doubtful.

[No. 313.]

Argued March 21, 22, 1894. Decided April 23, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts, in a suit in equity, brought by Fred H. Daniels, plaintiff against Charles H. Morgan, defendant, decreeing that plaintiff was the original inventor and entitled to receive a patent for an improvement in machines for coiling wire or wire rods. *Reversed, with instructions to dismiss the suit.*

Statement by *Mr. Justice* **Brewer:**

*On October 30, 1889, the appellee, 121] Fred H. Daniels, commenced suit against the defendant in the Circuit Court of the United States for the District of Massachusetts. In his bill he alleged that he was the original, sole, and first inventor of an improvement in machines for coiling wire or wire rods; that on June 26, 1886, he filed in the United States Patent Office an application in due form for a patent; that on September 4, 1886, the Commissioner of Patents declared an interference between his application, and one filed by the defendant on June 24, 1886; that thereafter testimony was taken on such interference, and a decision rendered on March 22, 1889, adversely to his claim of a priority in invention; that a rehearing was had, which rehearing resulted, on October 28, in affirming the original decision. The bill further averred that the defendant was not, as decided by the Commissioner of Patents, the first inventor or discoverer, and prayed for a decree that he, plaintiff, be entitled to receive a patent for his invention, as specified in his claims, and that defendant be enjoined from taking any steps to use or dispose of letters patent for said invention, or any part thereof.

This suit was brought under the authority of section 4915, Revised Statutes, which is as follows:

"Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

*To this bill, on January 10, 1890, the 122] defendant filed an answer denying that plaintiff was the inventor, as alleged. The case was submitted to the circuit court upon the testi-

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NOTE.—*As to patentability of inventions*, see note to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

As to abandonment of inventions, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

For what patents are granted; when declared void, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects, see note to Grant v. Walter, 37: 553.

As to reissued patents for inventions, when valid; effect of reissue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 644.

mony used in the interference proceedings, and upon such testimony a decree was entered, finding that plaintiff was the original inventor and entitled to receive a patent for the invention. From such decree the defendant brings this appeal.

Messrs. **Philip Mauro, Geo. S. Boutwell** and *Anthony Pollock* for appellant.

Messrs. **Chas. G. Washburn** and **J. E. Maynadier** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

It is worthy of notice that hitherto in the progress of this litigation upon the same testimony different persons have reached different conclusions. Thus, in the opinion filed June 5, 1888, by the examiner of interferences and assistant examiner, it was found that the defendant was the original inventor. On an appeal from that decision the examiners in-chief (two members being present) came to a different conclusion, and awarded priority to the plaintiff. On a further appeal the Commissioner of Patents on March 22, 1889, reversed the judgment of the examiners-in-chief, and sustained that of the original examiners. A motion for rehearing was brought before a succeeding commissioner and overruled. When this case was submitted, without any additional testimony, to the circuit court the conclusion finally reached in the Patent Office was dissented from, and it was found that the plaintiff was the original inventor. An examination of the opinions filed by these different officers indicates that by each of them the matter was carefully considered. Evidently, therefore, the question as to which was the prior inventor is not free from doubt. What, then, is the rule which should control the court in the **123**] determination of this case? It is *insisted by counsel for the appellant that the decision of the Patent Office should stand unless the testimony shows beyond any reasonable doubt that the plaintiff was the first inventor, and, in support of their contention, they cite the cases of *Coffin* v. *Ogden*, 85 U. S. 18 Wall. 120, 124 [21: 821, 823], and *Cantrell* v. *Wallick*, 117 U. S. 689, 695 [29: 1017, 1019]. In the first of these cases, which was a suit for infringement, the defense was a prior invention, and in respect to this defense the court observed: "The invention or discovery relied upon as a defense must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him." In the other case the same defense in a suit for infringement was set up, and there the court thus stated the rule: "The burden of proof is upon the defendants to establish this defense. For the grant of letters patent is prima facie evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 [23: 952]; *Lehnbeuter* v. *Holthaus*, 105 U. S. 94 [26: 939]. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.'"

These two cases are closely in point. The plaintiff in this case, like the defendant in those cases, is challenging the priority awarded by the Patent Office, and should, we think, be held to as strict proof. In the opinion of the court below the rule is stated in these words: "The complainant, on the issue here tendered, assumes the burden of proof, and must, I think, as the evidence stands, maintain by a clear and undoubted preponderance of proof that he is the sole author of that drawing." *Danie's* v. *Morgan*, 42 Fed. Rep. 451. This language is not quite so strong as that just quoted. The case as presented to the circuit court was not that of a mere appeal from a decision of the Patent Office, nor subject to the rule which controls a chancellor in examining a report of a master, or an appellate court in reviewing findings of fact made by the trial court. There is always a presumption in favor of that which has *once been decided, [**124** and that presumption is often relied upon to justify an appellate court in sustaining the decision below. Thus, in *Crawford* v. *Neal*, 144 U. S. 585, 596 [36: 552, 557], it was said: "The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." See also *Camden* v. *Stuart*, 144 U. S. 104 [36: 363], and *Furrer* v. *Ferris*, 145 U. S. 132 [36: 649].

But this is something more than a mere appeal. It is an application to the court to set aside the action of one of the executive departments of the government. The one charged with the administration of the patent system had finished its investigations and made its determination with respect to the question of priority of invention. That determination gave to the defendant the exclusive rights of a patentee. A new proceeding is instituted in the courts—a proceeding to set aside the conclusions reached by the administrative department, and to give to the plaintiff the rights there awarded to the defendant. It is something in the nature of a suit to set aside a judgment, and as such is not to be sustained by a mere preponderance of evidence. *Butler* v. *Shaw*, 21 Fed. Rep. 321, 327. It is a controversy between two individuals over a question of fact which has once been been settled by a special tribunal, entrusted with full power in the premises. As such it might be well argued, were it not for the terms of this statute, that the decision of the Patent Office was a finality upon every matter of fact. In *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72, 86 [20: 485, 487], a case involving a contest between two claimants for land patented by the United States to one of them, it was said: "It is fully conceded that when those officers (the local land officers) decide controverted questions of

fact, in the absence of fraud, or impositions, 125] or mistake, their decision on *those questions is final, except as they may be reversed on appeal in that department."

Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction. Tested by that rule the solution of this controversy is not difficult. Indeed, the variety of opinion expressed by the different officers who have examined this testimony is persuasive that the question of priority is doubtful, and if doubtful the decision of the Patent Office must control.

What was the invention which the parties each claim to have made and in respect to which an interference was ordered in the Patent Office? It was thus stated by the examiner: "In a device for coiling wire or wire rods, the combination with a rotating coiling receptacle or reel for receiving and laying in coils the rod as it is delivered from the rolls, of a spider or platform for supporting the coil mounted on a vertical shaft concentric with the reel-supporting shaft, and means for elevating the platform shaft independently of the other."

Plaintiff claims to have conceived the idea of this combination in July, 1878, and to have made in that and the succeeding year sketches and drawings which fully disclosed it. It is conceded that a machine embodying the invention was first constructed and put into successful operation in the spring of 1886, and that this was done under the direction and superintendence of defendant.

During the years 1878 and 1879, the defendant, a man about 47 years of age, was as he had been since 1864, the general superintendent of the Washburn & Moen Manufacturing Company, a corporation engaged in the manufacture of iron and steel wire; while the plaintiff, 24 years of of age, was in the employ of the same company as a draughtsman, working under the direction of the defendant. The business of the company had, during the years of 126] defendant's superintendency, grown *to be enormous.

In the actual work of the mill, as the finished wire came from the rolls it was coiled on reels. At first this was done through the agency of an attendant seizing the wire by a pair of tongs and engaging it with the reel, but this operation was attended with both danger and delay. To obviate this the parties interested in this manufacture sought the invention of machinery which should seize the finished wire and engage it with the reel, and thereafter dislodge the completed coil therefrom.

The defendant locates the time of his conception of the idea embodied in this combination in October, 1878, and that which enables him to locate it is a transaction with Daniel C. Stover. It appears that in October, 1878, Stover (who was a manufacturer and inventor) came to Worcester, Mass., and while engaged in examining the machinery in the mill had his attention directed to the way in which the wire was coiled on the reels, and thought that some device could be invented for picking up the wire immediately after its leaving the rolls. After some reflection he conceived the idea which he subsequently embodied in patent No. 219,124. He suggested his idea to the defendant, who replied that it was not new, and that others were working at it. He prepared a model which contained not only a device for picking up the wire, but also one for discharging the completed coil, and exhibited it to defendant, who, on his part, showed Stover a model which he had prepared. It is not pretended that either the model of Stover or that of defendant disclosed the exact combination for which a patent was claimed in this case. Nor is it important to notice all the details of the transactions at the time between Stover and the Washburn & Moen Company. It appears that Stover sold and assigned a one half interest in his invention to the Washburn & Moen Company. The time of Stover's visit is established by the date of that assignment and the application which he made for a patent, and by other writings. There is significance in the fact that although the plaintiff was present when Stover's model was shown, it does not appear that he made any suggestion that he had invented anything of a similar character; and yet, if his present claim *is true, he [127 had for months been considering the matter, and had at least three months before conceived the very idea of the combination now in dispute. But it is enough to say in respect to this branch of the case that the story of the invention by defendant at the time stated is reasonable, probable, and to a certain extent supported by the testimony of Stover.

As against this the plaintiff claims to have conceived the idea of this combination in July, 1878, and relies mainly on the testimony of two witnesses, Lambert and Fowler. Though he was a draughtsman he presented no sketch or drawing made prior to November, 1878, which in any manner pictures his invention. It is true he testifies to having made sketches prior thereto, but none have been preserved. One of them he claims to have shown to Lambert in July, 1878, and Lambert was called as a witness to support this statement; but Lambert's testimony does not, it seems to us, carry the weight which is claimed for it. He was a tinsmith by occupation, employed at times by the manufacturing company, and testifies that in July, 1878, on or about that time, very soon after Daniels' return from Europe, he came to his shop and showed him a sketch, and asked him to make a model of it. He declined, saying that he was too busy. Nothing more took place at that time, but in the fall of 1886, at Daniels' request, he made a model of the machine which, as he says, was disclosed by that sketch. This model was in evidence. Now, it is possible that one seeing for a few minutes a sketch of a complicated machine can eight years thereafter remember the details of that sketch so clearly as to make an accurate model. But, if it is possible, it surely is not probable. If the invention disclosed in the sketch impressed either Daniels or Lambert as something of great value, and, therefore, fixed itself firmly in the mind, it is strange that neither

seemed anxious to impress it upon the attention of others, carry it into actual use, or derive profit from it. On the other hand, if it was one which did not impress either as of any special value, it seems almost morally certain that the details of the sketch and the precise character of the invention would not have been accurately remembered through all those eight 128] years. We must not be *understood as imputing to Lambert intentional falsehood. He was familiar with the machinery actually in use in the wire mill. He saw in the course of his acquaintance with that machinery many models and many machines, and the machine embodying this invention, as perfected, had been in actual use in the mill several months before he made this model. He may well have gotten some of these matters confused in his mind, and introduced into this model elements and parts which were not seen by him in the sketch displayed in 1878, and which were in fact taken from other sketches and drawings, or from models, or machines. At any rate, when there was nothing to specially arrest the attention, it taxes credulity for one to claim that he bears in mind for over eight years the details of a sketch of a complicated machine which is casually shown to him and which he sees but for a short time, and is enabled to thereafter reproduce the details of that sketch in a model.

Equally unreasonable is the testimony of Fowler, which is to the effect that on July 20, 1878 (the date being fixed by a memorandum in his diary) Daniels came to visit him. This diary notes the fact simply of the visit of Daniels, but contains nothing in respect to the matters involved in this case. His testimony as to this was in these words: "He explained by rough sketches an arrangement he had for coiling the wire after it was delivered from the rolls, which was a round box mounted on an upright shaft, and in the bottom of the box was a plate, perhaps I should say a movable plate, which could be lifted for the purpose of raising the coil of wire. That was his method of getting hold of the coil, to get it out of the box." None of these rough sketches were preserved. There was apparently nothing to impress the matter upon the mind of Fowler, and his attention was not directed to it until some time in the early part of 1887, nearly nine years thereafter, when Daniels called on him for the purpose of securing his testimony in this case. Doubtless Fowler means to be truthful. There is no reason to impugn his integrity, but his testimony is subject to a criticism similar to that placed upon the testimony of Lambert. As one of the matters which was 129] *being considered and discussed by the manufacturing company was how to do the work which is now being done by the machine finally constructed by defendant, it is not at all unlikely that Daniels, one of the employés of that company, spoke of the matter to Fowler at the time named; very likely he may have drawn rough sketches to suggest the ideas which were in his mind; but it is not probable that in the absence of some special reason therefor the memory would carry for eight or nine years the details of the plan or idea suggested by Daniels and illustrated by these sketches. While, of course, it is possible, yet such testimony is not of a character to carry great weight.

There is other testimony on both sides of this controversy. It is unnecessary to notice it in detail. It is enough to say that the testimony as a whole is not of a character or sufficient to produce a clear conviction that the Patent Office made a mistake in awarding priority of invention to the defendant; and because of that fact, and because of the rule that controls suits of this kind in the courts, we reverse the judgment and remand the case, with instructions to dismiss the bill.

Mr. Justice **Jackson** did not hear the argument or take part in the decision of this case.

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*STEAMSHIP BRITANNIA ET AL., [130
Appts.,
v.
ELIZABETH CLEUGH, Executrix of George Cleugh, deceased.

STEAMSHIP BRITANNIA, *Appt.*,
v.
JOHN LUCAS COTTON.

LA COMPAGNIE FRANCAISE DE NAVIGATION A VAPEUR, Cyprien Fabre et Compagnie, *Appts.*,
v.
THE STEAMSHIP BEACONSFIELD ET AL.

(See S. C. Reporter's ed. "*The Britannia*," 130-155.)

Steamship, when in fault—lowest rate of speed—steamships crossing—risk of collision—stopping headway—breach of statute.

1. A steamship is in fault in running at a place where she is liable to meet outward going vessels, across the ebb tide in such a way that the current will prevent her from answering her helm with promptness.
2. A steamship entering one of the most crowded harbors in the world and liable to meet other vessels outward bound at any moment, and running where any vessel she would meet would probably be on her starboard bow, when there is a conflict between the current and the eddy which would be apt to thwart or retard her movement to the starboard should run at the very lowest rate of speed which would enable her to answer to her helm.

NOTE.—*As to collision, rules for avoiding; steamer meeting steamer*, see note to Williamson v. Barrett, 14: 86.

As to rights of steam and sailing vessels with reference to each other and in passing and meeting, see note to St. John v. Paine, 13: 537.

As to vessel overtaking another, see note to The Abbotsford v. Johnson, 25: 168.

As to measure of damages for collision, see note to Smith v. Condry, 11: 35, and to The Amiable Nancy, 4: 456.

As to damages where two vessels are at fault, for injury to another, see note to The City of Hartford v. Rideout, 24: 930.

As to collision; rules of navigation; steam vessels meeting; steam vessel and sail vessel meeting; speed; liability for collision, see note to The R. A. Packer v. New Jersey Lighterage Co. 35: 453.

3. If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side must yield the path to the latter, and pass behind her; and the latter vessel must keep on her course, unless special circumstances render it necessary to do otherwise in order to avoid immediate danger.

4. The judge, who is to find the facts for this court, cannot shut this court off from a consideration of the legal effect of the other facts found, by a conclusive finding that, in his opinion, a particular inference is or is not warranted by the facts so found.

5. Where two steam vessels are crossing so as to involve risk of collision, the one whose duty it is to keep her course must not interfere with or thwart the movements of the other vessel by stopping her headway unless some exigency or obvious danger justify her stopping.

6. When a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so.

[Nos. 340, 341, 342.]

Argued April 3, 4, 1894. Decided April 23, 1894.

APPEALS from decrees of the Circuit Court of the United States for the Southern District of New York, holding that the steamship Britannia was alone in fault for a collision with the steamship Beaconsfield, and dismissing the libel against the Beaconsfield, and awarding to Cleugh's executrix, for the damages to the Beaconsfield $38, 808.05 with costs, and to Cotton, for damages to the cargo, $52,925.46, with costs. Reversed, with directions to enter decrees that both vessels were in fault, and that the damages should be divided.

See same cases below, 34 Fed. Rep. 546, 42 Fed. Rep. 67.

Statement by *Mr. Justice* **Shiras**:

In the District Court of the United States for the Southern District of New York, George Cleugh, of Newcastle, England, filed his libel and complaint, as owner of the steamship Beaconsfield, against the steamship Britannia, alleging that, on the 19th day of November, 1886, the Beaconsfield, while proceeding to sea, loaded with a full cargo of grain, between Governor's Island and the Battery, was run into by the Britannia, bound in from sea, and so badly damaged that she sank shortly afterwards in shoal water, to which she had been towed by tug boats, and suffered damage, with loss of freight, to the amount of $48,000. The libel further alleged that the Britannia was running as too high a rate of speed for the place the vessels were in, without proper lookout or sufficient attention to her navigation, and without regard to the rules of navigation, and that the Beaconsfield was wholly without fault. An amended libel was subsequently filed containing a more detailed statement of the position and movements of the vessels at the time of the collision.

132] *To this original and amended libel the owners of the Britannia filed an answer traversing those allegations which attributed fault to the Britannia, alleging that the Beaconsfield had been carelessly and negligently managed in several particulars, which caused the collision, and praying that the libel be dismissed.

Subsequently, J. L. Cotton, master, and George Cleugh, owner, of the Beaconsfield, filed another and joint libel against the Britannia, to recover for loss of cargo, containing substantially the same allegations as those made in the libel previously filed by Cleugh. This libel was likewise amended so as to make a more particular and detailed statement of the facts as claimed by the libelants.

To this libel an answer was duly filed by the owners of the Britannia, denying fault on her part and alleging careless and improper management of the Beaconsfield, which was the real cause of the collision. They also gave security and procured the discharge of their vessel. Thereafter the owners of the Britannia filed a petition against the Beaconsfield, again charging the fault of the collision upon her, alleging damages suffered by the Britannia, and praying process against the Beaconsfield to the end that such damages might be assessed in the same suit.

This petition was met by an answer on the part of George Cleugh, the owner of the Beaconsfield, traversing the allegations of the petition.

At a subsequent term, the owners of the Britannia filed, in the same court, a libel and complaint, subsequently amended, against the Beaconsfield, containing a detailed statement of the transaction, and praying process against and condemnation of the Beaconsfield. To this libel, as amended, exceptions were filed on behalf of the owner of the Beaconsfield, on the ground of insufficiency and indefiniteness in certain particulars. Some of these exceptions were sustained, which led to a further amendment of said libel. An answer to the amended libel was then filed by the owner of the Beaconsfield.

These three cases were so proceeded in that, on the 9th day of July, 1889, final decrees were entered, adjudging that both *the Britan-[133 nia and the Beaconsfield were in fault, and apportioning the damages between them in such a way that there was found due from the Britannia to the Beaconsfield the sum of $14,978.90, and that there was due by the Britannia to J. L. Cotton and George Cleugh, as bailees of the cargo of wheat laden on the Beaconsfield, the sum of $25,124.63, being a moiety of the whole loss to cargo, the other moiety of said loss being adjudged against the Beaconsfield. *Cleugh* v. *The Britannia*, 34 Fed. Rep. 546.

From these decrees of the district court appeals were taken by the owners of both vessels to the circuit court. That court held that the Britannia was alone in fault, and accordingly dismissed the libel of the Britannia, and awarded to Cleugh's executor for the damages to the Beaconsfield $38,808.05, with costs, and to Cotton, for damages to the cargo, $52,925.46, with costs. *Cleugh* v. *The Britannia*, 42 Fed. Rep. 67.

From all three of these decrees the owners of the Britannia have appealed to this court.

Mr. **Robert D. Benedict** for appellants.

Mr. **Sidney Chubb** for Cotton, appellee.

Mr. **George A. Black** for the Steamship Beaconsfield *et al.*, appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

As both the district court and the circuit court, though for somewhat different reasons, found the Britannia to be in fault, and as we agree with them in that conclusion, it is not necessary for us to go at length into that part of the controversy. It is sufficient to say that it appears that the Britannia came so close to Governor's Island that she grazed the bottom, and rendered it necessary for her pilot to direct her engines to be put at full speed till she cleared the ground. After that the speed of the vessel was slowed, and her wheel was put **134**] *hard-a-port to round into East river. As found by the circuit court, at about the time of touching the bottom she sighted the Beaconsfield on her starboard bow, and at that time she blew a single whistle to the Beaconsfield, thus signifying an intention to pass under the stern of the Beaconsfield. After clearing the bottom and reducing her speed, the Britannia did not respond promptly to her helm, owing to the fact, as found in the fourth finding, that "the condition of the wind and tide was such as to form a flood eddy on the north side of the channel between the Battery and Governor's Island, and an ebb tide on the south side of the channel. These tides operate to turn the head of a vessel attempting to enter the East river near Castle William, on Governor's Island to the westward, as she crosses the ebb until she enters the flood eddy. Thereupon her head is turned to the eastward. Such tidal action was within the knowledge of the pilot of the Beaconsfield, and should have been within the knowledge of the pilot of the Britannia." Having placed herself in this predicament, the Britannia's efforts to pass astern of the Beaconsfield were retarded, and her fault was in that particular, that is, in running, at a place where she was liable to meet outward going vessels, across the ebb tide in such a way that the current prevented her from answering her helm with promptness. While this fault was not, as we shall hereafter show, the sole cause of the accident, it contributed to it, and upon the findings we agree with both the lower courts in thinking the fault was enough to render the Britannia liable, in whole or in part for the loss occasioned by the collision. In exoneration of the Britannia her advocate cites the case of *The Rhondda*, L. R. 8 App. Cas. 549. That was a case somewhat similar in its facts to the present one. The Rhondda was coming around a point in the straits of Massina, meeting another steamer, the Alsace-Lorraine. They came into collision, and the Alsace-Lorraine was sunk. Her owners libeled the Rhondda, but the Privy Council sustained the navigation of the Rhondda. She had the other vessel on her starboard bow, and therefore it was her duty to keep out of the way of the Alsace-Lorraine. **135**] This she attempted to do by going to *the starboard and passing under the stern of the other vessel. There was a current which checked the swing of the Rhondda to the starboard, and her captain, as soon as he saw that his vessel was not swinging off to starboard under his port helm as he had expected, stopped and reversed his engines. The court held that, as it appeared that the Rhondda had ported her helm, and that such action would have carried her clear of the other steamer if she had not been prevented by the current, the Rhondda was free from blame. The maneuvres, therefore, of the Britannia and the Rhondda were therefore alike. They were both meeting another steamer on their starboard bow. They both, in compliance with the rule of navigation applicable to such a case, endeavored to pass under the stern of the other vessel by porting the helm, and they both, when it was seen that the vessel was not swinging as rapidly to the starboard as was expected, stopped and reversed engines. The reason why, if the Rhondda was justly exonerated, the Britannia is not entitled to a like judgment, is found in the different circumstances in which the vessels were placed.

As we have seen the Britannia was entering one of the most crowded harbors in the world, and was liable to meet other vessels outward bound at any moment. It was also obvious, from her course in running close to Governor's Island, that any vessel she would meet, as she entered the strait after she cleared the island, would probably be on her starboard bow. Knowing, as she was bound to know, that, in the condition of the tide at the time, there was a conflict between the current and the eddy which would be apt to thwart or retard her movement to the starboard, it was her duty to have rounded the island at the very lowest rate of speed which would have enabled her to answer to her helm. This she failed to do, and, although her subsequent movements were skillful and in accordance with the rules, she must be held answerable for her original fault in rounding the island so closely that it was found necessary to put her engines, for a time, at full speed in order to clear her from the ground. This temporary enhancement of speed, and the failure to anticipate and guard against the *consequences of a well known current, [**136** rendered her subsequent efforts to avoid the collision unavailing.

On the other hand, in the case of the Rhondda, Sir James Hannen, in the course of his opinion said: "Undoubtedly it was strongly in evidence that there was such a stream at this place, whether it be called current or eddy, as was calculated to have an effect in the manner suggested on a vessel coming round into the neck of the channel, . . . and would be felt upon the starboard bow of a vessel precisely at the point where the Rhondda had arrived." But he proceeded to say: "The Rhondda had no reason to anticipate that the operation of the current or eddy would have any bearing upon her duty with reference to the Alsace-Lorraine, *because she had a right to expect that the coast would be clear from steamers coming out in the direction in which the Alsace-Lorraine was.*

This brings us to a consideration of the conduct of the Beaconsfield, and here the courts below parted company—the district court having held that the Beaconsfield's management was faulty, while the circuit court found her free from blame. Of course, this court must accept the facts as found for us by the circuit court, but we do not observe any substantial difference in the facts as understood by the re-

spective courts. Their diversity in opinion arose from a difference in their application of the rules of navigation to the admitted or established facts.

What were those facts? The Beaconsfield descried the Britannia when the latter vessel came around Governor's Island, and about the time she was disengaging herself from the ground. The Beaconsfield thereupon blew a single blast of her whistle, which meant that she expected the Britannia to pass under her stern. It is found that this whistle of the Beaconsfield was neither heard nor seen on the Britannia, but the latter's whistle, given while getting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own whistle. It is thus evident that the pilots of both vessels agreed in the view that the proper thing to avoid collision was for the Britannia to swing to starboard and pass behind the Beaconsfield. It is next found that the 137] *Beaconsfield, when she blew her first whistle, put her helm to port a little and went on at a slow speed. Her observation of the Britannia did not show that the latter was swinging to starboard, but even was disclosing a little more of her starboard side to the Beaconsfield. Thereupon the latter blew another single whistle, which still signified her expectation that the Britannia would pass astern, and, hearing no answer, put her wheel hard a-port, and stopped her engines and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and, at the time of the collision, she was nearly, if not quite, dead in the water. After her headway was thus stopped, the Beaconsfield took no further action, and lay still in the water until struck. The time from such stopping of her headway until the collision, during which she lay still, was about a minute and a half. It is further found that if the Beaconsfield had not stopped and backed, it is probable that the Britannia would have passed out a short distance astern of her; and, indeed, under the finding as to her rate of speed before she stopped, this is quite evident.

Was this behavior of the Beaconsfield in stopping her headway and remaining still, without further effort, for a minute and a half, proper, or, at least, excusable, as held by the circuit court? Or was it improper, and did it put her in contributory fault, as held by the district court?

In answering this question we must have regard to the well known rules of navigation. Those chiefly applicable to the present controversy are rules 19, 21, 23 and 24. Rev. Stat. § 4233.

The 19th rule is as follows: "If two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other." We do not understand this rule to signify, as the circuit judge seems to have thought, that the Britannia was, at all hazards and in some way or other, to avoid the Beaconsfield. Such a rendering of the rule would dispense with all inquiry beyond the single one, which vessel had the other on her starboard 138] *side. The plain meaning of the rule was, as applied to the situation under consideration, that the Britannia, which had the Beaconsfield on her starboard side, should yield the path to the latter, and pass behind her. This reading of the rule was recognized and complied with in the first instance by the pilots of both vessels in signaling each other that the Britannia would go astern.

Rule 21 provides that "every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse." This rule was likewise obeyed by both ships, in that, so long as they were advancing, after having seen and signaled each other, they went at a slow rate of speed. Later, in the history of the incident, they both stopped and reversed. In so doing the Britannia was clearly obeying the letter and spirit of the rule. Whether the Beaconsfield was justified in stopping and reversing we shall presently consider.

The 23d rule directs that "when by rule 19, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24." This rule throws light on the meaning of the 19th rule, and confirms the view that the latter rule means that the vessel having the other on her starboard shall yield the way or path to the other, and it further provides that the latter vessel not only may but must keep on her course, except as qualified by the 24th rule. That rule is as follows: "In construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

As we have seen, the Britannia fulfilled the duty imposed on her, by signaling that she would keep out of the way and pass to the stern of the Beaconsfield, by slackening her speed, and, finally, by stopping and reversing. Her only fault was in overlooking or disregarding the effect of the wind and tide, so that when she endeavored to swing to the starboard, she was unable to do so with reasonable quickness.

But did not the Beaconsfield manifestly depart from and *disobey rule 23 in not [139 keeping her course, and thus avoiding collision? Her excuse, in application of rule 24, is that the Britannia, after having signaled that she was going astern, did not appear to be doing so, and that this erratic behavior justified the Beaconsfield in stopping and reversing. But, as already stated, the pilot of the Beaconsfield was well aware of the existence of the counter current against which the Britannia had to contend in changing her course to the starboard, and if we are obliged to impute fault to the Britannia, in not having foreseen and provided against that current, so we must likewise blame the Beaconsfield for overlooking the effect of such current in delaying the movement of the Britannia to the starboard. The course of the Britannia was precisely what might have been anticipated, after her first and only fault, and did not, in our judgment, warrant the Beaconsfield in disregarding the injunctions of the 23d rule, which, if obeyed, would have prevented the collision.

We think there was likewise fault in the action of the Beaconsfield in remaining motionless for a minute and half, in full view of the

tardy motion of the Britannia in getting astern. This is sought to be excused by the fact that her pilot feared certain rocks, or a rocky bottom, which were not far from the place where his vessel was. The actual existence of such rocks or rocky bottom was somewhat in dispute; but accepting, as we do, the statement of the circuit court on the subject, we cannot sustain the conduct of the Beaconsfield. That statement is that "a careful collocation of the testimony of those on both steamers and elsewhere, assisted by elaborate plotting on the chart, indicates that the probabilities are that the Britannia would have passed astern of the Beaconsfield if the latter had kept her headway, even though she straightened out sufficiently to clear the reef her pilot spoke of, but by a very small margin only."

Stress is laid in the argument for the Beaconsfield on the 11th finding, that "at the time the Beaconsfield reversed she had approached so near the New York shore that, in view of her draft of water and the condition of the bottom in that locality, there was some 140] risk of her running aground *should she continue her way much longer under her port helm."

But the exigency, as shown by the other findings, did not require that she should continue her way "much longer." Had she advanced one hundred and fifty feet, the collision would not have taken place.

This alleged danger of running aground on the New York shore, if she continued her course, was not set up in the thrice amended pleadings, and seems, as well as the suggestion that there were rocks, not shown on the charts, on the course the Beaconsfield was going, to have been an afterthought, by way of excuse, of the pilot of the Beaconsfield.

But allowing the finding to stand, it does not establish as a fact in the case that there was any real danger to the Beaconsfield in keeping on her course for the very short distance that would have avoided the collision. Nor was it necessary, as the findings show, that in going on the Beaconsfield should have approached any closer to the New York shore. There was plenty of time and room for her to have changed her course sufficiently to have avoided a nearer approach to the north shore.

As for the other excuse, advanced by the pilot of the Beaconsfield, that there were rocks ahead, as already stated, it was disposed of by the learned judge of the circuit court, who, when asked to affirmatively find that there was no reef of rocks about 1500 feet from the Battery flag, or in that neighborhood, as testified to by the pilot of the Beaconsfield, refused on the stated ground that it was "*immaterial*, as by findings already made the collision happened well inside of such point."

The thirteenth finding, that "shortly after the Beaconsfield began reversing, the Britannia commenced to swing to starboard, a motion which was perceived on the Beaconsfield," is important, and strengthens the case against her. Seeing the Britannia at last, however tardily, taking the direction which the rule and the exchanged signals required, it was misconduct in the Beaconsfield to continue reversing, and to finally remain motionless.

141] *It cannot be reasonably held that the 31st finding was a finding of fact, obligatory upon this court. It is in these words: "The conduct of those in charge of the Beaconsfield, as specifically set forth in the foregoing finding, does not warrant the inference that there was, on their part, negligence contributory to produce the collision."

Of course, if this *were* a finding of fact, within the meaning of the rule, it would be conclusive of the case, and all the other findings would become mere surplusage. But it is evident that the learned judge did not intend it to be so regarded. It was plainly meant as an additional conclusion in law. He speaks of it as "an *inference* from the foregoing findings." Nor can we assent to the proposition that it is competent for the judge, who is to find the facts for this court, to shut us off from a consideration of the legal effect of the other facts found, by a conclusive finding that, in his opinion, a particular inference is or is not warranted by the facts so found.

Regarding, therefore, this finding as merely expressive of the learned judge's view of the legal conclusion that arose upon the facts as found, and giving reasonable effect to his findings of fact, we are unable to concur in his conclusion.

The disregard by the Beaconsfield of the Britannia's signal, her failure to obey the rule and keep her course, and her supine negligence in remaining motionless for so long a period, while she saw the Britannia approaching her, clearly put her in fault.

It is argued that the words "shall keep her course" do not mean that she shall maintain her speed, and English cases are cited to the effect that the rule does not imply that the vessel shall *maintain the same speed*. If this is all that is meant in the cases cited, and we so read them, we have no reason to disagree with them, and they do not, in the slightest degree, impugn our reasoning. But if the contention is, and if those cases must be understood as holding that a vessel, whose duty it is to keep her course, complies with that duty by reversing her engines and ceasing to move at all, we are unable to concur in such a view. It is inconsistent with both the words *and the [142 sense of the rule. A vessel which voluntarily becomes motionless cannot properly be said to keep her course. The word "course," both from its etymology and the primary meaning given to it by lexicographers, signifies a running or moving forward—a continuous progression or advance.

The collocation of the rule, and its direct references to rules 17, 19, 20, and 22, plainly point to the meaning that, while the other vessel must keep out of the way, the preferred vessel shall not interfere with or thwart the movements of such other vessel by bringing a new element into the calculation, which would be done if, instead of pursuing her course, she stopped her headway. It is not meant that some exigency or obvious danger might not justify her in checking her speed, and even in stopping altogether. But such a case is provided for in the 24th rule. As we have seen, no such exigency is found to have existed in the present case.

We are relieved from any force there may be in the suggestion that we ought to follow

the construction supposed to have been put upon this rule by the English courts, in order that there should be no difference between the courts of the two countries in construing the same rule, by the Act of August 19, 1890 (26 Stat. at L. 327) which declares that the rule shall be read as follows: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course *and speed.*" It, however, appears that this Act awaits the proclamation of the President to become operative.

The case of *The Northfield & The Hunter* is applicable to the present question in regard to the management of the Beaconsfield. There, the Northfield, a Staten Island ferry-boat, had left her slip to go to west of Governor's Island, and was swinging round from south to southwest. The Hunter was coming down the North river and heading south to go down west of Governor's Island. The vessels were therefore in similar positions in respect to each other as the vessels in the present case. The District Court for the Southern District of New York held, per Blatchford, *J.*, as follows: "Under the circumstances, the Northfield had the Hunter on her own starboard side, and it 143] was the duty of *the Northfield, under the rule, to 'keep out of the way' of the Hunter. It was equally the duty of the Hunter 'to keep her course.' The Northfield ported her helm to a sufficient extent to enable her to pass safely under the stern of the Hunter. When, however, the Hunter was about three hundred yards distant from the Northfield, instead of keeping her course, she stopped her engines. It is quite clear that if the Hunter had not stopped at all, but had kept her course, the Northfield would have passed safely under the stern of the Hunter. The stopping by the Hunter was the cause of the collision." Disposing of the excuse set up by the Hunter for her stopping, that her navigator assumed that the Northfield was intending to pass ahead of the Hunter rather than astern of her, the learned judge said: "In so assuming they took the risk of being wrong in the assumption." 4 Ben. 112. This case was affirmed in the circuit court, and also in this court, in which this language was used: "The officers of the tug perfectly understood that under the rule it was their duty to keep the tug on its course. The officers of each vessel had the right to assume that the other vessel would do its duty, and to make their course and keep their speed on that assumption." *Hutchinson* v. *The Northfield*, Reported only in U. S. Sup. Ct. Rep. 24 L. ed. 680, 681. In the case of *Jones* v. *Slauson* ("*The Elizabeth Jones*") 112 U. S. 552 [28: 815], it was said: "Conceding it to have been the duty of the Willis, under the rule, to keep out of the way of the Jones, it was equally the duty of the latter not to baffle or prevent the efforts of the Willis to that end. Her departure from the rule that she should keep her course cannot be justified, because there were no special circumstances in such departure necessary in order to avoid immediate danger."

In *Belden* v. *Chase*, 150 U. S. 699 [37: 1227], it was said: "It is a settled rule in this court that when a vessel has committed a positive breach of statute she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. Obedience to the rule is not a fault, even if a different course would have prevented the collision. . . . Masters are bound to obey the rules and entitled to rely on the assumption that they will be obeyed, and *should [144 not be encouraged to treat the exceptions as subject of solicitude rather than the rules."

In *Crockett* v. *The Isaac Newton*, 59 U. S. 18 How. 581 [15: 492], it was said by *Mr. Justice* Curtis: "It must be remembered that the general rule is, for a sailing vessel meeting a steamer, to keep her course while the steamer takes the necessary measures to avoid a collision; and though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for obeying the rule. But the duty of the steamer, to port her helm and go to the starboard implies a correlative obligation of the ship to keep her course." See also *Sears* v. *The Scotia*, 81 U. S. 14 Wall. 181 [20: 823].

"It is the duty of a steamer to keep out of the way of a sailing vessel when they are approaching in such directions as to involve a risk of collision. The correlative obligation rests upon the sailing vessel to keep her course, and the steamer may be managed upon the assumption that she will do so." *Ludwig* v. *The Free State*, 91 U. S. 200 [23: 299].

It is true that some of the cases just cited were cases wherein the vessel whose duty it was to keep her course was a sailing vessel, yet the principle involved is the same in the case of two steamships crossing, where it is the duty of the one who has the other on her starboard bow to keep out of the way of the other, and of the latter to keep on her course.

The conclusion reached is the same as that arrived at in the district court, and, accordingly, we reverse the three decrees, and remand the causes to the circuit court, with directions to enter decrees in accordance with this opinion, that both vessels were in fault, and the damages should be divided. *Reversed.*

Mr. Justice **Brown** (with whom was *Mr. Justice* **Jackson**) dissenting:

I cannot agree with the court in holding the Beaconsfield to have been in fault for this collision. Her conduct, so far *from being [145 reckless or in violation of the rules of good seamanship, appears to me to have been characterized by an excess of prudence, which, even if it were an error, was not a fault for which I would willingly condemn her. This court has had frequent occasion to hold steamers liable for too great speed. This is the first in which we have condemned one for too little. Indeed, cases in which steamers have been held liable for not maintaining their speed are extremely rare, both in this country and in England: and, if any such exist, I think they will be confined to those wherein tugs descending a river with tows have been held in fault for stopping and allowing their tows to spread out in the path of ascending vessels. It seems to me that the conclusion that the Beaconsfield was in fault for stopping and reversing can

only be reached by ignoring the most vital findings of fact with respect to her conduct, and proceeding upon the theory that, because the collision would not have happened if she had kept her speed, it was necessarily a fault that she had not done so.

The findings, so far as they bear upon the questions at issue, are as follows:

5. ". . . When about midway between Diamond Reef and the New York piers she saw the Britannia as the latter came clear of Castle William, and blew a single whistle to her. The Beaconsfield was then heading about W. N. W. or W. by N. The full speed of the Beaconsfield was between nine and ten knots, with fifty-six revolutions. At this time her engines were moving under an 'easy ahead,' with thirty revolutions, which would make her speed through the water about five knots. The retardation due to the action of the wind and to that of the flood eddy (described in the 4th finding) greatly reduced her speed over the ground as she came within the influence of the eddy to considerably less than four knots. . . . While getting clear of the bottom, and with her engines at full speed, she [the Britannia] blew a single whistle to the Beaconsfield. The whistle of the Beaconsfield referred to in the 5th finding was neither heard nor seen on the Britannia, but the latter's whistle, given while getting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own signal. At the time the Britannia thus signaled the distance between the steamers was not quite half a mile."

8. ". . . While getting clear of the bottom, and with her engines at full speed, she (the Britannia) blew a single whistle to the Beaconsfield. The whistle in the Beaconsfield referred to in the fifth finding was neither heard nor seen on the Britannia, but the latter's 146] whistle, given while getting *clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own signal. At the time the Britannia thus signalled, the distance between the two steamers was not quite half a mile."

9. "After clearing the bottom the Britannia ported and hard-a-ported her helm, but her bow while in the ebb tide near Governor's Island did not swing to starboard, but, on the contrary, did for a brief space take a slight but perceptible swing to the westward."

10. "When the Beaconsfield blew her first whistle her wheel was put to port a little and kept steady-a-port, and under her slow engine she drew ahead, her head inclining a little toward the New York docks. A careful watch was kept on the movements of the Britannia, and it was observed not only that she did not swing to starboard, but also that she was showing a little more of her starboard side to the Beaconsfield; thereupon those upon the Beaconsfield, while still about four lengths from the Britannia, blew another single whistle, and hearing no answer put their wheel hard-a-port, and stopped and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and at the time of the collision she was nearly, if not quite, dead in the water."

11. "At the time the Beaconsfield reversed she had approached so near the New York shore, that in view of her draft of water and the condition in the bottom of that locality, there was some risk of her running aground should she continue her headway much longer under her port helm. At that time the Britannia, not yet swinging to the eastward, was heading so as to cross the bows of the Beaconsfield, had advanced over a considerable part of the distance which separated them when she blew her first whistle, and was manifestly coming into the northern part of the channel."

12. "This second whistle from the Beaconsfield was not heard on the Britannia. The latter also blew a second single whistle and thereafter a third, neither of which was seen or heard on the Beaconsfield."

13. "Shortly after the Beaconsfield began reversing, *the Britannia commenced to [147 swing to starboard, a motion which was perceived on the Beaconsfield."

14. "The captain of the Britannia had noticed that she did not swing as promptly as he had expected after clearing the bottom, and after she did begin to swing he saw that she needed to come more to starboard, and that the ships for some reason did not get clear of each other; and, differing from the pilot as to the chance of clearing the Beaconsfield if he kept on, he gave the order to reverse his engines; thereafter he let go his port anchor when about one hundred feet from the Beaconsfield."

24. "At the time these steamers sighted each other and signaled, they were crossing so as to involved risk of collision, within the meaning of the 19th rule, and the Britannia had the Beaconsfield on her starboard side."

25. "At the time when the Beaconsfield stopped and reversed, the vessels were approaching each other so as to involve risk of collision. A prudent navigator viewing the situation at that moment from the deck of the Beaconsfield would have reached the conclusion that, if neither the course of the Britannia were altered nor her headway checked, collision was imminent and inevitable, unless avoided by some change in the movements of the Beaconsfield."

26. "The Britannia's movements, visible to the Beaconsfield, were not in accordance with the single whistle she had blown, but were such as to create a natural, reasonable, and strong apprehension of collision in those in charge of the Beaconsfield, and they were thereby justified in taking the statutory precaution to avoid risk of collision, which is prescribed by the 21st rule for a vessel approaching another vessel so as to involve risk of collision."

Although the collision occurred in November, 1886, after the Revised International Regulations, adopted by Act of Congress of March 3, 1885 (23 Stat. at L. 438) took effect, the case was treated by court and counsel as covered by the rules prescribed in Revised Statutes, section 4233, which do not, however, differ materially from the Revised Regulations.

In connection with the above findings, the following rules are pertinent:

*Rule 19. "If two vessels under steam [148 are crossing so as to involve risk of collision, the vessel which has the other on her own star-

board side shall keep out of the way of the other."

21. "Every steam vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

23. "Where, by rules 17, 19, 20, and 22, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of rule 24."

24. "In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

Two questions are naturally raised by the above findings: (1) Whether the obligations imposed upon the privileged vessel by rule 23, to "keep her course," also obliges her to maintain her speed. (2) Granting that it does, whether this requirement applied to the Beaconsfield under the peculiar circumstances of this case.

(1) The *first* proposition depends upon what is meant by keeping the course of a vessel. The word "course," as used in this connection, is defined by the lexicographers as follows: By Webster, as "progress from point to point without change of direction; any part of a progress from one place to another, which is in a straight line or in one direction." By Worcester, as "the track or line of motion; direction in which motion takes place." And by the Imperial Dictionary, as "the direction of motion; the line in which a body moves; as what *course* shall the pilot steer; the *course* of a projectile through the air."

Now, unless we are to give to the word "course" a meaning quite different from that given by the grammarians, we must hold that the steamer discharged her obligation to "keep her course" by keeping steadily in the direction in which she had been previously going. But we are not without authority upon this point. In the case of *The Beryl*, which was a collision in the North Sea between the steamship Abeona [149] and the *steamship Beryl, the two vessels were approaching each other at right angles, the Beryl being upon the starboard side of the Abeona. The Abeona admitted that the Beryl kept her course, but claimed that she kept it too long, directly the contrary of the claim made by the Britannia in this case. The Beryl eased her engines from a quarter to half a mile distant from the Abeona. It was held by the admiralty court (9 Prob. Div. 4) that although the obligation to keep her course was applicable, yet the Beryl was bound not to disregard the obligation of the other article to stop and reverse, if necessary to avoid a collision, and that both articles were applicable to the case. The admiralty court held that the Beryl did act in time in stopping her engines, but on appeal to the court of appeals the case was reversed (9 Prob. Div. 137, 140-142, 144) and the Beryl held to be in fault, *not for failing to maintain her speed*, but for failing to stop and reverse her engines in due time. In delivering the opinion of the court, Brett, Master of the Rolls, observed: "It was suggested to us to-day that 'keeping her course' meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. But keeping her course means that she is to keep on the same direction as before; it has nothing to do with the question of speed. . . . The Abeona was bound to get out of the way of the Beryl; the moment that rule applied to the Abeona, article 22 applied to the Beryl, namely, to keep her course. . . . The Abeona did everything that was wrong; and then the question arises, did the Beryl break any of the rules? She kept her course, and when she saw that the Abeona was not doing her duty, she whistled. . . . Seeing the Abeona was still keeping on, she whistled again and slackened her speed. The first question upon that is this: Were the circumstances such then that there was risk of collision? The vessels were at a distance of from a quarter to half a mile. At that time the officer of the Beryl slackened his speed."

Bowen, *Lord Justice*, observed: "It has been suggested that the expression 'keep her course' used in article 22 refers to the speed of the vessel as well as to the direction of her head, *but this is an untenable argument. In [150] article 18 we find the words 'stop and reverse if necessary,' which obviously are intended to point out that the vessel, when it is necessary, is to do more than simply slacken her speed. It may, however, be a matter of consideration whether 'if necessary' is to be construed as meaning if it is actually necessary, or only if the captain should reasonably think that a necessity has arisen; but even if we were to take the latter as the construction most favorable to the master of the Beryl, the answer of our assessors to the question put to them, which the Master of the Rolls has already referred to, puts him clearly in the wrong, and obliges us to hold that the Beryl was also to blame for this collision."

Fry, *Lord Justice*, was of the same opinion, and thought that the Beryl should have stopped and reversed earlier than she did.

This case is not only inconsistent with the opinion of the court in the case under consideration, but is absolutely the reverse of it.

In view of the fact that these rules are international and have been pronounced by this court to be a branch of the international law (*Sears* v. *The Scotia*, 81 U. S. 14 Wall. 170 [20: 822]) it is of the utmost importance that the same construction should be placed upon them by all courts upon which they are obligatory, and the fact that the courts of the country in which they were first adopted has given them a certain construction is a cogent argument in favor of a similar construction elsewhere. There is a peculiar propriety in its application in this case in view of the fact that the Beaconsfield was a British vessel, and its officers presumably acquainted with the law of their flag. The only case to the contrary to which our attention has been called is that of *The Northfield & The Hunter*, 4 Ben. 112, in which, however, no such general rule of construction was laid down. But, under the peculiar circumstances of that case, to which I shall advert hereafter, as distinguishing it from the case under consideration, it was held that the privileged vessel was in fault for stopping and reversing.

*(2) But, whatever be the interpretation [151

of this rule, it seems to me clear that, under the circumstances of the particular case, the Beaconsfield was guilty of no fault in stopping and reversing. It will not for a moment be claimed that a steamer is bound to keep up her speed, if her master can see that by so doing she must inevitably be brought into collision with the other vessel. He is not, by a persistent adherence to any rule, at liberty to thrust himself directly in the path of an approaching vessel. There is certainly a point in every case beyond which he is not bound to proceed. The obligation to avoid a collision, if it be possible to do so, must be read into and made a part of all steering and sailing rules and is specially provided for in rule 24, that "in construing and obeying these rules due regard must be had to all dangers of navigation and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger." There is no rule of more general observance than that which requires sailing vessels to keep their course when approaching a steamer, and yet in *Miner* v. *The Sunnyside*, 91 U. S. 208 [23:302], a sailing vessel was condemned for persistently adhering to the rule and running down a steam tug, which lay motionless upon the water, although the latter was conceded to be in fault for not getting out of her way. "Negligence more manifest," said *Mr. Justice* Clifford, "culpable or indefensible, in view of the circumstances, is seldom exhibited in controversies of this character; and the only excuse offered for it is, that the 18th sailing rule provides that, where one of two ships is required to keep out of the way, the other shall keep her course; entirely overlooking the fact that the mandate of that rule is declared by the rule itself to be subject to the qualification" of rule 24. See also *Crockett* v. *The Isaac Newton*, 59 U. S. 18 How. 581 [15:492]; *The Lake St. Clair* v. *The Underwriter*, L. R. 2 App. Cas. 389.

So, rule 22, which requires the privileged steamer to keep her course, must like all others, be read in connection with rule 21, that every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, or, if necessary, stop and reverse.

152] *This case then reduces itself to the question whether, at the time the order was given upon the Beaconsfield to stop and reverse, the master had a right, in the exercise of a reasonable judgment to suppose, that, if he persisted in his speed, a collision was probable—in other words, had he reason to believe there was *danger* of collision? The sequence of events after the steamers came in sight of each other, as appears from the findings, was as follows:

When about midway between Diamond Reef and the New York piers she (the Beaconsfield) saw the Britannia as the latter came clear of Castle William and blew a single whistle to her. Owing, probably, to a strong wind then blowing from the west (about 22 miles an hour) this whistle of the Beaconsfield was not heard upon the Britannia. The latter, however, while getting clear of the bottom and her engines at full speed, blew a single whistle to the Beaconsfield, which was heard and taken to be an answer to her own signal. At this time the vessels were not quite half a mile apart. Although, after clearing the bottom, the Britannia ported and hard-a-ported her helm, her bow, while in the ebb tide near Governor's Island, did not swing to starboard, but on the contrary, for a brief space took a slight, but perceptible swing to the westward—to port. It was seen upon the Beaconsfield, not only that the Britannia did not swing to starboard, but that she was showing a little more of her starboard side to the Beaconsfield; whereupon the Beaconsfield, while still about four lengths from the Britannia, blew another single whistle and hearing no answer, put her wheel hard-a-port, and stopped and reversed at full speed until her headway was stopped, when her engines were stopped and she remained motionless in the water.

Was she in fault for so doing? There were three circumstances calculated to excite the apprehension of her master. (1) The Britannia, instead of swinging to starboard, appeared to be swinging to port. That this also alarmed those on the Britannia is evident from the fourteenth finding, that after she began to swing her master saw that she needed to come more to starboard; that the ships did not, for some reason, get *clear of each other, and,[153 differing in opinion from the pilot, he gave the order to reverse the engines. (2) She did not at once answer the Beaconfield whistle—a circumstance tending to show either that she did not hear it, or disregarded it. In view of the fact that the steamers were not more than ten or twelve hundred feet apart, this silence was certainly alarming. (3) At this time, too, the Beaconsfield had approached so near the New York shore, that, in view of her draft of water and the condition of the bottom, there was some risk of her running aground, should she continue her headway much longer under her port helm. In this condition of things we are confronted by the 25th and 26th findings, that at the time the Beaconsfield stopped and reversed, the vessels were approaching so as to involve risk of collision. That a prudent navigator, viewing the situation from the deck of the Beaconsfield, would have reached the conclusion that, if the course of the Britannia were not altered nor her headway checked, a collision was imminent and inevitable, unless avoided by some change on the part of the Beaconsfield. And (finding 26) that the Britannia's movements visible to the Beaconsfield were not in accordance with the single whistle she had blown, and were such as created a natural, reasonable, and strong apprehension of collision in those in charge of the Beaconsfield. Under these circumstances I agree with the opinion of the court below that the Beaconsfield was justified in taking the statutory precautions to avoid risk of collision prescribed by the 21st rule, as to stopping and reversing.

The case of *The Northfield & The Hunter*, 4 Ben. 112, decided by *Judge* Blatchford, whose experience as an admiralty judge undoubtedly entitles his opinions to most respectful consideration, is clearly distinguishable from this. In that case the Northfield was going at a speed of from 9 to 10 knots an hour, while the Hunter, the privileged vessel, with a schooner in tow, was not going more than 2 knots an hour. The master of the Hunter, who was fearful that the schooner would get adrift if any extra strain should come upon his lines,

stopped his vessel. But the court expressly finds that such stopping did not occur *in* 154]*articulo periculi*, but took *place at a distance from the Northfield which would have enabled the latter easily to have avoided her.

The only excuse for holding the Beaconsfield in fault is, that her pilot was bound to know the existence of the eddy, which gave the Britannia's bow a swing to port, before she answered her wheel to swing to starboard. Considering, however, the proximity of the two vessels at this time, and the failure of the Britannia to promptly respond to the Beaconsfield's whistle, I do not think the pilot of the latter was bound to know the precise moment when the Britannia would begin to answer her helm, and swing her bow to starboard. The vessels were in such proximity that seconds became of the utmost importance, and the failure on the Britannia to do exactly what she ought to have done meant inevitable disaster.

The case of *The Rhondda*, L. R. 8 App. Cas. 549, so far from being an authority in favor of the position assumed by the court in this case, is, as I read it, directly the contrary. The Rhondda, having the Alsace-Lorraine on her starboard side, was rounding Furo Point at the entrance of the Straits of Messina, when she observed the Alsace-Lorraine at a distance of half a mile and about a point on her starboard bow. The Rhondda at once put her helm hard-a-port, but failed to answer her wheel in consequence of the strong current at the entrance of the straits (the ancient Charybdis). She then blew her whistle and *stopped and reversed her engines* at full speed, and was held to have performed her full duty. The Alsace Lorraine *did not ease or stop her engines*, but put her helm hard-a port, and was struck by the Rhondda nearly amidships, and was held to have been in fault. I think the case tends to show that the Beaconsfield was right in her maneuvre.

I would apply to this case the observations of this court in the case of *The Favorita* v. *Union Ferry Co.* 85 U. S. 18 Wall. 598. 603 [21: 856, 859], in which a collision occurred under somewhat similar circumstances: "It is said if the Manhasset had advanced instead of stopping she would have cleared the steamship. This may or may not be true; but if true, she is not in fault for this error of judgment. It was a question whether to advance or stop and back, and the emergency was so 155]great that there was no time to *deliberate upon the choice of modes of escape. In such a moment of sudden danger, caused by the misconduct of the Favorita, the law will not hold the pilot of the Manhasset, acting in good faith, guilty of a fault, if it should turn out after the event that he chose the wrong means to avoid the collision, unless his seamanship was clearly unskillful. And this we do not find to be the case. On the contrary, if there were error at all, it was such a mistake of judgment as would likely be committed by any one in similar peril." 1 Ben. 30, 8 Blatchf. 539.

I agree with the court that the 31st finding is a finding of law and not of fact, but I think it was such a legal conclusion as was justified by the other findings.

For these reasons I am of opinion that the decree of the circuit court should be affirmed.

ROBERT L. WHARTON, *Appt.*, *v.* JOHN H. WISE, Sheriff of Accomack County, Virginia.

(See S. C. Reporter's ed. 155-177.)

Articles of Confederation—compact between Maryland and Virginia—approval by Congress—how indicated—right to take oysters in Pocomoke sound—right of Virginia court to convict for taking oysters.

1. The articles of the Confederation were not designed to prevent arrangements between adjoining states to facilitate the free intercourse of their citizens, or remove barriers to their peace and prosperity.
2. The compact of 1785, between the states of Maryland and Virginia was not prohibited by the Articles of Confederation, and continued in full force after the adoption of the Constitution, except so far as inconsistent with its provisions.
3. The approval by Congress renders the compact of 1785 between Maryland and Virginia free from constitutional objections, if any, that were valid, had previously existed.
4. The consent of Congress to any agreement or compact between two or more states is sufficiently indicated, when not necessary to be made in advance, by the adoption or approval of proceedings taken under it.
5. The compact of 1785 between Maryland and Virginia gives no right to the citizens of Maryland to fish or take oysters in the waters of Pocomoke Sound.
6. The compact of 1785 between Maryland and Virginia does not prevent a court of Virginia from trying and convicting a citizen of Maryland for an offense against the state of Virginia of taking oysters from Pocomoke Sound, within her limits, contrary to a statute of the state.

[No. 1054.]

Argued March 5, 6, 1894. Decided April 23, 1894.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Virginia, dismissing a writ of habeas corpus sued out for the discharge of the appellant, Robert L. Wharton, a citizen of Maryland, from a judgment of imprisonment until a fine should be paid, imposed upon him by the County Court of Accomack County, Virginia, upon a conviction of violating a law of Virginia in taking oysters, contrary to its prohibitions, from Pocomoke sound, within her limits. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1:640.

As to colorable conveyances to enable suit to be brought; motive of transfer, when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7:287.

As to when habeas corpus may issue, and when not; and from what courts, and by what judges: what may be inquired into by writ of, see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

Messrs. **John Prentiss Poe,** Atty. Gen. of Maryland, **Bradley T. Johnson** and **Thomas S. Hodson,** for appellant:

The compact of 1785, between Virginia and Maryland, is still a subsisting agreement binding upon and enforceable by each of these states, and the citizens thereof, according to its true interpretation, except in so far as some of its provisions have been superseded by the Constitution of the United States.

Cooley, Const. Lim. 591; Maryland Act of Assembly of 1856, chap. 130; Maryland Code Pub. Laws, Jan. 1860, art. 41, §§ 12, 20; Maryland Act of 1870, chap. 205; Act of 1872, chap. 292; Act of 1874, chap. 247; Act of 1876, chap. 198; Act of 1880, chap. 36; Act of 1880, chap. 445; Act of 1882, chap. 391; Act of 1884, chap. 76; Revised code of Virginia of 1819, and subsequent codes; 2 Madison Papers, 712; *Holmes* v. *Jennison*, 39 U. S. 14 Pet. 571 (10: 594); *Binney's Case*, 2 Bland. Ch. 126; *State* v. *Hoofman*, 9 Md. 28; *Hendricks* v. *Com.* 75 Va. 934; *Delilah* v. *Jacobs*, 4 Cranch, C. C. 238; *Georgetown* v. *Alexandria Canal Co.* 37 U. S. 12 Pet. 91 (9: 1012); *Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 672 (27: 1070); *Corfield Coryell*, 4 Wash. C. C. 386; *Bennett* v. *Boggs*, Baldw. 60; *Rundle* v. *Delaware & R. Canal Co.* 55 U. S. 14 How. 80 (14: 335); *Brien* v. *Elliot*, 2 Penr. & W. 49.

In view of these decisions and of the legislation of the two states above referred to, no court would now hold the compact of 1785 to be invalid.

But, besides this, the special legislation of this state for the settlement of the boundary between Virginia and Maryland, by its terms binds the state in honor and in law to abide by the compact.

Act of 1874, chap. 247; Act of 1876, chap. 198.

A similar act of assembly was passed by Virginia.

An award ascertaining the boundary was made by two of the arbitrators in 1877, and was accepted by both states.

Md. Act of 1878, chap. 274.

The two states having thus agreed to submit the question of boundary to arbitrators, and having accepted the award made by them, then proceeded to obtain the consent of Congress.

This was given by an Act of Congress to be found in United States Statutes at Large of 1878, 1879, chapter 196, page 483, entitled "An Act Giving the Consent of Congress to an Agreement or Compact Entered into Between the states of Virginia and Maryland, Respecting the Boundary between the two States."

Clearly the stipulations in reference to rights and privileges under the compact of 1785, were a part of the agreement between the states.

Green v. *Biddle*, 21 U. S. 8 Wheat. 85 (5:568); *Virginia* v. *West Virginia*, 78 U. S. 11 Wall. 39 (20: 67).

Substantially the compact gave to the citizens of the two states a common right of fishery in the Potomac; a common right of fishery in any waters includes the right of oyster fishery.

Angell, Tide Waters, § 65; Gould, Waters, § 20 and note: *Com.* v. *Bailey*, 18 Allen, 542; *Moulton* v. *Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Smith* v. *Maryland*, 59 U. S. 18 How. 74 (15: 270).

By a fair and reasonable construction of the 7th clause of the compact, the right of fishing, thus provided for includes the right of fishing for oysters.

By the true interpretation of those parts of such compact as are still in force, the citizens of Maryland now possess and are entitled to enjoy freely a right of fishery including the right to take oysters, in common with the citizens of Virginia, in the Pocomoke river.

The Pocomoke river, as mentioned in the compact of 1785, embraces what is now commonly called Pocomoke sound, which is nothing but the mouth of Pocomoke river.

Inasmuch as the statute of Virginia under which the appellant was arrested, indicted and convicted was never adopted and enacted by concurrent legislation of Maryland, as stipulated in the compact, it was and is inoperative by virtue of that compact, as against citizens of Maryland, and therefore, the conviction thereunder of the appellant, who was and is a bona fide citizen of Maryland, was illegal and void.

Hendricks v. *Com.* 75 Va. 939.

In that case the court of appeals of Virginia say that, by article 8, all laws and regulations which may be necessary for the preservation of fish in the river Potomac or the river Pocomoke, within the limits of Virginia shall be made with the mutual consent and approbation of both states. The effect of this article is to give to the state of Virginia concurrent jurisdiction with the state of Maryland over the Potomac from shore to shore, and over that part of the Pocomoke river which is within the limits of Virginia, to enact such laws with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters.

The demurrer confesses the truth of the allegations of defendant's plea.

The compact being operative and unrepealed, the facts stated in the plea are true, and being so, the oyster law of Virginia under which this indictment was found and conviction had, is utterly void as to citizens of Maryland taking oysters in Pocomoke river, wherever the body of water so designated in the compact may be.

The 8th section of the compact provides that "All laws for the preservation of fish or for the performance of quarantine, in the river Potomac, or for preserving or keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast or of giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states."

The legislature of Virginia by an unbroken series of acts, beginning with its first oyster law and extending down to 1880, has practically conceded to Marylanders in both rivers the same oyster rights as Virginians.

Marylanders, from time immemorial, enjoyed the right of oystering in Pocomoke sound, without molestation, until shortly before the line was determined by the arbitrators in 1877, and located by commissioners appointed by the two states in 1883.

Interpreted then either by the letter or by

the spirit of the compact, there is an entire mutuality or equality of privileges in both rivers, for both states. And all the departments of the government of Virginia have acted in conformity with this view since the making of the compact in 1785.

The compact and the legislative action of Virginia, and the peaceable enjoyment of their equal rights to fish in Pocomoke by citizens of Maryland, was for more than half a century a complete and satisfactory settlement of the whole controversy on the lower Potomac and in Pocomoke sound. The disputed location of the line, as to the upper branches of the Potomac, alone, kept the controversy open.

The renewal of controversy was not in reference to the old controversy as to the line on the land, but grew out of the oyster privileges on the water.

The body of water now known as Pocomoke sound, was known as the Pocomoke river at the time of the making of the compact.

There is no mention in any writer, nor any tradition that Pocomoke sound or river, east of Watts island, was ever called or known as Chesapeake bay.

Where there is any reasonable doubt as to the meaning of a contract, the construction put upon it by the parties themselves, and, especially, before any new facts are developed and while all parties remain in the same position as when it was entered into, will be entitled to great weight and consideration.

Brawley v. *United States*, 96 U. S. 168 (24: 622).

The oyster laws of Virginia, from the earliest law to the days of Henry A. Wise, are a legislative concession and declaration both, that "fish" include "oysters," and that the 8th section of the compact included Pocomoke sound or river.

To the keeping of this compact, the faith and honor of each state was pledged.

Both states have had jurisdiction in Pocomoke sound, under their own laws, of various offenses, and Maryland, as well as Virginia, has exercised such jurisdiction there, but she has rightly abstained from attempting to enforce either the Virginia and Maryland oyster laws in that part of Pocomoke river or sound which lies in Virginia.

The indictment must set out that the oyster law of Virginia alleged to have been violated was passed with the consent and approbation of the state of Maryland also. This it does not do and cannot do, as it is not the fact.

State v. *Hoofman*, 9 Md. 28.

No conviction can be had therefore under the Virginian statute against citizens of Maryland for taking oysters in Pocomoke sound.

Hendricks v. *Com.* 75 Va. 934.

Under the 10th section of the compact, the appellant as a citizen of Maryland could not lawfully be tried in the courts of Virginia for an alleged violation of its statute, but was entitled to be tried in the courts of Maryland and consequently his trial and conviction in Accomack county court was illegal and void.

10th section of the compact; 2 Scharf, History of Maryland, 528; 2 Henry, Life of Patrick Henry, 176; 1 Bancroft, History of Constitution of United States, 151; 2 Rives, Madison, 58; Va. Code, 1878.

The compact provides, for "piracies, crimes and offenses" commmitted by Marylanders against Virginians and by Virginians against Marylanders.

These are to be tried in the courts of the state of which the offender is a citizen.

McCready v. *Virginia*, 94 U. S. 391 (24: 248).

Messrs. **R. Taylor Scott,** Atty. Gen. of Virginia, **James H. Fletcher, Jr., Wm. A. Jones** and **W. R. Staples,** for appellee:

The navigable waters and the soils under them within the territorial limits of Virginia, subject to the restrictions and limitations of the Federal Constitution, in fee simple belong to Virginia. The commonwealth can prohibit all acts which impair or make less valuable these waters and the soils under them, and the statute under which Robert L. Wharton and Severn Nelson were prosecuted in the county court of Accomack county is the proper exercise of legislative power, and must be obeyed and conformed to by Marylanders. It does not regulate commerce nor does it abridge or impair any "privileges" or "immunity" of interstate citizenship, and is not obnoxious to the compact of 1785.

New Orleans v. *United States*, 35 U. S. 10 Pet. 662 (9: 573); *Martin* v. *Waddell*, 41 U. S. 16 Pet. 410 (10: 1012); *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 (11: 565); *Smith* v. *Maryland*, 59 U. S. 18 How. 71–74 (15: 269,270); *Harding* v. *Jordan*, 140 U. S. 382 (35: 433); *McCready* v. *Virginia*, 94 U. S. 391 (24: 248); *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387 (36: 1018).

In construing and giving effect to this compact this court will take judicial notice that "the true boundary line between the states of Maryland and Virginia, so far as they are coterminous one with the other," has been ascertained, distinctly and accurately marked and its courses, etc., formulated into statutes enacted by each state and accepted and ratified by Congress; therefore no part of it is doubtful.

Va. Code, 1887, pp. 59-64, § 13, 20 Stat. at L. 482; Virginia's Oyster Legislation, 2 Code, 1819, p. 314; Acts 1831, 1832, chap. 192, p. 260.

In 1846, an act was passed forbidding all persons other than actual residents and inhabitants of Virginia from taking oysters in the waters of Accomack county, except in such rivers, and portions thereof as are common to Virginia and other states.

Va. Code, 1849, § 12; Act of 1852; Acts of 1870; Acts of 1874, chap. 214, p. 238, Acts of 1874, 1875, chap. 86, p. 64.

In January 1766, "Pocomoke river" and "Pocomoke bay" or "sound" were known to be separate and distinct bodies of water, and this was known more than a century before the compact of 1785 was made.

The adoption of the Federal Constitution annulled and abrogated so much of "the compact" as bears upon and relates to "crimes and offenses" committed upon Chespeake bay and the settled boundary line between Virginia and Maryland put to rest all doubts as to its location.

The legislatures of sovereign states cannot abdicate, nor can they transfer their sover-

eignty; cannot authorize or empower tribunals of other states to try persons who have committed "crimes and offenses" within the territorial limits of the state, for this would be to make treaties a power conferred by the Constitution upon Congress.

U. S. Const. art. 3, § 11; 2 Story, Const. (5th ed.) § 1673; *The Genesee Chief* v. *Fitzhugh*, 53 U. S. 12 How. 444 (13: 1058); *Hendricks* v. *Com.* 75 Va. 934.

This court will adopt and follow Virginia's construction of her statute laws.

The laws of the state are the laws as construed and applied by state courts.

Green v. *Neal*, 31 U. S. 6 Pet. 298 (8: 405); *Shelby* v. *Guy*, 24 U. S. 11 Wheat. 361 (6: 495); *Martin* v. *Waddell*, 41 U. S. 16 Pet. 408 (10: 1012); *Beauregard* v. *New Orleans*, 95 U. S. 18 How. 502 (15: 472), *Bank of Hamilton* v. *Dudley*, 27 U. S. 2 Pet. 524 (7: 507).

There is nothing in the compact, or properly to be deduced from it, which gives to the citizens of Maryland right to fish in Pocomoke river or Pocomoke sound.

Virginia's laws binds even Marylanders, and must be obeyed. Wharton and Nelson have violated these laws and been convicted. The court had jurisdiction over them; its judgment must stand.

Mr Justice **Field** delivered the opinion of the court:

This case comes before us on appeal from an order of the Circuit Court of the United States for the Eastern District of Virginia, dismissing a writ of habeas corpus, sued out for the discharge of the appellant, a citizen of Maryland, from a judgment of imprisonment until a fine should be paid, imposed upon him by the county court of Accomack county in that state, upon a conviction of violating a law of Virginia in taking oysters, contrary to its prohibitions, from Pocomoke Sound within her limits. An act of that commonwealth, approved in February, 1892, provides that if any person other than a resident of the state, "take or catch oysters or other shellfish in any of the waters of the state, he shall, upon conviction thereof, be fined five hundred dollars." Acts of the Assembly of Virginia, 1891, 1892, chap. 363, p. 603, § 10.

At March term, 1893, of the county court of Accomack county, the appellant was indicted by the grand jury of the county for that, being a non-resident of Virginia, he did unlawfully take and catch oysters in the waters of the state and within the jurisdiction of the county, to wit, on Ledge Rock in Pocomoke Sound, against the peace and dignity of the commonwealth. At the following April term he appeared in court and filed a special plea to its jurisdiction, alleging that at the time the offense charged was committed he was a citizen of Maryland, residing in Somerset county of that state, and that the act of the assembly of Virginia, under which the indictment was found, had not been adopted or ratified by the general assembly of Maryland; that by the compact of 1785, between those states, which had never been repealed or annulled, but was still in effect, and operative, the court had no jurisdiction to try the defendant for the alleged offense, Pocomoke Sound mentioned in the indictment being a part of the Pocomoke river mentioned in the compact. The commonwealth demurred to the plea, and the court sustained the demurrer, adjudging the plea to be insufficient. Thereupon *the defend- [157 ant, under the plea of not guilty, was tried and convicted, and was sentenced to pay a fine of five hundred dollars, the sum prescribed by the statute for the offense, and the costs of the prosecution, and ordered to be committed to the jail of the county until the fine and costs were paid. Averring that he intended to apply to the circuit court for a writ of error, he moved the county court to be admitted to bail pending his appeal, but the motion was denied, on the ground that the law of the state did not provide for admitting a person to bail after conviction. He was thereupon taken to the jail by the sheriff of the county and detained by him in default of payment of the fine and costs. He then applied to the Circuit Court of the United States for the Eastern District of Virginia for a writ of habeas corpus to be directed to John H. Wise, the sheriff of the county of Accomack, by whom, under the judgment, he was imprisoned, requiring the officer to produce the petitioner before that court, with the authority for his detention, alleging that his imprisonment was unlawful on grounds, which as stated by counsel, were similar to those now urged for a reversal of the judgment before us, namely: That the compact of 1785, between the states of Virginia and Maryland, was still a subsisting agreement, binding upon and enforceable by each of those states and the citizens thereof; that by its provisions the citizens of Maryland possess and are entitled to enjoy freely a right of fishery, including the right to take oysters in common with the citizens or Virginia, in the Pocomoke river; that that river, as mentioned in the compact of 1785, embraces what is now commonly called Pocomoke Sound, which is nothing but the mouth of Pocomoke river; that the law of Virginia, under which the petitioner was arrested, indicted, and convicted, was never adopted by the concurrent legislation of Maryland, and was therefore inoperative as against the citizens of that state, and that the conviction thereunder of the petitioner, who was a citizen of Maryland was void. And on the further ground that, assuming the law of Virginia was not inoperative against citizens of Maryland, still, under the 10th section of the compact of 1785, the petitioner, as a citizen of that state, could not be lawfully tried in the *courts of Virginia for the [158 offense charged, but was to be tried in the courts of Maryland.

The writ was issued, directed to the sheriff of Accomack county, and made returnable before the Circuit Court of the United States for the Eastern District of Virginia at Norfolk on the 11th of May, 1893, and was then adjourned for hearing in Richmond on the 1st of June following, at which time and place the case was fully heard. At the succeeding term the court rendered its decision to the effect that the writ of habeas corpus be dismissed, and that the petitioner be remanded to the custody of the sheriff of Accomack county. From this judgment the petitioner appealed to this court.

The disposition of the appeal will require an examination of certain provisions of the compact between the states of Maryland and Virginia of 1785, as upon their interpretation and effect the controversy which has given rise to the present proceeding, and similar controversies between citizens of those states, and their respective rights to fish in the waters of Virginia for oysters, will be determined. The questions involved are of deep interest to both states, and they have been presented by distinguished counsel on their behalf with great ability.

Previously to June, 1784, great inconveniences were experienced by citizens of both Maryland and Virginia from the want of established and recognized regulations between those states respecting the jurisdiction and navigation of the river Potomac, which constituted a boundary between the two states for over one hundred miles. In that month and year the general assembly of Virginia, reciting that such inconveniences resulted from want of some concerted regulations between the states, "touching the jurisdiction and navigation of the river Potomac," passed the following resolutions:

"*Resolved*, That George Mason, Edmund Randolph, James Madison, Jr., and Alexander Henderson, Esquires, be appointed commissioners, and that they, or any three of them, do meet such commissioners as may be appointed on the part of Maryland, and in concert with them frame such liberal and equitable regulations concerning the said river as may be mutually advantageous to the two states, and that they make report thereof to the general assembly.

163] *"*Resolved*, That the executive be requested to notify the above appointment, with the object of it, to the state of Maryland, and desire its concurrence in the proposition."

The resolutions were communicated to the executive of Maryland, and by him laid before the legislature of that state, which responded to the invitation by a resolution, passed on the 18th of January, 1785, appointing commissioners on her part to meet those of Virginia, but with powers somewhat enlarged. The resolution, as adopted by the senate of Maryland, declared that Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer (selected by the house of representatives two days before) should be commissioners for the state of Maryland to meet the commissioners appointed by the commonwealth of Virginia, "for the purpose of settling the *navigation* and *jurisdiction* over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke;" and that the commissioners, or any two of them, should have full power, on behalf of Maryland, "to adjudge and settle the jurisdiction to be exercised by the said states, respectively, over the waters and navigation of the same, the proceedings to be laid before the general assembly of the state to be ratified," etc.

The commissioners met at Mt. Vernon in the following year, and on the 28th of March a compact between the two states was mutually agreed upon by them.

In its first clause Virginia disclaimed all right to impose any toll, duty, or charge, prohibition or restraint on any vessel sailing through the capes of Chesapeake Bay to the state of Maryland, or from that state through the capes outward bound, and agreed that the waters of Chesapeake Bay and Pocomoke river within the limits of Virginia should be forever considered as a common highway for the use and navigation of any vessels belonging to the state of Maryland or any of its citizens, or for carrying on any commerce to or from that state or with any of its citizens, and that any such vessel inward or outward bound might enter any of the rivers within the commonwealth of Virginia as a harbor or for safety against an enemy, without the payment of port duties or any other *charge; and that the [164 waters of Chesapeake Bay and Pocomoke river should be free for the navigation of vessels from one part of the state of Maryland to another.

In the second clause the state of Maryland agreed that any vessel belonging to Virginia or any of its citizens, or carrying on commerce to or from that state, or with any of its citizens, might freely enter its rivers as a harbor, or for safety against an enemy, without the payment of any port duty or other charge.

In the third clause it was provided that war vessels, the property of either state, should not be subject to the payment of any port duty or other charge.

The fourth and fifth clauses related to commerce between citizens of the two states in their produce, providing that vessels of a certain size might enter and trade in the ports of either state with a permit from the naval officer of the district, and should not be subject to port charges.

The sixth clause declared that the river Potomac should be considered a common highway for the purpose of navigation and commerce to the citizens of both states, and all other persons in amity with the two states, trading to or from Virginia or Maryland.

The seventh clause provided that "the citizens of each state respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both states; provided, that such common right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other."

The eighth clause provided that "all laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of *Virginia, by pre- [165 venting the throwing out ballast or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states.

The tenth clause provided that "all piracies, crimes, or offenses committed in that part of

Chesapeake Bay which lies within the limits of Virginia, or that part of the said Bay where the line of division from the south point of Potowmack river (now called Smith's Point), to Watkins' Point, near the mouth of Pocomoke river, may be doubtful and on that part of Pocomoke river within the limits of Virginia, or where the line of division between the two states upon the said river, is doubtful, by any persons not citizens of the commonwealth of Virginia against the citizens of Maryland, shall be tried in the court of the state of Maryland which hath legal cognizance of such offense. And all piracies, crimes, or offenses committed on the before mentioned parts of Chesapeake Bay and Pocomoke river, by any persons, not citizens of Maryland, against any citizen of Virginia shall be tried in the court of the commonwealth of Virginia which hath legal cognizance of such offense. All piracies, crimes, and offenses committed on the said parts of Chesapeake Bay and Pocomoke river, by persons not citizens of either states, shall be tried in the court of the commonwealth of Virginia having legal cognizance of such offenses. And all piracies, crimes, and offenses committed on the said parts of Chesapeake Bay and Pocomoke river, by any citizen of the commonwealth of Virginia or of the state of Maryland, either against the other, shall be tried in the court of that state of which the offender is a citizen."

There were other provisions in the compact, but those to which reference is made are all that are important in the disposition of the present case.

The compact provided that its articles should be laid before the legislatures of the two states and, their appropriation being obtained, should be confirmed and ratified by a law of each state, never to be repealed or altered by either without the consent of the other. The articles were accordingly laid before the legislatures of [166] those states and were approved, *ratified, and confirmed by a law of each substantially identical in terms. The concluding clause of the act of ratification of the legislature of Virginia is as follows: "And whereas this general assembly are of opinion that the said compact is made on just and mutual principles for the true interests of both governments, and the same having been confirmed by the general assembly of the state of Maryland, be it therefore enacted that the said compact is hereby approved, confirmed, and ratified by the general assembly of Virginia, and that every article, clause, matter, and thing therein contained shall be obligatory on this state and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government and all its citizens according to the true intent and meaning of this compact; and the faith and honor of this state are hereby solemnly pledged and engaged to the state of Maryland and the government and citizens thereof that this law shall never be repealed or altered by the legislature of this commonwealth without the consent of the state of Maryland."

A similar clause concludes the act of ratification by the state of Maryland, with a change only in the terms required to indicate it as the act of Maryland instead of that of Virginia.

The provisions of the compact were wel designed to promote the peace, good neighborhood, and welfare of both states, and facilitate intercourse between their citizens, and it was clearly within their competency at the time to adopt them, if not restrained by the Articles of the Confederation, then in existence and in which they had joined. They were then sovereign states, possessing, unless thus restrained, all the rights and powers of independent nations over the territory within their respective limits, and could exercise any control and dominion over their navigable waters and make any regulations necessary for the protection of their navigation or to promote the commerce upon them of their respective states. Those articles expressly provided that each state composing the Confederation retained its sovereignity, freedom and independence, and every power, jurisdiction, and right, which *was [167] not by them expressly delegated to the United States in Congress assembled. The Confederation was a league of friendship of the states with each other, so declared in the articles and entered into "for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignity, trade, or any other pretense whatever." But its articles did not form a constitution or ordinance of government, with power to enforce its provisions upon each other, or even a compact having any coherence or binding force other than that of a league of friendship, which its members only claimed them to constitute.

The validity of the compact of 1785 has been questioned as in conflict with the second clause of the sixth article of the Confederation, which provided that no two or more states should enter into any treaty, confederation, or alliance whatever between them without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same was to be entered into, and how long it should continue; and also as having been superseded by the Constitution of the United States subsequently adopted. A few words upon each of these positions. The articles inhibiting any treaty, confederation, or alliance between the states without the consent of Congress were intended to prevent any union of two or more states, having a tendency to break up or weaken the league between the whole; they were not designed to prevent arrangements between adjoining states to faciliate the free intercourse of their citizens, or remove barriers to their peace and prosperity; and whatever their effect, such arrangements could not be the subject of complaint by the states making them until, at least, the Congress of the Confederation interposed objections to their adoption or enforcement, which was never done.

The provisions of the compact, so far as they were consistent with the Constitution of the United States, subsequently adopted, and to which Maryland and Virginia were parties, were of course suspended and superseded by it.

*But as an operative agreement, bind- [168] ing the action of the two states upon the sub-

braced, where not inconsistent with the Constitution, its validity has often been recognized by their authorities. Neither of the governments has ever denied or repudiated its obligation, but, as in the present case and in all controversies between the states, it has been treated as of obligatory force.

In determining the effect of the prohibition of the clause in the sixth article of the confederation upon the validity of the compact, the observations of this court, in the recent decision of the controversy between Virginia and Tennessee, upon the meaning of the clause of the Constitution of the United States which is similar, in one particular, with that in the Articles of Confederation, and broader in another, may be properly considered. The article of the confederation inhibits "any treaty, confederation, or alliance" between two or more states without the consent of Congress. The Constitution of the United States prohibits, without such consent, any agreement or compact of one state with another. In the case mentioned there was an agreement between the states of Virginia and Tennessee to appoint commissioners to run and mark the boundary between them, made without the consent of Congress, and the question considered was whether the agreement was within the prohibition of the clause cited from the Constitution of the United States, and we said: "The terms 'agreement' or 'compact,' taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York 169] which the latter *state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So in case of the threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repeal the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

"We can only reply by looking at the object of the constitutional provision, and construing the terms 'agreement' and 'compact' by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is *directed to the [170 formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries (§ 1403) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language 'may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation," and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to apply to treaties of a political character; such as treaties of alliance for purpose of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political co operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;' and that the 'latter clause, compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in lands situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other.' And he adds: 'In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief.'" *Virginia* v. *Tennessee*, 148 U. S. 503, 517-519 [37: 537, 542, 543.

So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles. Various

compacts were entered into between Pennsylvania and New Jersey and between Pennsylvania and Virginia, during the Confederation, in reference to boundaries between them, and to rights of fishery in their waters, and to titles 171] to land in *their respective states, without the consent of Congress, which indicated that such consent was not deemed essential to their validity. Virginia and Maryland were sovereign states with no common superior and no tribunal to determine for them the true construction and meaning of its provisions in case of a conflict of opinion upon the subject. Each state was left to decide for itself as to their true construction and meaning, and to its own sense of the obligations of the compact for their enforcement. If, therefore, the Congress of the United States, which, as said above, never complained of the compact of 1785, had interposed objections to its adoption or enforcement as being within the meaning of the terms treaty or confederation, or as establishing an alliance within the prohibition of the articles mentioned, yet it would not lie in either of the states that were parties to the contract to allege its invalidity on the subject. As said by Mr. Steele, in his very able and elaborate opinion, upon the construction of provisions of the compact, given to the governor of Maryland, and which is referred to in the record, they cannot complain that there was in its adoption any breach of good faith towards themselves, and we may add, or any rupture by them of the league of friendship declared to be the object of the articles to establish.

In our judgment the compact of 1785 was not prohibited by the Articles of Confederation. It was not a treaty, confederation, or alliance within the meaning of those terms as there used, and it remained as a subsisting operative contract between them, in full force when the confederation went out of existence upon the adoption of the present Constitution of the United States. And it was not affected or set aside by the prohibitory clause of that instrument. Its prohibition extends only to future agreements or compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of Congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce.

As stated by counsel, stipulations as to riparian rights of fishery, and as to jurisdiction 172] in and over waters lying between *the two states, remained as they previously existed, neither suspended or impaired.

We are therefore of opinion that the compact continued in full force after the adoption of the Constitution, except so far as inconsistent with its provisions; and such we understand has been the clear declaration of the two states whenever they have been called upon to express their opinion upon the subject, and such is the concession of counsel. In the acts of both states, passed in 1874, designating arbitrators to ascertain and fix the boundary between them, the validity of the contract was affirmed in the declaration that "neither of the said states, nor the citizens thereof, shall, by the decision of the said arbitrators, be deprived of any of the rights and privileges enumerated and set forth in the compact between them, entered into in the year 1785, but that the same shall remain to and be enjoyed by the said states and the citizens thereof forever." Va. Laws 1874, chap. 135; Md. Laws 1874, chap. 247.

As justly observed, there could not be a more solemn and conclusive recognition and assertion—so far as the two states were concerned—of the continued existence and obligatory force of the compact than is contained in this language of both in appointing the arbitrators and designating the conditions upon which their award should be accepted. The states of Maryland and Virginia not only consented to the appointment of the arbitrators, upon the conditions mentioned, but their award was approved by both states and by an Act of Congress. That approval covered all the conditions and stipulations upon which the award was made, and renders the compact of 1785, the rights and privileges of which were to remain and be enjoyed by the states and the citizens thereof forever, thus consented to by Congress, free from constitutional objections, if any, that were valid, had previously existed. The Act of Congress (20 Stat. at L. 481–483) recited that arbitrators, duly appointed on the part of the states of Virginia and Maryland for the purpose of ascertaining and fixing the boundary between them, did proceed to examine into and ascertain the true line of said boundary, and *had made their award, which [173 was set forth, and that that award had been ratified and confirmed by the legislatures of those states, respectively, and then enacted that the consent of Congress was given to the agreement or award and to each and every part and article thereof. That consent, taken in connection with the conditions upon which the award was authorized, operated as an approval of the original compact, and of its continuance in force under the sanction of Congress. The consent of Congress to any agreement or compact between two or more states is sufficiently indicated, when not necessary to be made in advance, by the adoption or approval of proceedings taken under it. *Green* v. *Biddle*, 21 U. S. 8 Wheat. 85–87 [5: 568].

We proceed, therefore, to consider the clauses of the compact, upon the construction of which the present controversy must be determined.

The appellant, a citizen of Maryland, is under a judgment of imprisonment for not paying a fine and costs of prosecution imposed for unlawfully catching and taking oysters in the waters of Virginia in violation of its laws. That state is the owner of the navigable waters within its limits and the lands under them, holding them in trust for the public, and authorized to pass all necessary laws for the protection of the fish therein, whether floating or shell, and the punishment of any citizens of its own or other states for taking them against its prohibitions.

The oyster grounds of the state are of large extent, very productive, and of great value. Pocomoke Sound is represented to have an area of 92 square miles, of which about 52 square miles consist of natural oyster rocks and beds, particularly adapted for the growth of the oyster. Many millions of oysters are the product from these rocks and beds each year. The

business of taking them from the water and carrying them to the different markets of the country constitutes an extensive and profitable industry, giving occupation and support to several thousand people of the state and to their families, and furnishing an article of food extremely palatable and delicious to many thou- 174] sands in other states. Great care *is taken in their culture and protection, and a vigorous police of the state is maintained to prevent their unlawful removal, or any encroachment with respect to them upon the rights of the state. The preservation of the oysters and of these rocks and beds, so well and peculiarly fitted for their increase, has been for many years a matter of special interest on the part of the state, and the act under which the appellant was indicted and convicted constitutes a part of its legislation for that purpose.

The contention of Maryland, as made by her counsel on behalf of the appellant, is that by the true construction of the seventh and eighth sections of the compact of 1785, her citizens are lawfully entitled to possess and enjoy and exercise a common right of fishery, including the right to catch and take oysters in the Potomac river and in the Pocomoke river, including what is also called Pocomoke Sound, which is alleged to be part of that river, and to constitute its mouth; and further, that if her citizens do not possess such right of fishery in the Pocomoke river and Pocomoke Sound, they cannot be subjected to trial in the courts of Virginia for the offenses charged to have been committed in those waters against the citizens of that state. We will briefly consider each of these positions.

The seventh section of the compact refers, so far as fishing is concerned, only to the Potomac river, and provides "that the right of fishery therein shall be common to and equally enjoyed by the citizens of both states," with the proviso that such common right shall not be exercised by the citizens of one state to the hindrance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right fish with nets or seines on the shores of the other. It is conceded that the right of fishing, when not qualified, extends to the taking of both floating fish and shell-fish. This concession, however, is of no importance as to fishing in the Potomac, as the offense charged in the case before us is limited to taking oysters in Pocomoke Sound, to which no reference is made in the section in question.

The eighth section is equally free from any 175] reference to the *offense complained of. Its language is that "all laws and regulations which may be necessary for the preservation of fish, or for the performance of quarantine, in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out of ballast, or giving any other obstruction thereto, shall be made with the mutual consent and approbation of both states."

There is no ambiguity or obscurity in this language. It simply provides that necessary laws and regulations for the preservation of fish in the river Potomac, and for the performance of quarantine with respect to the river, and for preserving and keeping open the channel and navigation of that river and of the river Pocomoke within the limits of Virginia, by preventing the throwing out of ballast or giving any other obstruction thereto, shall be enacted by the mutual consent and approbation of the two states. There is nothing in these provisions having any reference to fish of any kind in the Pocomoke river or in the Pocomoke Sound, whether that sound be deemed a part of that river or otherwise. As observed by counsel, no clause of the compact having given any right to Maryland to fish in Pocomoke river, there was no reason why Maryland should be allowed to interfere in any way by legislation or regulation for the preservation of its fish.

The case of *Hendricks* v. *Com.* 75 Va. 939, decided by the court of appeals of that state, is cited as authorizing the contention that a right to fish in the Pocomoke river is given by the compact, equally with the right to fish in the Potomac. The language of the court in that case gives color to that view, but it is plain that the court of appeals fell into a mistake in its judgment from a misquotation of section eight of the compact, upon which it relied. The language of the court is: "By article eight all laws and regulations which may be necessary for the preservation of fish in the river Potomac or the river Pocomoke, within the limits of Virginia, shall be made with the mutual consent and approbation of both states." It then adds as its conclusion: "The effect of this article is to give the state of Virginia concurrent *jurisdiction with the 176] state of Maryland over the Potomac from shore to shore and over that part of Pocomoke river which is within the limits of Virginia, to enact such laws, with the consent and approval of Maryland, as may be deemed necessary and proper for the preservation of fish in said waters." Turning to the eighth article of the compact, we find that it does not contain any language having reference to the preservation of fish in the Pocomoke river and by this misquotation the error in the conclusion of the court followed. There being an error of citation, a decision founded upon the supposed correctness of the citation cannot be accepted as authoritative any more than a decision founded upon a mistranslation of a passage in an author will be followed when the mistake or error is discovered. There was no question before the court of appeals in the case cited, relating to fishing in the Pocomoke river. We shall hereafter refer to that decision on another point, in which it is not open to any criticism.

The question whether Pocomoke Sound is to be considered as part of Pocomoke river is immaterial in view of the conclusion we have stated, that the compact gives no right to the citizens of Maryland to fish in the waters of that river, and only refers to the river in providing that legislation or regulations, preserving and keeping open its channel free from obstructions, shall be enacted by the mutual consent and approval of the two states. But owing to the earnestness with which the identity of the river and sound has been pressed, it is proper to state that, after careful examination of the documentary evidence offered

on the subject, we are clear that the river and sound were at the time the compact was made, and for many years preceding it, considered and designated as separate and distinct bodies of water, and after that date, down to what is termed the "Black-Jenkins award of 1877," they never lost their separate and distinct character and designation. And we agree with the statement of the court below, in considering this subject, that there is no map of these waters and no joint official document existing in relation to them, which has confounded the river with the sound, or claimed that the sound 177] is the river or any part of the river *Pocomoke. The objection to the jurisdiction of the courts of Virginia to try the appellant for the offense charged does not find any support in the tenth section of the compact of 1785. That section only provides for the trial of citizens of Maryland in that state where offenses are committed by them in Virginia upon citizens of that state. It was so held by the court of appeals of Virginia in *Hendricks* v. *Com.* above cited. The offense charged against the appellant, and for which he was tried and convicted, was one against the state of Virginia, and not one against any of her individual citizens. It was for catching and taking oysters in her waters, which were the property of the state, against her prohibitions, he being a citizen of Maryland.

The objections of the appellant to the jurisdiction of the county court of Accomack, in rendering judgment against him being untenable, the judgment of the Circuit Court of the United States for the Eastern District of Virginia in refusing to discharge him from imprisonment for failure to pay the fine imposed upon him for a violation of the laws of Virginia and the costs of his persecution, must be affirmed. And it is so ordered.

Mr. Justice **Harlan** and *Mr. Justice* **Grey** concur in the result.

JOEL B. ERHARDT, Collector of the Port of New York, *Plff. in Err.*,
v.
LEWIS STEINHARDT ET AL.

(See S. C. Reporter's ed. 177-182.)

Tariff Act—question for jury.

1. Whether an article is dutiable under one or the other of two clauses of the Tariff Act is a question of fact for the jury, where it depends upon conflicting evidence.
2. The verdict of the jury that Boonekamp Bitters were properly classified under the proprietary preparation clause of the Tariff Act and not as liquors or cordials is conclusive, there being evidence tending to sustain it.

[No. 334.]

Argued March 30 and April 2, 1894. Decided April 23, 1894.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for the plaintiffs, Lewis Steinhardt *et al.*, in an action brought by them against Joel B. Erhardt, Collector, for duties paid under protest on certain imported goods invoiced as Boonekamp Bitters. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

*This was an action to recover duties [178 paid under protest on certain goods impor ed in September, 1889, and invoiced as Boonekamp Bitters. The collector rated them under the paragraph in Schedule H of section 2502 of the Act of March 3, 1883 (22 Stat. at L. chap. 120, p. 505) reading: "Cordials, liquors [liqueurs], arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this Act, two dollars per proof gallon;" and assessed the bottles in which the bitters were imported at three cents apiece under the paragraph of the same schedule, reading: "Wines, brandy, and and other spirituous liquors imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package; and all such bottles, except as specially enumerated or provided for in this Act, shall pay an additional duty of three cents for each bottle."

The importers claimed by their protest that the articles should have been assessed under the paragraph of Schedule A of said Act (22 Stat at L. 494) which provided as follows: "Proprietary preparations, to wit: All cosmetics, pills, powders, troches, or lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases, or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this Act, fifty per centum ad valorem;" and that the bottles should have been subjected to thirty per cent. ad valorem under the paragraph of Schedule B (22 Stat. at L. 495) reading: "Green and colored glass bottles, vials, demijohns, and carboys (covered or uncovered) pickle or preserve jars, and other plain, molded or pressed green and colored bottle glass, not cut, engraved or painted, and not specially enumerated or provided for in this Act, one cent per pound; if filled and not otherwise in this Act provided for, said articles shall pay thirty per centum ad valorem in addition to the duty on the contents."

*It appeared that the bitters in question [179 are made in Antwerp and advertised as a proprietary preparation compounded according to a private formula. The wrapper represented the enclosed articles as "fine stomachic bitters known as 'Boonekamp,' the outcome of a fortunate discovery made by Mr. A. E. Boonekamp, of Antwerp, Belgium, in the year 1815." That they possessed valuable properties "as an appetizer and as a regulator to the human system;" and as having "aperient and digestive

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties under protest; protest, how, made and its effects, see note to Greely v. *Thompson*, 13: 397.

qualities;" that "as a preventative against all forms of epidemic disease they are invaluable," while "taken in doses of one spoonful before each meal they aid digestion and impart a healthy and vigorous action to the system. They also make a pleasant refreshing beverage taken with water, gin, or aniseed cordial."

A certified copy of the Flemish label, as registered in the patent office, and the invoice in French were put in evidence.

Testimony was given tending to show that the bitters were prepared by a secret formula; that they were claimed to be valuable for aperient, digestive and tonic qualities, and used for the cure or relief of cramps, dyspepsia, dysentery, and sick stomach; that they were called patent medicines; and sold by dealers in such medicines and by grocers. It was admitted by plaintiffs that their principal trade in the article was with liquor dealers, and evidence was adduced that they were sold by liquor firms and in the wine and spirit department of wholesale groceries; and generally dealt out from retail bars. One bartender testified that he dispensed these bitters to his customers, and "that some liked it in whisky, some in gin, and some liked it straight." Another witness said they were not made to please the palate, as cordials were, and that "people will shake themselves when they drink them." It further appeared that the bitters were below proof, containing only about 47½ per cent of alcohol by weight, while "proof spirits" require 49½ per cent, and that they contained rhubarb, orange peel, turmeric, and an essential oil, supposed to be oil of anise.

Samples of these bitters were before the jury for examination and comparison, and there was [180] evidence to the effect that *substantially all bitters contained more or less alcohol; that absinthe contained wormwood and anisette, and was bitter; that neither absinthe, nor kirschwasser, nor arrack, nor curaçoa, was a proprietary preparation; and that cordials, liqueurs, and the like, did not contain drugs. Testimony was given as to the value and character of the bottles, but it was not returned in the bill of exceptions. The court charged the jury as follows: "It is unnecessary for me to detain you, except to state the question which it will be for you to answer in this case, affirmatively or negatively: Is plaintiffs' bitters substantially similar to either cordials, liqueurs, arrack, absinthe, kirschwasser, or ratafia? In determining the question of substantial similarity you may take into consideration any or all of these compositions; the appearance presented to the senses; its adaptability for use; the uses for which it is sold; and the effect that it produces. Looking at the question of similarity or dissimilarity on those various grounds, you will determine whether it does or does not present any substantial similarity to those enumerated articles."

The defendant excepted "to the ruling of the court in sending the specific question to the jury, as embodied in the charge."

The jury, after deliberation, answered the question submitted by the court in the negative. Defendant's counsel then moved the court for the direction of a verdict for the defendant on the ground that the articles, although proprietary, were also bitters, containing spirits; that the articles being equally provided for in both sections, the collector was entitled to assess the higher rate of duty under the last paragraph of section 2499 of the Revised Statutes as amended. This motion was denied, and defendant excepted. The jury thereupon rendered a verdict, under the direction of the court, for the plaintiffs, and, judgment having been rendered thereon, this writ of error was sued out.

Mr. **Edward B. Whitney**, *Assistant Atty. Gen.*, for plaintiff in error.

Mr. **Edward Hartley** for defendants in error.

Mr. Chief Justice* **Fuller delivered [181] the opinion of the court:

Counsel for plaintiff in error concedes that the bitters in question are proprietary preparations, and would be dutiable as such if there were no other governing clause; but contends that, as between the paragraph relating to proprietary preparations, and the paragraph relating to cordials, liqueurs, and other similar spirituous beverages, or bitters containing spirits, the latter should control; that the familiar rule that the more specific designation governs cannot be applied, because neither of the two paragraphs is more specific than the other; and that the beverage rate should be applied under the last clause of section 2499 of the Revised Statutes as amended in 1883 (22 Stat at L. 491) providing that "if two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates."

But we are of opinion that this contention cannot be sustained on the ground simply that Boonekamp bitters were a proprietary bitters, and also a bitters containing spirits. The proprietary paragraph has such enumerating force that a proprietary bitters, having a special character and value as such, protected by trademark and recommended as a remedy, although it contains spirits, as bitters generally do, cannot be treated as non-enumerated, or as so falling within two separate clauses as to involve the same result, unless that conclusion be compelled by other facts and circumstances disclosed in regard to it. The real inquiry here was whether the article, though confessedly dutiable as a proprietary preparation within the statute, was so similar to cordials, liqueurs, arrack, absinthe, kirschwasser, or ratafia as to be also susceptible of being assessed under the clause applicable to the latter. This was a question of fact, and we think properly left to the jury, if there was any evidence upon which a verdict for defendant in error could be justified. The question was, indeed, reduced to a very narrow compass, for it was admitted that absinthe was the only article named in the cordials' clause, to which *the government could claim that Boone-[182] kamp bitters bore substantial similarity, a concession based on the view that absinthe was the only "bitters" specified in the clause.

Absinthe, according to the Century Dictionary, is "the common name of a highly aromatic liqueur of an opaline green color and bitter taste," and is prepared by "steeping in alcohol

or strong spirit bitter herbs," the chief of them being wormwood. It was not denied that it is bitter; that it is used as a beverage; and is not a proprietary preparation. It appeared that the wormwood "has a medicinal effect upon the human system as a tonic," and that the article contains anisette, a cordial. On the other hand, Boonekamp bitters is a proprietary preparation, recommended to the public as such, and as prepared according to a private formula, as a remedy for certain specific maladies. The label is duly registered at the Patent Office. There waa evidence tending to show that it contains rhubarb, orange peel, turmeric, and an essential oil, probably oil of anise; that it is bitter; that it is not attractive as a beverage, and hardly used distinctively as such; and that while it is sold largely by liquor dealers, and used at bars, it is chiefly so sold for use and used in water, wines, or spirits, as a bitter, and for its cathartic, as well as tonic, qualities. A bottle of the bitters was produced for the inspection and consideration of the jury. Both articles contain alcohol in about the same proportion.

We are unable to conclude otherwise than that there was evidence tending to show that Boonekamp bitters were not substantially similar to absinthe, and that there was, therefore, no ground for taking the case away from the the jury. The verdict that there was no such similarity determined that these bitters were properly classified under the proprietary preparation clause and this excluded them from all other provisions. The rate of duty on the bottles was dependent on the rate of duty on the contents, and the determination as to the the latter controlled. *Judgment affirmed.*

183] JOHN GOURKO, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 183-192.)

Charge to jury on trial for murder—arming for self-defense.

1. On a trial for murder a charge to the jury that the defendant may prepare himself for self-defense, but if he kills when there is no case of self-defense, such act of previous preparation becomes criminal in its character because of his subsequent act, and then the fact of his previously preparing himself shows deliberation and design—is erroneous.

2. The jury were not authorized to find defendant guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes simply of self-defense, and if, independently of the fact of arming himself, the case, tested by what occurred on the occasion of the killing, was one of manslaughter only.

[No. 972.]

Submitted Nov. 17, 1893. Decided April 16, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment and conviction for the murder of one Peter Carbo, by John Gourko, in the Indian Territory, on November 1, 1892. *Reversed and cause remanded for a new trial.*

Statement by *Mr. Justice* **Harlan:**

The plaintiff in error, a white man and not an Indian, was charged by indictment in the Circuit Court of the United States for the Western District of Arkansas with the crime of having, on the first day of November, 1892, at the Choctaw Nation, in the Indian territory, within the above district, feloniously, willfully, and with malice aforethought killed and murdered one Peter Carbo. A verdict of guilty was returned, and, a motion for a new trial having been overruled, the defendant was adjudged to suffer death. The present writ of error brings up that judgment for review.

John Gourko and his brother Mike Gourko, and the deceased Peter Carbo, all of Polish nativity, were engaged as laborers at certain coal mines in the vicinity of the town of Alderson, Choctaw Nation, Indian territory. Between Carbo and the Gourko brothers—the two latter being respectively about 19 and 17 years—there was considerable ill feeling, growing out of a charge made by the former that the latter had clandestinely appropriated for their benefit money due for the taking

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NOTE.—*As to officers de facto: indictment for murder: sufficiency of statement of time and place*, see note to Ball v. United States, 35: 377.

As to criminal law: correction of sentence of one convicted: re-sentence, see note to *Ex parte* Cross, 36: 1039.

Homicide when justifiable in self-defense.

There must have been not only the belief, but also reasonable ground for the accused to believe, that, at the time of killing the deceased, he was in imminent or immediate danger of his life or great bodily harm from the deceased, to excuse the homicide on the ground of self-defense. Wilson v. State, 17 L. R. A. 654, 30 Fla. 234.

One upon whom an unprovoked brutal assault is made by one of greatly superior strength who has already demonstrated his power and purpose to do great bodily injury, and is under the influence of liquor, reckless and angry, is justified in seizing a knife lying at hand, and using it in self-defense to the extent of killing his assailant. Garello v. State, 31 Tex. Crim. Rep. 56.

An aggressor in a personal difficulty—one not reasonably free from fault—can never be heard to acquit himself of liability for its consequences on the ground of self-defense. Lovett v. State, 17 L. R. A. 705, 30 Fla. 142.

A police officer may defend himself to the extent of taking life, against an attack by a prisoner whom he has lawfully arrested. Com. v. Weathers, 7 Kulp, 1.

One who brings on or begins a difficulty, although with no intent to kill or do bodily injury to the other party thereto, cannot justify on the ground of self-defense an attempt by him to kill the latter, although it afterwards becomes necessary to kill him to save his own life. Sullivan v. State, 31 Tex. Crim. Rep. 486.

To justify killing, in self-defense, one having or presenting a deadly weapon, the belief or fear of imminent danger need not, in fact, be well grounded, if the conduct or actions, coupled with the threatening language of the assailant, is such as to induce a reasonably cautious man to believe that his life or person is in imminent danger. State v. West, 45 La. Ann. 14.

out of several lots of coal that he claimed to have dug, and with the taking of which from the mines they had no connection. Although the Gourko brothers denied this 184 charge, Carbo *persisted in repeating it, and, according to the testimony of the younger Gourko, threatened to kill them both and "to shoot John like a dog." Carbo was about 40 or 45 years of age, weighed about 200 pounds, possessed extraordinary physical strength, and was regarded as a dangerous character. The defendant was in delicate health, weighed about 135 pounds, and was deemed a quiet, peaceable boy.

On the morning of November 1st, 1892—that being a holiday for the Polish laborers—there were quite a number of miners in the town of Alderson. About nine o'clock Carbo and the defendant were observed to be engaged in an angry conversation near the post-office.

The postmistress at Alderson, describing what occurred, testified that Carbo would swear and call Gourko "names and make threats that he would hit him or something of the kind, and shook his fist right in his face." Being afraid that Carbo was "going to hurt the boy," she spoke to Mr. Anderson, who was working in the store, and said, "'Pete is going to kill John, I am afraid.' . . . The boy did not show any disposition to want to quarrel with him or want to fight; he would step back as much as two or three steps away, and Pete would follow him up and shake his fist in his face, and the boy went on; and as he came back I spoke to John, the defendant, and asked him not to have any trouble there by the office, and he said he wasn't going to; he said 'I have just gone to get a marshal to come and have him arrested,' and he said, 'I will wait until the marshal comes home.'"

Another witness, John Silluski, also a Polander, gave this account of the meeting

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A mere apprehension of immediate danger does not justify a homicide, no matter how sincere it may be, but there must be an honest and reasonable belief of such danger. Field v. Com. 89 Va. 690.

A homicide is not justifiable as in self-defense because the deceased threatened with a baseball bat the person who killed him, where, after the latter retreated, the deceased stood still in a peaceful attitude and threatened no further violence. Byrd v. Com. 89 Va. 536.

Homicide is not excused or reduced in degree by the fact that the deceased is the aggressor in a quarrel between the parties, where the quarrel ceases and the deceased withdraws and the defendant is clearly the aggressor in a second quarrel in which the killing is done. Drake v. Com. 14 Ky. L. Rep. 677.

The doctrine that one attacked by another in his own castle is not compelled to flee or to resort to apparent means of escape does not apply where the killing occurred in a public grocery owned by the accused, and no assault was made upon him with a deadly weapon, the deceased having only a small knife which was in his pocket. Hall v. Com. 15 Ky. L. Rep. 102.

To justify a homicide on the ground of self-defense, the slayer must apprehend with reasonable cause danger of losing his life or receiving great personal injury, and his action must be to avert the apprehended danger. State v. Talmage, 107 Mo. 543.

One attacked by another has the same right in acting upon reasonable appearances of danger, to defend himself against appearances of serious bodily harm as he has against appearances that indicate danger of death. Fuller v. State, 30 Tex. App. 559.

The fact that one has been previously threatened and assaulted with a deadly weapon by another will not justify him in lying in wait and slaying his adversary. Turner v. Com. 89 Ky. 78.

A party is justified in taking the life of another when necessary to save his own, where such other is pursuing him and forcing the fight, and the former is endeavoring in good faith to withdraw, although the difficulty may have been brought on by his own imprudent language. State v. Talmage, 107 Mo. 543.

One who kills his enemy after the latter has thrown away his weapon and turned to fly cannot claim to have been acting in self-defense. Meurer v. State, 129 Ind. 587.

One who voluntarily brings on, seeks, or provokes a difficulty in the progress of which, though to save his own life, he kills his adversary, cannot be justified on the ground of self-defense, but must in part at least, bear the consequences of his lawlessness, the degree of his guilt depending upon the intent with which the difficulty is brought on or provoked. State v. Parker, 100 Mo. 217.

The fact that some trivial act of one accused of murder intended as a mere joke, or even if intended to annoy, contributed to bring on the difficulty, will not deprive him of the right of self-defense. Bennyfield v. Com. 13 Ky. L. Rep. 446.

One who arms himself and in any manner challenges a fight with another cannot afterwards maintain, that in taking the life of the latter, who assaulted him during the difficulty, he acted in self-defense. Gaines v. Com. 88 Va. 682.

There was no abandonment of the difficulty, so as to entitle defendant, accused of homicide, to a charge on the theory of self-defense, where it was provoked by him and was only temporarily suspended while deceased went across the street to arm himself, and was immediately renewed on his return. Roberts v. State, 30 Tex. App. 291.

One who has reasonable grounds to believe and does believe that another is about to enter his house with the object of doing him great bodily harm has the right to use such force as is necessary to prevent such entry, even to the taking of life. Sparks v. Com. 89 Ky. 644.

One who goes upon another's premises for the purpose of provoking a quarrel with and killing the owner, and who kills the latter while he is using no more force than is necessary to eject him, is guilty of murder and cannot plead self-defense. Gaines v. Com. 88 Va. 682.

To justify, under Mansfield's Ark. Digest, section 1551, the killing of one attempting in a violent manner to enter another's habitation, it must reasonably appear to the one committing the homicide that such entry will expose him to the danger of losing his life or of receiving great bodily injury, it being his duty to prevent the entry by means not fatal if he can do so consistently with his own safety. Brown v. State, 55 Ark. 593.

A homicide is justifiable, under Mansfield's Ark. Digest, section 1551, as committed in resisting a violent attempt to enter a house for the purpose of assaulting a person dwelling or being therein, though the person committing it does not attempt to leave the house, if he resorts to fatal means only to avoid exposing himself to the danger of losing his own life or of receiving serious bodily injury. King v. State, 55 Ark. 604.

One who provokes a difficulty without intending to fight on equal terms, but with a design to use a pistol if it becomes necessary, and during the diffi-

between the deceased and the defendant near the postoffice: "That day was a holiday, the first of month of November, and on this holiday all Polish stay at home; I staid at home too. John Gourko was sick. He worked a couple of days, and stay at home three or four; I don't know how many. On that day I staid at home and he staid at home too. He felt bad on that day. About 9 o'clock or half past 9 I go to the postoffice, and John Gourko too, and Pete Carbo was standing in front of the postoffice. and three other men were standing there, and he was 185] talking to *them, and I passed him and went inside of the postoffice. I heard John say, 'Pete, how many cars of coal do you say I stole from you?' and Pete say, 'I don't say you stole; you and your brother together work at that place, and I lost about 6 cars.' John wasn't mad that time. Pete said he stole about six cars. John left home that morning, he did; he wasn't well; he was sick, didn't work; he had chills and fever: was sick all the time. John said, 'You old sucker, I never stole no six cars of coal.'" Being asked what next happened, the witness stated that Carbo "cursed Gourko all the time," applying to him epithets of the most degrading kind, and which need not be here repeated. The witness further said: "And Pete said, 'You want to fight this morning. Come on here,' and John said, 'I don't want

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culty kills the party thus provoked, is guilty of murder of the second degree, notwithstanding the latter assaulted him in a dangerously violent manner. State v. Talmage, 107 Mo. 543.

One unlawfully attacked by another is not bound to retreat to avoid the necessity of killing his assailant. Williams v. State, 30 Tex. App. 429.

One acting under apprehended danger of death or serious bodily harm is not bound to retreat or resort to other means of averting such danger, but may slay his adversary if the danger be, or reasonably appears to him to be, imminent and present. Baltrip v. State, 30 Tex. App. 545.

One who, with murder in his heart and a deadly weapon in his hand, pursues and overtakes another and kills him, is guilty of murder regardless of any principles of self-defense or of declining a further struggle. People v. Bruggy, 98 Cal. 476.

Actual danger is not necessary to justify the exercise of the right of self-defense; reasonable grounds to believe such danger real and imminent are sufficient. State v. Harrod, 102 Mo. 500; Gibson v. State, 89 Ala. 121, 18 Am. St. Rep. 96; Perkins v. State, 78 Wis. 551; State v. Wyse, 33 S. C. 582.

The right to kill in self-defense is not confined to cases where one has a reasonable belief that it is necessary to save his own life, but the right accrues if there is imminent danger, or a reasonable apprehension of such danger, to limb, or involving great bodily harm, although there may be, in fact, no danger to life. Kirby v. State, 89 Ala. 63.

When one without fault in bringing on a difficulty finds himself so menaced by present impending danger that he strikes and slays his assailant, it is not absolutely necessary to his plea of self-defense that he should have attempted to have escaped by flight, if he was so obstructed by obstacles that he could not escape, or in attempting to do so would probably have increased the peril with which he was menaced. Hammil v. State, 90 Ala. 577.

The plea of self-defense in committing homicide is not good unless there were no other reasonable means of escape, by retreating or by avoiding the combat with safety. Com. v. Ware, 137 Pa. 465, 47 Phila. Leg. Int. 484.

A person assaulted in his yard is required to avoid the necessity of killing by retreating into his house if he can do so, and is not allowed by law to stand his ground and kill his assailant. Watkins v. State, 89 Ala. 82.

The principle that one may defend himself in his own dwelling without retreating therefrom is not applicable when he has quitted his domicil and enclosure. Martin v. State, 90 Ala. 602.

If any forcible attempt is made against a person or property with a felonous intent, or if an attack is made with a murderous intent, the person attacked is under no obligation to retreat. Perkins v. State, 78 Wis. 551.

To support the claim of self-defense on a trial for homicide, an accused must have been free from fault in provoking or bringing on the difficulty, and he cannot shield himself on the ground of a necessity which his own fault or wrong contributed to produce. Kirby v. State, 89 Ala. 63; Waller v. State, 89 Ala. 79; State v. Bryant, 102 Mo. 24.

One who seeks a difficulty with another for the purpose of chastising him for his abuse of a near relative, and arms himself with a pistol to be used in case of necessity, and kills such person with the weapon pursuant to such purpose, is guilty of murder, although it was necessary to use the pistol in self-defense. Gibson v. State, 89 Ala. 121, 18 Am. St. Rep. 96.

The danger which will excuse a homicide on the ground of self-defense must be apparent and imminent at the time of the fatal injury, or honestly believed to be so, and on reasonable grounds. Barnard v. State, 88 Tenn. 183; State v. Jackson, 32 S. C. 27; Poe v. State, 87 Ala. 65; Price v. People, 131 Ill. 223, 12 Crim. L. Mag. 479.

The right of self-defense does not imply the right of attack, and will not avail in any case where the difficulty was induced by the party himself. Lewis v. State, 88 Ala. 11; State v. Jacobs, 28 S. C. 29.

A party has not the right to arm himself, seek his adversary, and provoke a quarrel or difficulty with him, and then take advantage of it to justify killing such party on the ground of self-defense. State v. Hawkins, 18 Or. 476; State v. Scott, 41 Minn. 365; Helm v. State, 67 Miss. 562.

The right of self-defense cannot be carried to the extent of taking human life, until the party assailed has availed himself of all proper means in his power to decline combat by retreat, if there is open to him a safe mode of escape. Poe v. State, 87 Ala. 65.

A party attacked or assaulted is not required to escape, or to attempt it, if the conditions are such that by so doing he will increase his peril, real or apparent. Shell v. State, 88 Ala. 14; Babcock v. People, 13 Colo. 515; Brown v. Com. 86 Va. 466; State v. Evans, 33 W. Va. 417; Gonzales v. State, 28 Tex. App. 130.

One close pressed by an attacking man who is his superior in strength, in a situation which justifies fear of grave bodily harm, is excusable for shooting his assailant. Stoneham v. Com. 86 Va. 523.

A party killing another cannot, in any case, substantiate his excuse if he killed his adversary, even after a retreat, unless there were reasonable grounds to apprehend that he would otherwise have been killed himself or have suffered great bodily harm. Brown v. Com. 86 Va. 466.

It is only in the last extremity that the right to use a deadly weapon, under any circumstances, arises. People v. Carlton, 115 N. Y. 618.

to fight; I am a sick man; I am going to arrest you; I don't feel well.' And he said, 'Come on and fight if you want to fight this morning,' and he said. 'I don't want to fight.' John looked behind the store for a policeman or something; he wanted to arrest him, I guess; I don't know."

It appears from the evidence that the killing occurred about twenty or thirty minutes after the difficulty at the postoffice, and near a saloon in which a billiard table was kept. The witness who gave the fullest account of the difficulty up to the time of the killing was Mr. Anderson. He testified, in substance, that he saw the beginning of the trouble in front of the postoffice, in which was the store where he worked. Being asked to state what occurred, he said: "Well, I was in the store there, and, as usual, around the postoffice there was a crowd gathered there for the mail at distributing times, and other times men congregate around in front of the store and in the store, and this morning which was the morning of the first of November, 1892, there was quite a crowd gathered right in front of the window and door of the store or postoffice, and it was not long until my attention was called to the loud talking out there by the postmistress. . . . The man who was doing the loud talking was Peter Carbo, the man who was killed. He appeared at that time to be angry, and was talking pretty loud when I first saw him. 186] I heard him *talking there before I got in position where I could see him. I saw him then quarreling with John Gourko; . . and I seen Pete Carbo shake his fist at John, and putting his fist up under his nose, and using considerable bad language. . . . I heard him say that frequently, several different times, and John Gourko there, when he would be shaking his fist at him he would be stepping back, backing away. I seen him back as far as from here to you, and pass around the crowd. And it would only be a few moments until Peter would be there. *Q.* Peter would follow him up? *A.* Yes, sir. And in the interval he would sometimes have one hand in his bosom and the other hand behind here. Of course, I didn't know whether he was armed or not. I stood in the store where I belonged, and after a little while the disturbance out there ceased, and they separated, and then in a few minutes after that, just a short space of time, I don't know just how long, Mr. Gourko there came back to the store, and the postmistress spoke to him, called him in and had a talk with him, and told him she didn't wish any more trouble. And I was speaking to Mr. Gourko there, as I was acquainted with him, and told him that the postmistress didn't want any more trouble in front of here, in front of her window, and no more such language as that was, and I told him to keep away from Peter Carbo, and have no more trouble with him. I also asked him if he was armed, and he said he was not. And presently—just about that time there was a customer come in, and I had to leave him and go back to my work, and after I went back to my work, waiting on the customers, I can't tell how long that was, but I got through the customers, and I happened to walk to the store door, and I leaned up against the side of the door, and was standing there, and presently I saw Mr. Gourko there coming right to me from behind the billiard hall, that was in front and to the right of me, right across the street or passageway; he was coming around that, and he was coming directly towards me, as though he was coming to the postoffice, or me and the door, just as though he was coming right over to our store, and as he got up almost opposite the front of the billiard hall I was in the act of *calling[187 to him, or saying something to him—I am pretty noisy sometimes to the boys around there and call to them or say something—and just as I was going to speak, Pete Carbo and him got into conversation, and I said nothing. . . When I first saw him he was right in front of the billiard hall, standing out in front, and Gourko was coming right up this way, and when the converation occurred Gourko stepped out here at the right-hand corner of the billiard hall and Peter Carbo advanced right up towards him, that way, until they were a few paces apart, and they were saying something I could not understand; I don't think it was in our language; if it was I didn't understand it. Still, I didn't think of any trouble; they were not talking loud at that time, as I understood it. Gourko drew a small bright pistol from his pocket, and he shot at Carbo, and he apparently shot almost in that direction, over his head, and he then almost instantly shot the second time, and Carbo dodged to the right and down'ard, and he shot again, and the third time he shot he dropped his gun further down and fired and Carbo fell." Being asked to describe Carbo's attitude and what was the position of his hands, the witness said: "I can't remember just which hand it was, one hand apparently was thrust in his bosom and the other hand was behind him, but which hand it was I cannot call to mind. It wasn't but just a short time from the time he began to advance until the shooting was done." He further stated, in reply to an inquiry as to when Carbo put his hands behind him: "I think when he started out in front of the billiard hall, about 10 or 12 feet from the front of the billiard hall is where I saw him start from, advance out to where Gourko stood. *Q.* I will ask you to state if you know whether he began to talk to the defendant here when you saw him start out of the billiard hall, when he started towards him? *A.* Yes, sir; but I could not understand what he said. I think that was in the Slavish language—in some language besides mine. But as he went out there he was talking. I could hear their voices, but I could not understand anything that was said. *Q.* I believe you say they came around from the front, and Peter came out from the back? *A.* No, sir; Peter *was standing [188 in front, and Gourko, the first I seen of him, he was opposite the rear of the store, coming up the street or passageway, or whatever you call it, the pass way, and when he got up opposite there, where he could see by the corner of the billiard hall here, like this was the billiard hall, and Gourko was coming up this way, bearing right across, just as though our store was right over here, and he was

bearing over from this, as though he was coming over right direct to where I was standing in the door, and Peter Carbo, the first I seen of him, was right in front of that store, and when they began to talk Peter Carbo advanced right out that way, and when he got up in three or four paces of him Gourko stopped. *Q.* They met right there? *A.* Yes, sir; when they got together Peter was talking, and I don't know whether this man was saying anything or not. *Q.* They were saying something in their own language which you did not understand? *A.* Yes, sir; that boy was standing still when Peter was advancing, and he was standing still when the first shot was fired. *Q.* The first shot was fired over his head? *A.* Yes, sir." There was evidence, on behalf of the government, tending to show that just before the killing Carbo was in the saloon referred to watching a game of billiards; that while he was there Gourko came to the door, and opened a conversation with Carbo which indicated that he was indignant at the language the latter had previously used towards him and did not intend to rest quietly under the insults that had been put upon him; that the parties quickly, and as if by mutual agreement, left the saloon to "settle" the dispute between them; that in a moment or two after they got on the outside the killing occurred; and that Carbo, at the time he was shot, was facing Gourko, with one hand across his bosom, under the lapel of his coat, and the other behind or across his back. There was evidence tending to show that the deceased was often seen, when, not quarreling, with his hands in that position. The third shot fired by defendant took effect, and resulted in the instant death of Carbo. It was clearly proved that he was unarmed at the time he was shot.

The evidence disclosed other circumstances, 189] but those above *stated are the principal facts, and are sufficient for the purpose of presenting the grounds upon which the defendant seeks a reversal of the judgment.

No counsel for plaintiff in error.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The court below made a long charge in reference to the principles of law which it conceived to be applicable to murder, manslaughter, and self-defense. Among other things, the court said to the jury: "A man has a deliberate intent to kill in the absence of a right to kill under the law of self-defense, and in the absence of that which would mitigate the offense to manslaughter. He cannot have a deliberate intent to kill and then say that his offense was only manslaughter, because the fact that he had an intent to kill implies that he deliberated over that purpose, that he prepared himself for it, and, as you will learn further on, where deliberation, premeditation upon a purpose to slay, where previous preparation to execute that purpose exists, there is banished from the case that condition known as manslaughter, because that grows into existence upon sudden impulse, without previous preparation to take life. Whenever that exists we have malice, and nothing else, unless it is a case where a man prepares himself for self-defense, and then, in order to exonerate himself from that killing, he must execute that preparation where the law gives him a right to do it, and in a defensive way; he may prepare himself for self-defense, but if he kills when there is no case of self-defense, such act of previous preparation becomes criminal in its character because of his subsequent act, and it becomes attached to that act. It does not necessarily import especial malevolence toward the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit; a heart regardless of social duty, and a mind deliberately bent on mischief. It *imports pre- [190 meditation." To this part of the charge the defendant duly excepted.

The defendant asked the court to instruct the jury "that preparation in the heat of blood may be followed by manslaughter as well as under a certain state of case it may be followed by murder or self-defense." The court refused to give this instruction without modification, and to that action of the court the defendant excepted. The court modified the proposition embodied in this instruction by saying to the jury: "If a party prepares to defend himself in a case where he could defend himself, he has a right to do that; but if he prepares himself as I have already told you, and then executes a deadly purpose by killing under circumstances where he would have no right to kill, where there was an absence from the case of the right of self-defense or an absence of the mitigating conduct that I have given to you that would reduce the grade of the crime to manslaughter, then the fact of his previously preparing himself shows deliberation for a deadly criminal purpose, and there could not be manslaughter under such conditions as that. He may prepare himself, as I have already told you, to defend himself in a proper way; but because he has prepared himself to act upon the defensive, if he afterwards abandons that purpose and kills, if he has no right to kill in the absence of facts that would give him the right to defend, then the fact of previous preparation becomes evidence of deliberation, evidence of design. As I have already told you, manslaughter cannot spring out of a state of case where a man prepares himself to kill wrongfully, when he prepares himself to take human life when he has no right to do it. That is evidence of malice aforethought, and it is the distinguishing line between manslaughter and malice aforethought."

We are of opinion that the part of the charge to which the defendant took exception, as well as what the court said in modification of the instruction asked by the defendant, were wanting in the clearness that was requisite in order that the jury might not misapprehend the principles of law by which they were to be controlled.

Assuming, for the purposes of the present inquiry, that the *defendant was not en- [191 titled to an acquittal as having acted in self-

defense, the vital question was as to the effect to be given to the fact that he armed himself with a deadly weapon after the angry meeting with Carbo in the vicinity of the postoffice.

If he armed himself for the purpose of pursuing his adversary, or with the intention of putting himself in the way of his adversary, so as to obtain an opportunity to kill him, then he was guilty of murder. But if, in view of what occurred near the postoffice, the defendant had reasonable grounds to believe, and in fact believed, that the deceased intended to take his life, or to inflict upon him great bodily harm, and, so believing, armed himself solely for necessary self-defense in the event of his being pursued and attacked, and if the circumstances occurring on the occasion of the meeting at or near the saloon were such as, *by themselves*, made a case of manslaughter, then the defendant's arming himself, after the difficulty near the postoffice, did not have, in itself, the effect to convert his crime into that of murder. Stated in another form: Although the defendant may not have been justified on the occasion and under the particular circumstances of the difficulty at the billiard saloon in believing that the taking of his adversary's life was, then and there, necessary to save his own life or to protect himself from serious bodily harm; nevertheless, the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes simply of self-defense, and if, independently of the fact of arming himself, the case, tested by what occurred on the occasion of the killing, was one of manslaughter only.

The court, in effect, said—or the jury may, not unreasonably, have understood the court as declaring—that preparation, by arming, although for self-defense only, could not be followed, in any case, by manslaughter, if the killing, after such arming, was not, in fact, in necessary self-defense. Such we understand to be the meaning of the charge. In our opinion the court erred in so charging the jury. If the accused was justified in the eye 192] of the law in arming himself for *self-defense, and if without seeking but on meeting, his adversary, or a subsequent occasion, killed him, not in necessary self-defense, then his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, made it the one or the other. If guilty of manslaughter, looking alone at those circumstances, he could not be found guilty of murder by reason of his having previously armed himself solely for self-defense.

The judgment is reversed and the cause remanded for a new trial.

EDWARD G. HANRICK, *Appt.*,
v.
NICHOLAS HANRICK ET AL.

NICHOLAS HANRICK ET AL., *Appts.*,
v.
EDWARD G. HANRICK ET AL.

WILLIAM BRADY ET AL., *Appts.*,
v.
EDWARD G. HANRICK ET AL.

(See S. C. Reporters' ed. 192 198.)

Act of March 3, 1887—removal of suit—costs.

1. The Act of March 3, 1887, chap. 373, corrected by the Act of August 13, 1888, chap. 866, by new regulations of removals for prejudice or local influence, supersedes and repeals the earlier statutes upon this subject.
2. Such Act does not authorize one defendant to remove a suit into the circuit court of the United States from a state court, upon the ground of prejudice or local influence between himself and other defendants.
3. A party defendant who has wrongfully removed a suit from a state court into the United States circuit court, must on reversal, pay the costs in the latter court and the costs of the appeals to this court.

[Nos. 337, 338, 339.]

Argued April 3, 1894. Decided April 30, 1894.

APPEALS from a decree of the Circuit Court of the United States for the Northern District of Texas, for the partition of land in an action brought in the state court, by Nicholas Hanrick *et al.*, against Edward G. Hanrick *et al.*, which suit was removed from the state court to said circuit court, on the application of William Brady, one of the defendants. Reversed, with costs of the appeals against Brady and case remanded to the circuit court, with directions to render judgment against him for costs in that court and to remand it to the state court.

Statement by *Mr. Justice* **Gray**:

This was an action, brought December 17, 1878, in the district court of Falls county in the state of Texas, to recover two undivided thirds of land in that county, of which Edward Hanrick, a citizen of that state, was seized at the time of his death in 1865.

NOTE.—*As to removal of causes, under Act of 1875; citizenship*, see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies, see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see note to Gaines v. Fuentes, 23: 524, and to Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts where United States Constitution, Act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied, see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers; Rev. Stat. § 643, see note to Davis v. South Carolina, 27 574.

193] intestate and without issue. His *heirs, at the time when this suit was brought, were his sister Elizabeth; Nicholas Hanrick and others, the children of his deceased brother James; and Edward G. Hanrick, the only son of another deceased brother. The plaintiffs were Elizabeth and the children of James, and were some of them citizens of the state of New York, and the others subjects of the United Kingdom of Great Britain and Ireland and residents of Ireland. The defendants were Edward G. Hanrick, a citizen of Texas, residing in the northern district of Texas, who contended that the plaintiffs had no title, because both Elizabeth and James were aliens; and Philip O'Brien and wife, residents of the state of Massachusetts and citizens of the United States, to whom some of the plaintiffs had conveyed their interests by a deed absolute in form, but alleged to be in trust for the grantors.

The petition, which stated the above facts, was afterwards amended by joining as defendants William Brady, a citizen of New York; John B. Sargent, a citizen of Massachusetts; and Wharton Branch and Edward J. Gurley, citizens of Texas. Brady, Sargent and Branch severally claimed interests in the lands under conveyances from the defendants O'Brien and wife; and Gurley claimed an undivided third of the land under a deed from Edward G. Hanrick pursuant to a contract made by Edward Hanrick in his lifetime. The amended petition prayed for a partition of the whole land, having due regard to any valid conveyances of interests therein, and to other equitable considerations.

On June 15, 1887, Brady, relying on section 639 of the Revised Statutes, and the acts of March 3, 1875, chap. 137, and March 3, 1887, chap. 373, filed in the state court a petition, supported by his affidavit, for the removal of the suit into the circuit court of the United States, on the ground that there was in the cause a controversy between himself, a citizen of New York, and the defendants Edward G. Hanrick, Branch and Gurley, citizens of Texas and that by reason of prejudice and local influence, created by said Henrick, Brady could not obtain justice in the courts of the state. Thereupon the state court ordered the case to be removed as prayed for.

194] *On November 21, 1887, the defendants Hanrick and Gurley moved the circuit court to remand the case to the state court, because there was no controversy between the defendant Brady and the plaintiffs; because Brady was a citizen of the same state as some of the plaintiffs; because all the defendants were not citizens of a different state from the plaintiffs; because there was no separable controversy between Brady and any other party to the suit; and for other reasons.

On November 23, 1887, the circuit court, against the exception of the defendants Hanrick and Gurley, made an order denying their motion to remand the case to the state court; reciting that it had been made to appear to the court that from prejudice and local influence the defendant Brady would not be able to obtain justice in the courts of the state; and adjudging that the cause be removed from the state court to the circuit court.

The pleadings were then, by order of the circuit court, reformed according to the equity rules of the court; and, after further proceedings and hearings, it was decreed that the parties were entitled to undivided interests in the land as follows: The plaintiffs, two ninths; the defendant Edward G. Hanrick, two ninths; the defendants Brady and O'Brien and wife, two ninths; and the defendant Gurley, one third. A final decree of partition was entered accordingly, from which appeals were taken to this court by the plaintiffs, by the defendant Hanrick, and by the defendants Brady and O'Brien and wife.

Messrs. **W. Hallett Phillips** and *L. W. Goodrich* for E. G. Hanrick, appellant.

No briefs filed for other parties.

Mr. Justice **Gray** delivered the opinion of the court:

The first question to be decided is whether the circuit court of the United States lawfully acquired and retained jurisdiction of the case. The determination of this question really *depends upon the construction and ef- [195 fect of the Act of March 3, 1887, chap. 373, as corrected by the Act of August 13, 1888, chap. 866; but will be aided by referring to the earlier acts of Congress and to the construction of those acts by this court.

The Judiciary Act of September 24, 1789, chap. 20, § 12, authorized "a suit" commenced in any state court "by a citizen of the state in which the suit is brought against a citizen of another state" to be removed by the defendant into the circuit court of the United States upon a petition filed in the state court. 1 Stat. at L. 79. Under that statute, it was held to be essential to the jurisdiction of the circuit court that all the defendants should be citizens of a different state from any of the plaintiffs. *Strawbridge* v. *Curtiss*, 7 U. S. 3 Cranch, 267 [2: 435]; *Susquehanna & W. V. R. & Coal Co.* v. *Blatchford*, 78 U. S. 11 Wall. 172 [20: 179]; *Barney* v. *Latham*, 103 U. S. 205, 209 [26: 514, 516].

The earliest Act of Congress for the removal of causes on the specific ground of prejudice and local influence was the Act of March 2, 1867, chap. 196, by which "where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state," the suit might be removed into the circuit court of the United States by "such citizen of another state, whether he be plaintiff or defendant," upon filing a petition and affidavit in the state court. 14 Stat. at L. 558.

Under that Act, it was held, after able arguments and full consideration, that the phrase "a suit in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state" had the same meaning as the shorter description, in the Act of 1789, of "a suit between"

such parties; that each term implied a proceeding in a court of justice by a party plaintiff against a party defendant; and consequently that all the defendants must be citizens of other states from any of the plaintiffs, and that one of several defendants could not remove the suit. *Grover & B. S. Mach. Co.* v. *Florence S. Mach. Co.* 85 U. S. 18 Wall. 553, 585 [21: 921, 922]; *Fannevar* v. *Bryant*, 88 U. S. 21 Wall. 41 [22: 476]; *Blake* v. *McKim*, 103 U. S. 336, 338, 339 [26: 563, 564].

The Act of 1867 was substantially re-en-[196] acted in clause 3 of *section 639 of the Revised Statutes, which, however (like the Act of 1789) described the case to be removed as "a suit" between a citizen of the state in which it is brought and a citizen of another state (instead of describing it, as in the Act of 1867, as "a suit in which there is controversy between" such parties) and was likewise held to require that all the necessary parties on one side of the suit should be citizens of different states from those on the other, and not to permit a removal because of a separable controversy between one of the defendants and the plaintiff. *Myers* v. *Swann*, 107 U. S. 546 [27: 583]; *American Bible Society* v. *Price*, 110 U. S. 61 [28: 70]; *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54 [30: 60]; *Hancock* v. *Holbrook*, 119 U. S. 586 [30: 538]; *Young* v. *Parker*, 132 U. S. 267, 270, 271 [33: 352, 353].

The Act of March 3, 1875, chap. 137, § 2, authorized any suit in a state court "in which there shall be a controversy between citizens of different states" to be removed by "either party" into the circuit court of the United States; and added this clause: "and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States." 18 Stat. at L. 470.

Under that statute, it has been uniformly held that, in order to justify a removal of the suit because of "a controversy which is wholly between citizens of different states," the whole subject-matter of the suit must be capable of being finally determined between them, and complete relief afforded as to the separate cause of action, without the presence of other persons originally made parties to the suit; and that when there was but one indivisible controversy between the plaintiffs and the defendants, as in the case of a suit for partition, the suit could not be removed by one of several plaintiffs or defendants. *Blake* v. *McKim*, 103 U. S. 336 [26: 563]; *Torrence* v. *Shedd*, 144 U. S. 527 [36: 528]; *Bellaire* v. *Baltimore & O. R. Co.* 146 U. S. 117 [36: 910]; *Wilson* v. *Oswego Twp. ante*, p. 70; *Merchants Cotton Press & S. Co.* v. *Insurance Co. of N. A. ante*, p. 195.

197] *The Act of 1875 contained nothing concerning removal on the specific ground of prejudice or local influence, and did not repeal clause 3 of section 639 of the Revised Statutes. *American Bible Society* v. *Grove*, 101 U. S. 610 [25: 847]; *Hess* v. *Reynolds*, 113 U. S. 73 [28: 927]; *Baltimore & O. R. Co.* v. *Bates*, 119 U. S. 464 [30: 436].

The Act of March 3, 1887, chap. 373, corrected by the Act of August 13, 1888, chap. 866, was intended, as this court has often recognized, to contract the jurisdiction of the circuit courts of the United States, whether original over suits brought therein, or by removal from the state courts. It not only amends the Act of 1875; but it allows to none but defendants the right to remove any case whatever, and, by new regulations of removals for prejudice or local influence, supersedes and repeals the earlier statutes upon this subject. 24 Stat. at L. 553; 25 Stat. at L. 434; *Smith* v. *Lyon*, 133 U. S. 315 [33: 635]; *Fisk* v. *Henarie*, 142 U. S. 459 [35: 1080]; *Tennessee* v. *Union & P. Bank. ante*, p. 511.

This Act, after other provisions which need not be stated, re-enacts the last clause of section 2 of the Act of 1875, above quoted, except that it omits the words "plaintiffs or." It then takes up the subject of the Act of 1867, and enacts that in the case, defining it in the words of that Act, "where a suit is now pending or may be hereafter brought, in any state court," a removal may be had, not, as under that Act, by "such citizen of another state, whether he be plaintiff or defendant," but only by "any defendant being such citizen of another state;" and not upon petition to the state court and the mere affidavit of the petitioner to his belief in prejudice or local influence, but upon petition to the circuit court of the United States and "when it shall be made to appear to said circuit court" that prejudice or local influence exists.

Whether this Act permits one of two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which there have been conflicting decisions in the circuit courts, and upon which we are not now required to express a definitive opinion.

Beyond doubt, the existing Act, like every Act which *preceded it, does not auth-[198 orize one defendant to remove a suit into the circuit court of the United States from a state court, upon the ground of prejudice or local influence between himself and other defendants. The whole object of allowing a defendant to remove a suit or controversy into the circuit court of the United States is to prevent the plaintiff from obtaining any advantage against him by reason of prejudice or local influence. Unless such prejudice or influence in favor of the plaintiff is alleged and proved, he cannot be prevented, under the clause of the existing statute upon this subject, from prosecuting his suit against all the defendants in the court in which he originally brought it.

The present case was a suit for partition, to which all the plaintiffs and all the defendants were indispensable parties. *Torrence* v. *Shedd*, 144 U. S. 527 [36: 528]; *De la Vega* v. *League*, 64 Tex. 205; *Stark* v. *Carroll*, 66 Tex. 393. Each and all of the defendants contested the rights which the plaintiffs asserted; the defendant Brady was a citizen of the same state as some of the plaintiffs; and

the only prejudice and local influence which he alleged as a ground of removal was between himself and other defendants. For this reason, independently of other reasons urged against the validity of the removal, Brady's removal of the cause into the circuit court of the United States was not warranted by any of the acts of Congress on which he relied.

Brady, having wrongfully removed the case into the circuit court, must pay the costs in that court, as well as the costs of the three appeals to this court. *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379 [28: 462]; *Torrence* v. *Shedd*, and *Tennessee* v. *Union & P. Bank*, above cited.

Appeal of the plaintiffs sustained, and decree reversed, with costs of the three appeals against Brady; and case remanded to the circuit court with directions to render judgment against him for costs in that court, and to remand it to the state court.

199] THE BRADLEY FERTILIZER COMPANY, *Appl.*,
v.
THE EDWIN I. MORRISON ET AL.

(See S. C. Reporter's ed. "*The Edwin I. Morrison*," 199-216.)

Charter of vessel—perils of the sea—damage to cargo—findings of the court.

1. Where by the charter party it is agreed on the part of the vessel that she shall be tight, staunch, strong, and in every way fitted for the voyage, the owner is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo; if there be a defect, although latent and unknown to the owner of, he is not excused.
2. Where perils of the sea are excepted by the charter-party the burden of proof is on the owner to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception does not exonerate him from liability for loss or damage from one of those perils to which his negligence, or that of his servants contributed.
3. Where damage to the cargo was caused by water taken aboard through a bilge pump hole, if there be any doubt upon the evidence whether the cap and plate covering that hole were in good condition and knocked off through extraordinary contingencies, that doubt must be resolved against the vessel.
4. Where the findings of the court below that "the damage to cargo was caused by a danger of the seas, and was within the exception in charter-party and bills of lading," etc., were determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, such findings are open to the revision of this court.

[No. 227.]

Argued Jan. 24, 1894. Decided April 30, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, reversing the decree of the District Court of that district, and dismissing a libel filed by the Bradley Fertilizer Company against the schooner Edwin I. Morrison to recover for the damage done to a cargo of guano by sea water taken aboard on her voyage from Weymouth, Massachusetts, to Savannah, Georgia. Reversed, and cause remanded with direction to enter a decree for libelant for the amount found due by the district court with interest and costs.

See same case below, 27 Fed. Rep. 136, 40 Fed. Rep. 501.

Statement by *Mr. Chief Justice* **Fuller:**

This was a libel filed by the Bradley Fertilizer Company in the District Court of the United States for the Southern District of New York against the schooner Edwin I. Morrison, *to recover for the damage done to a [200 cargo of guano by sea water taken aboard on January 10, 1884, on her voyage from Weymouth, Massachusetts, to Savannah, Georgia. The libel set up the charter, the loading, the bills of lading, the sailing from Weymouth, the arrival at Savannah, and the delivery of the cargo in a damaged condition; and also alleged that the schooner, when she left Weymouth and before, "was not tight, staunch, strong, and every way fitted for said voyage as agreed;" "and that the cap was gone from off the bilge pump hole on the port side of said schooner, or was then so loosely, insecurely and negligently fastened and screwed that the same worked and came off without any danger of the sea intervening, whereby said vessel was unseaworthy and unfit for said voyage, or after leaving port said cap was removed and not properly and securely replaced and screwed down, or was negligently and improperly loosened and left insecure by those in charge of said schooner, so that by the unseaworthiness of said schooner or by the negligence and improper navigation of those in charge of her, said cap came off from said pump hole without any danger of the sea," and that about seven feet of water was admitted through it into the hold and upon the the cargo.

The answer admitted the charter, shipment, bills of lading, sailing, arrival, and delivery of the cargo in a damaged condition, and in excuse thereof alleged: "That on said voyage the said vessel encountered very rough and tempestuous weather, in consequence of which she shipped large quantities of water, and was greatly damaged by the seas, and it was found

NOTE.—*As to liability for necessaries, supplies, and repairs to ship; liability for conduct and acts of master and mariners*, see note to United States v. The Malek Adhel, 11: 239.

As to liability of carrier by water for loss or damage of goods, see note to Moore v. American Transp. Co. 16: 674.

As to lien for freight; who has, and how waived or lost, see note to Raymond v. Tyson, 15: 47.

As to lien of the contract of affreightment on the vessel, and for damages to goods, see note to The Freeman v. Buckingham, 15: 341.

As to lien for repairs and necessaries for vessels, domestic and foreign; and for supplies, salvage and freight; proceedings in rem for, see notes to Blaine v. The Charles Carter, 2: 636, The General Smith, 4: 609, and The Palmyra, 6: 531.

on the arrival of the said vessel at Savannah that her said cargo or a portion thereof was damaged by the said perils of the seas encountered on the said voyage, or from causes excepted in the said contract or contracts of affreightment."

The district court found that nine tenths of the damage to the cargo was occasioned by sea water taken in through the bilge pump hole on the port side, and that the vessel was not seaworthy in respect of the proper security of this port cap and plate, and rendered a decree in favor of libelant. The opinion is reported in *The Edwin I. Morrison*, 27 Fed. Rep. 136.

201] *The schooner sailed on the 5th of January, and, according to the log, on the afternoon of January 9, met a very strong gale and heavy seas, and shipped great quantities of water. The log of January 10, read as follows:

"This day begins with a strong westerly gale and sea still running very high. At 8 A. M., set two reefed foresail; set storm trysail *and hove vessel to, heading about south;* find that the vessel is making water faster than we can pump it out with both pumps, *the men not being able to work at pumping steadily because of heavy seas sweeping her decks.*

"(NOTE.—The words in italics are inserted on margin of log in lead pencil.)

"Sounded pumps and find that she has 7 ft. of water in the hold.

"(NOTE.—The figure 7 is written over an erasure.)

"Cut the boat lashings and got all ready to leave the vessel, when found that the cap had washed off the bilge pump hole on the port side; nailed a piece of sheet lead over it and started both pumps agoing; pumped two hours and sound again and find that we are freeing her very rapidly. So ends this day. No latitude; no longitude."

The bilge pump hole referred to in the above extract was a hole in the port side in the waterway, a short distance only in front of the poop, and ran down through the waterway between the ceiling and the skin of the ship. It was from three to four inches in diameter, and covered by a brass plate about four inches square, countersunk into the timber, through which was a hole, covered by a brass cap, which screwed into the plate, and the plate was fastened into the waterway by screws. There was a similar hole on the starboard side. The district judge was of opinion that these holes, which had never been used, were dangerous unless the caps and plates to cover them were kept perfectly tight and secure; that "the obligation to keep watch of their condition was as stringent as the danger from weakness in them was extreme;" and that there was no satisfactory evidence that there had been more than a casual examination of them since the schooner was built, some eleven years previous.

202] *The theory of the defense was that the plate and cap were perfectly tight, but that, through the many seas taken aboard, they were knocked off by accident or by some blow from floating articles. The district judge held that this was possible, but for reasons, which he gave, that its probability was exceedingly small; and that even if it could be supposed that the plate had been knocked off through the blow of some object washed across the deck, it would still be incumbent on the claimant to show that the cap and plate were so made and fastened as not to be knocked off by ordinary collisions of that kind, which had not been done; that while there could be scarcely any doubt that the cap and plate were carried off through the action of the sea, yet that the evidence indicated clearly that this was done before the vessel was subjected to any extraordinary conditions, aside from her deep loading, and that there was no indication of any such violence about the wood work in that quarter as would be necessary to knock away such a cap if properly secured; and that the only reasonable conclusion was that after eleven years' service the fastenings had become weak, and that the plate had been carried away from that cause, and not from any extraordinary contingencies.

The case having been taken to the circuit court, the testimony of one Candage, an expert, was given to the effect that these bilge pump plates in the waterways were regarded as permanent fixtures not requiring to be removed for examination; that by taking hold of the cap one could judge of the firmness of the plate; that he had sometimes unscrewed the cap, but usually could judge of condition by the eye; that by unscrewing one could judge of the condition of the wood slightly better; that he never thought it necessary to unscrew the plate, which, if done frequently, would have a tendency to weaken the fastenings; that if the plate of the Morrison had been there for ten or eleven years and never removed, and had been painted over from time to time with the ways, no examination was necessary other than by the eye; that he would say as matter of opinion there would be no gradual weakening of the fastenings of the plate; that upon the *details stated in a [203 hypothetical question it was his opinion that the loss of the bilge pump plate was attributable to the fact that some hard substance had been dashed against it by the force of the waves and the rolling of the vessel, though the force of the water alone could not have ripped it out and carried it away. The circuit judge was of opinion (40 Fed. Rep. 501) that "the vessel was not originally unseaworthy because she had bilge pump holes covered as these were. The presumption of continuing seaworthiness in respect to this part of the ship is not rebutted by the single fact that no special test was made as to their condition, in view of the testimony (especially that taken in this court) as to what is the usual examination given to such structures." And he concluded that the inference to be drawn from the testimony was "that there was no defect, patent or latent; that the fastenings were sufficient, and were knocked out by a blow such as could not reasonably have been anticipated, and which was caused by a danger of the sea."

The circuit court made its findings of fact and conclusions of law, which are given in the margin* (and to which, in *whole or in [204

* "I. The schooner Edwin I. Morrison, owned by the claimants, was chartered on December 19, 1888, by a written charter party, to the libelant for a voyage from Weymouth, Mass., to Savannah, Ga.,

part, and to certain refusals to find, libelant filed twenty-seven exceptions) and rendered 205] a decree reversing the* decree of the district court and dismissing the libel with costs, whereupon the cause was brought by appeal to this court.

Mr. **Geo. A. Black,** for appellant:

It was error of law to find facts without evidence, or against the undisputed evidence, or to refuse to find a material fact proved by uncontradicted evidence.

Alexandre v. *Machan* (*"The City of New York"*) 147 U. S. 77 (37: 87).

Inferences from circumstantial facts presents a question of law.

Sun Mut. Ins. Co. v. *Ocean Ins. Co.* 107 U. S. 485 (27: 337); *Gilroy* v. *Price* [1893], App. Cas. 64; *Simson* v. *Brown*, 68 N. Y. 358; *Richards* v. *Hansen*, 1 Fed. Rep. 65; *The Oguendo*, 38 L. T. N. S. 151; *Work* v. *Leathers*, 97 U. S. 379 (24: 1012); *Wilson* v. *Griswold*, 9 Blatchf. 267.

Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy and suitable for the service in which she is to be employed.

The Northern Belle v. *Robson*, 76 U. S. 9 Wall. 529 (19: 747); *Douglas* v. *Scougall*, 4 Dow, P. C. 276; *The Reeside*, 2 Sumn. 574; *The Glenfruin*, 10 Prob. Div. 107; *The Director*, 34 Fed. Rep. 64; *Davison* v. *Von Lingen*, 113 U. S. 41 (28: 885); *Ellis* v. *Atlantic Mut. Ins. Co.* (*"The Tornado"*) 108 U. S. 342 (27: 747); *The*

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to carry a complete cargo of guano in bags and (or) bulk for a price agreed upon.

"II. By the charter party it was agreed on the part of the vessel that she 'should be tight, staunch, strong, and every way fitted for such a voyage,' and 'the dangers of the sea (were) mutually excepted.'

"III. Under this charter there was loaded on board said schooner by the libelant a cargo of guano, superphosphate, and other fertilizers, viz, $343\frac{120}{246}$ tons in bulk and $410\frac{38}{41}$ tons in bags, besides 3025 empty bags and sacks. Six bills of lading were given therefor, which acknowledged the receipt of said cargo in good order and condition and agreed to deliver the same in like good order and condition at Savannah, the dangers of the sea only excepted. The bulk cargo was stowed between decks and the remainder in the lower hold.

"IV. The cargo was what is known as a 'dead cargo,' and a hard one for a vessel to carry in severe weather.

"V. The vessel was not overloaded. She was accustomed to and able to carry that amount of cargo of the same character at that season.

"VI. The vessel was built in 1873; had three masts; was about 155 feet long over all, carrying spanker, mainsail, foresail, forestaysail, jib, flying jib, outer jib, foretopsail, maintopsail, and mizzentopsail. She was properly manned and equipped. Her officers and crew consisted of a master, first mate, second mate, steward, and four sailors. On this voyage she had two passengers on board, viz, the master's wife and a lady friend.

"VII. On the port side of the vessel, in the waterway, and close to the bulwark, there was a hole about three inches in diameter, made when she was built, for the purpose of introducing a hose pipe into her bilges to free her of any water accumulated there. The waterway (of yellow pine) was about three and a half inches above the deck. The hole was a short distance in front of the poop and ran down through the waterway, between the ceiling and the skin of the ship. The hole was covered by a brass plate about four inches square countersunk into the timber flush with the top of the waterway and fastened by four brass screws. In the brass plate was a removable cap, also of brass, intended to be unscrewed from the plate when the hole was to be used, but it had not, in fact, been used for four or five years (if, indeed, at all) and was painted over whenever the waterway was painted. The removable cap projected about three eighths of an inch above the surface of the plate, the edges being beveled so as to leave not more than an eighth of an inch of perpendicular surface. There was a similar plate and cap on the starboard side of the vessel, but somewhat further aft and upon the poop deck.

"VIII. Such bilge pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Verdigris sometimes forms around brass screws, thus weakening the hold of the wood; but waterways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of twelve years.

"If the plates and caps which are generally used to cover such holes are not kept tight and secure, *the* holes become dangerous; but that mode of *covering was generally* deemed secure by seafaring men, and seldom, if ever, have any accidents arisen from their use.

"IX. The bilge pump hole, heretofore described as located in the waterway, was opposite a port in the bulwarks of the vessel. The opening of the port was about a foot square, beginning about two inches from the bulkhead of the poop deck. The poop deck was about four and a half feet above the main deck, and extended from just about the mainmast to the stern.

"X. Said bilge pump plate was in plain view, upon a casual inspection, at the time of making the charter and loading the vessel. The vessel was loaded several times before this voyage by the libelant.

"XI. Before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that time made of them consisted of such inspection as could be given by the eye, and to such an inspection they were from time to time subjected. They were not tested either by unscrewing the cap or the plate, or by tapping the plate with a hammer. Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any) in the bilge pump plate. Immediately after the loss of the port bilge plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound.

"XII. The examination which was made of the cap and plate, as set forth in the XIth finding (viz, by a survey without the use of special tests, unless there is some appearance of defect) is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage.

"XIII. The voyage began the 5th day of January, 1884, and the vessel actually got to sea on the 7th, when she encountered a strong northwest gale. The light sails were furled and the mainsail and foresail double reefed. The gale caused her to labor heavily and ship large quantities of water, some of which entered the cabin and reached the cargo. The vessel was driven out of her course and into the Gulf Stream. The gale moderated somewhat the latter part of the day, but the vessel still continued to roll heavily and shipped plenty of water. The pumps were attended to and the vessel was found to be making considerable water. The next day the gale continued, with a very heavy sea running, until about 4 P. M., when it moderated, and at 6 P. M., topsails were set. The latter part of the day there was a strong breeze, and two reefs were made in the spanker. The vessel made little water this day. The next day, the 9th, began with a strong southeast breeze, which freshened to a strong gale. Two reefs were made in main and foresails. At 4 P. M. the spanker and jib were furled. The middle part of the day there was a very sharp gale and heavy sea running. The vessel labored heavily and shipped great quantities of water. The pumps were carefully attended to, and she was found to be making considerable water. The latter part of the day the wind was still increasing and the foresail and the forestaysail were furled. It was then blowing a 'living' gale from the westward. The weather through the night continued to be extremely severe; there was a 'terrific gale of wind.' Planks were carried

Vesta, 6 Fed. Rep. 532; *Premuda* v. *Goepel*, 23 Fed. Rep. 410; *Svendsen* v. *Stursburg*, 31 Fed. Rep. 86; *Stanton* v. *Richardson*, L. R. 7 C. P. 421.

Where the owner covenanted that his vessel was tight and staunch, if this is called in question on probable grounds, it is incumbent on him to prove it.

The Niagara v. *Cordes*, 62 U. S. 21 How. 28 (16: 48); *Woodley* v. *Mitchell*, L. R. 11 Q. B. Div. 47; *The Emma Johnson*, 1 Sprague, 528; *The Lydian Monarch*, 23 Fed. Rep. 299; *Inman* v. *South Carolina R. Co.* 129 U. S. 128 (32: 612).

The shipowner must establish the seaworthiness of his vessel before he can claim that the injuries arose from a sea peril which would injure a seaworthy vessel.

The Live Yankee, Deady, 420; *Searles* v. *Manhattan R. Co.* 101 N. Y. 662; *Taylor* v. *Yonkers*, 105 N. Y. 209, 59 Am. Rep. 492; *Hunter* v. *New York, O. & W. R. Co.* 6 L. R. A. 246, 116 N. Y. 623; *Hubert* v. *Reckenagel*, 18 Fed. Rep. 912; Lawson, Carriers, § 247.

The burden lay upon the claimants to show not only a sea peril, but the extent of that sea peril, as their excuse for the damage to the cargo, and whatever they fail to prove to have been caused by a sea peril must be attributed to the defect in the vessel.

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away from the bulwarks of the starboard side of vessel, also one of the ports; the waterway on starboard side was started off. The covers of the chain locker and a spar were found loose in the morning, floating in the waist of the vessel on both sides. Coal washed about decks; also buckets and bucket racks; also pieces of bulwark. The forecastle door and galley door were washed off, but were not lost. The men could not stand at pumps on main deck because it was continually swept by the seas, and it was with difficulty that they were able to work at the pump on the poop deck, which was about four and a half feet higher than the main deck, on account of the sea breaking over. Before midnight the vessel was hove to under a storm trysail, two reefed foresail, and forestaysail on the port tack. The vessel was shipping water through the cabin windows, doors, and down the booby hatch. The cabin was situated in the after part of the poop deck. The top of the cabin house was about three and a half feet above the deck. They commenced to take water in the cabin while eating supper, and all through the night it forced its way in. This was unusual and indicated very bad weather and a rough sea. Everything in the cabin was drenched, excepting the berths, with water washing around the cabin with motion of vessel. Water reached the cargo during the night through the cabin, a strained waterway, and otherwise. The pumps were tried every two hours, and by four o'clock Thursday morning it was discovered, by the pumps bringing up guano with the water, that the cargo was wet. The master of the vessel did not go to bed during the night, but was mostly on deck. Previous to 4.30 o'clock in the morning they were able to get a suck on the pumps, indicating that there was no water then in the well, but after that they were unable to do so. At this time the weather was very bad, a very bad sea flooding the decks continually and washing everything movable about. About five o'clock they sounded and found eighteen inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps. This gave the vessel a list to port. The only outlets on the port side for the seas that came abroad were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at nine o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as she was supposed to be sinking. The lashings of the boat on the poop deck were cut and the women on board came up from the cabin to take the boat. Between ten and eleven o'clock they wore ship and the vessel slowly righted up, the booms swinging from the port to the starboard side, bringing the port side out of the water. The vessel was then working heavily in the sea, losing steerageway, and settling fast. When the vessel righted up and rolled her lee side out of water, the second mate, who with others fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge pump plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole and sung out to the captain, 'Look here!' Being greatly excited and not looking for such a thing, he hardly realized what the trouble was. The captain came and said, 'My God, this is the bilge pump!' It was found that the whole bilge pump plate, with the screws, was gone.

"XIV. The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come part of the clear wood was itself hauled, the splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw holes were not smooth nor black nor rusty. The wood of this particular waterway in the vicinity of the plate did not look rotten, and when after the arrival at Savannah the temporary plugging referred to in the XVIIth finding was removed, and the hole plugged and covered with sheet lead, the timber into which the plug was driven and on which the lead was nailed was found solid, and since that time the covering had not been further repaired nor the timber changed in any way.

"XV. No marks of violence other than the splintering of the wood about the screw holes were visible upon the water way or upon the adjacent bulwarks or stanchions.

"XVI. As no one witnessed the removal of the bilge pump plate, direct evidence of the cause of this mishap is not obtainable. It is, however, to be inferred from the facts proved that it was knocked out by something striking violently against it subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 A. M. and 5.30 A. M.

"XVII. The hole was at once plugged up, covered with canvas, and sheet lead nailed over the canvas.

"XVIII. At this time the wind had abated somewhat. The vessel's wheel was tied hard up and the sails trimmed so that she would lie to, and the crew went to work pumping again and gained on the water. By eleven or twelve o'clock that night they succeeded in getting her free of water, so far as the pumps could do so, and the journey was continued.

"XIX. Afterwards it was found that the mainmast had been loosened by the working of the vessel, and that the coating was broken; also that a scupper on the starboard side was broken.

"XX. The weather continued severe during almost the entire voyage and the injury to cargo was increased thereby.

"XXI. The vessel arrived in Savannah, January 27th.

"XXII. Upon the arrival she delivered her cargo, some of it in a damaged condition. The extent of the damage was $9175.40.

"XXIII. At the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch and strong, and in every way fitted for the contemplated voyage.

"XXIV. There was no latent defect in the vessel which contributed to the injury to the cargo.

"XXV. There was no fault or negligence in the navigation of the vessel or care of the cargo.

"XXVI. The whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter party and bills of lading.

"*Conclusions of Law.*

"First. The damage is to be attributed to the dangers of the seas, and not to the fault of the vessel.

"Second. The decree of the district court is reversed and the libel dismissed with costs of both courts."

The Egyptian, 10 L. T. N. S. 910; *The Shand*, 16 Fed. Rep. 570; *Speyer* v. *The Mary Belle Roberts*, 2 Sawy. 1.

Mr. **Geo. Bethune Adams**, for appellees:

The findings of the circuit court are conclusive as to the facts.

The E. A. Packer v. *New Jersey Lighterage Co.* 140 U. S. 360 (35: 453); *Alexandre* v. *Machan* ("*The City of New York*") 147 U. S. 72 (37: 84).

The question of seaworthiness was purely one of fact.

Walsh v. *Washington M. Ins. Co.* 32 N. Y. 427; *Moores* v. *Louisville Underwriters*, 14 Fed. Rep. 226; 2 Arnould, Marine Ins. 637.

The circumstances under which the plate was lost raised a presumption that it was caused by dangers of the seas.

The Rover, 33 Fed. Rep. 515; Carver, Carriage by Sea, § 89; 1 Phillips, Ins. 644; McArthur, Marine Ins. 110, 111; Lowndes, Marine Ins. 108, 109.

210] **Mr. Chief Justice* **Fuller** delivered the opinion of the court:

Assuming, as we must, that the damages awarded by the District Court resulted from the loss of the cap and plate covering the bilge pump hole, the question to be determined is whether that loss was occasioned by a peril of the sea or by the condition of that covering as it was when the vessel entered upon her voyage. If through some defect or weakness the plate and cap and the screws which secured it came off, or if the cap and plate were so made or so fastened as to be liable to be knocked off by any ordinary blows from objects washed by the sea across the decks, then the vessel was not seaworthy in that respect, and the loss could not be held to come within the exception of perils by the sea, although the vessel encountered adverse winds and heavy weather. By the charter party it was agreed on the part of the vessel that she should be tight, staunch, strong, and in every way fitted for the voyage, and the rule is well settled that the charterer is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo. *The Northern Belle* v. *Robson*, 76 U. S. 9 Wall. 526 [19: 748]; *Work* v. *Leathers*, 97 U. S. 379 [24: 1012]. If there be a defect, although latent and unknown to the charterer, he is not excused. 3 Kent, Com. *205; 3 Valin, Com. Ord. de la Mar. title 3; 1 Du Fret, art. 12, p. 654; *Lyon* v. *Mells*, 5 East. 428; *Work* v. *Leathers*, *supra*.

As said, on circuit, by *Mr. Justice* Gray, in *The Caledonia*, 43 Fed. Rep. 681, 685: "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence." In *The Glenfruin*, 10 Prob. Div. 103, the same rule is thus expressed by Butt, *J.*: "I have always understood the result of the cases from *Lyon* v. *Mells*, 5 East, 428, to *Kopitoff* v. *Wilson*, L. R. 1 Q. B. Div. 377, to be that under his implied warranty of seaworthiness, the ship owner *contracts, not merely that he will do his **211** best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had these cases left any doubt in my mind, it would have been set at rest by the observations of some of the peers in the opinion they delivered in the case of *Steel* v. *State Line SS. Co.* L. R. 3 App. Cas. 72."

Perils of the sea were excepted by the charter party, but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants contributed. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 397, 438 [32: 788, 791]. It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by the Morrison was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances. The especial peril which seemed at one time to have threatened her safety was directly attributable to the water taken aboard through the uncovered bilge pump hole, which rose from eighteen inches about 5 A. M. to seven feet at about 9 A. M., so that she was necessarily sinking deeper and deeper, while the absorption by the guano added to the dead weight, and increased the danger of her going down.

Among other exceptions, libelant excepted to the refusal to amend one of the findings by adding: "No spars or sails were carried away and no repairs were made to the vessel at Savannah beyond nailing a few boards on the starboard side where the bulwarks had been broken, which was done by the crew; and the vessel, after discharging, loaded with a cargo of phosphate rock, which is a much harder cargo to carry than guano; and delivered it safely." These facts were established in substance by uncontradicted evidence, and as they tended to *show that the schooner was not in- [**212** jured to any appreciable degree, and therefore that the weather was not of such an extraordinary character as would have damaged the cargo to the extent that it was if the vessel had been seaworthy in the respect under consideration, we think the amendment was material, and should in effect have been made. What happened to the vessel after the loss of the bilge-pump plate throws but little, if any, light upon the situation at the time of the loss; and libelant excepted to parts of the thirteenth finding so far as they involved the inference that certain incidents therein detailed occurred before the cap and plate came off, as unsupported by evidence; and also to that part of the 16th finding which stated that it was to be

inferred that the plate was knocked out "subsequently to the time when they wore ship after finding eighteen inches of water in the hold" on the same ground. But without going into these details or inquiring how far they are open to examination, the significant fact is found that although at half past four in the morning the pumps sucked, indicating that there was then no water in the well, they did not suck (twenty minutes later, as disclosed by the evidence, nor) again until the hole was discovered and stopped up, when they gained on the water, and after several hours freed the vessel.

In any aspect, the real point in controversy is, did the respondents so far sustain the burden of proof which was upon them as to render the probability that the cap and plate was in good condition and knocked off through extraordinary contingencies so strong as to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonable have been expected they would have been subjected? If the determination of this question is left in doubt, that doubt must be resolved against them.

The 8th, 11th, 12th, 14th, 15th, and 16th findings were as follows:

"VIII. Such bilge pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Verdigris sometimes forms [213] around *brass screws, thus weakening the hold of the wood; but waterways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of twelve years.

"If the plates and caps which are generally used to cover such holes are not kept tight and secure, the holes become dangerous; but that mode of covering was generally deemed secure by seafaring men, and seldom, if ever, have any accidents arisen from their use.

"XI. Before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that time made of them consisted of such inspection as could be given by the eye, and to such an inspection they were from time to subjected. They were not tested either by unscrewing the cap or the plate, or by tapping the plate with a hammer. Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any) in the bilge pump plate. Immediately after the loss of the port bilge plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound.

"XII. The examination which was made of the cap and plate, as set forth in the XIth finding (viz, by a survey without the use of special tests, unless there is some appearance of defect) is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage.

"XIV. The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come part of the clear wood was itself hauled, the splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw holes were not smooth nor black nor rusty. The wood of this particular waterway in the vicinity of the plate did not look rotten, and when after arrival at Savannah the temporary plugging referred to in the XVIIth finding was removed, and the hole plugged and covered with sheet lead, the timber into which the plug was *driven and on which the [214] lead was nailed was found solid, and since that time the covering had not been further repaired nor the timber changed in any way.

"XV. No marks of violence other than the splintering of the wood about the screw holes were visible upon the waterway or upon the adjacent bulwarks or stanchions.

"XVI. As no one witnessed the removal of the bilge pump plate, direct evidence of the cause of this mishap is not obtainable. It is, however, to be inferred from the facts proved that it was knocked out by something striking violently against it subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 A. M. and 5.30 A. M."

There was no direct evidence that the plate was knocked out, or, if this were so, that it was by some extraordinary collision; and while the 14th finding tends to support the inference of the 16th, it will be observed that the tendency of the 15th is to rebut it. If it appeared that the wood was solid, and the screw holes splintered, the drawing out of the screws might be imputed to a blow or blows; but, on the other hand, if there were no marks of violence in the vicinity, since such blow or blows to effect the result if the cap, plate and waterway were in good condition, must necessarily have been of great violence, it seems almost incredible that no marks thereof appeared on the stanchions and bulwarks on the port side, and that nothing but the cap and plate were carried away. And here it is proper to note that no survey of the vessel was had, and that respondents introduced no proof of exact measurements to show the height of the cap above the waterway, or of the perpendicular edge, nor was the duplicate cap on the starboard side produced.

If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case.

From the 6th and 7th findings it appears that the vessel was built in 1873; that the bilge pump hole had not been *used for four or five [215] years, if at all; and that the cap and plate were painted over whenever the waterway was painted; and from the findings above quoted that these holes were dangerous unless the caps and plates were kept tight and secure; that the hold of the wood might become weakened by the formation of verdigris about the brass screws; that tapping with a hammer or unscrewing the cap might have developed any insecurity, if there were any; that no such tests were applied; but that the caps and plates appeared all right to visual observation. But

this was not enough to establish the fact of security; and the 12th finding, that examination by the eye is such that a reasonably prudent master or owner might be expected to give such coverings in order to determine their seaworthiness, does not give it that effect. The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact "did not depend on their knowledge or ignorance, their care or negligence." The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement.

We are unwilling by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate to relax the important and salutary rule in respect of seaworthiness. *The Reeside*, 2 Sumn. 567, 574; *Douglas* v. *Scougall*, 4 Dow, P. C. 269.

The findings that "at the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage;" that "there was no latent defect in the vessel which contributed to the injury to the cargo;" and that "the whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter party and bills of lading," were findings determined by the interpretation which the 2 165] law put upon the circumstances of the transaction as stated in the previous findings, and, as such, open to our revision. *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.* 107 U. S. 485 [27: 337]; *United States* v. *Pugh*, 99 U. S. 265 [25: 822]; *The Britannia* v. *Clough*, *ante*, p. 130; *Gilroy* v. *Price* [1893] App. Cas. 56, 64.

In our judgment these deductions were incorrect, and the specific conclusions of law did not follow.

The decree of the circuit court is reversed and the cause remanded with a direction to enter a decree for libelants for the amount found due by the district court with interest and costs.

Mr. Justice **Brewer**, not having heard the argument, and *Mr. Justice* **White**, not being a member of the court when the hearing was had, took no part in the consideration and decision of the case.

WILLIAM RUNKLE ET AL., Admrs., *Plffs. in Err.*,

v.

SANTIAGO J. BURNHAM, who sues for the use of FRANCISCO G. MEDIAVILLA.

(See S. C. Reporter's ed. 216-228.)

Motion for non-suit, when waived—account when admissible—immaterial evidence—testimony—findings of fact—weaker evidence—power of attorney—failure to produce evidence.

1. By not resting on his motion for a non-suit, and by thereafter offering his own evidence, the defendant waived his motion, and the overruling thereof cannot be assigned for error in this court.
2. An account which is admissible as against the assignor of a contract sued on, is admissible against the assignee, who stands in the place and stead and holds the rights of the assignor.
3. For the rejection of evidence, which is immaterial to the result, no reversal for error can be had.
4. Testimony is admissible to show the condition of affairs at the time the agent acted, not in order to vary or change the written contract, but to throw light upon the situation.
5. The findings of fact made by the court below are binding in this court, if there be any evidence to support them.
6. The production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice.
7. A power of attorney to settle a liability and obtain the principal's release therefrom implies a power in the agent to settle a liability which it is necessary should be settled in order to obtain such release.
8. The failure of a party to produce in evidence or to testify in reference to an instrument when its contents were peculiarly within his knowledge, justifies the presumption that its provisions would have had been unfavorable to his position in regard thereto.

[No. 266.]

Argued March 12, 13, 1894. Decided April 30, 1894.

IN ERROR to the Circuit Court of the United States for the District of New Jersey, to review a judgment for the plaintiff, Santiago J. Burnham, in an action brought by him against Daniel Runkle, defendant, for whom the plaintiffs in error were afterwards substituted as his administrators, upon a written contract, for the amount due thereon. *Affirmed.*

Statement by *Mr. Justice* **White**:

The defendant here, who was plaintiff below, brought an action of assumpsit against Daniel Runkle to recover the sum of $19,087.36, with interest at the rate of nine per cent from the 4th of August, 1884, to the time of entering suit.

After issue joined the case was by stipulation submitted to the court without the intervention of a jury.

The contract in issue purported to have been "subscribed" by one Mestre as "attorney in fact of the defendant."

At the close of the plaintiff's case, the defendant moved for judgment in his favor, which motion was overruled, and this action of the court was excepted to. Defendant did not thereupon rest, but proceeded to offer evidence on his own behalf. After both parties had concluded, the defendant requested the court to find: 1st, that it does not appear that Mestre had any authority to assume an obligation in the name of the defendant; and, 2d, that the contract of August 4, 1884, does not place any liability on the defendant. These requests were refused, and the defendant duly excepted to their refusal. The court then proceeded to find the facts as follows:

"First. That on the eighteenth day of March, eighteen hundred and eighty-two, contracts for a loan and water works were

awarded by the city of Havana to Daniel Runkle, the defendant; Walter H. Gilson, Joseph H. Lyles, and Maddison & Co., of London, and on the 27th of the same March, Lino Martinez deposited the sum of $64,000 218] in Spanish gold in the *municipal treasury of Havana as a guarantee for the proposition which Messrs. Gilson, Runkle, Lyles, and Maddison & Co., of London, had presented to the municipality of Havana for the loan of $5,600,000.

"Second. That Martinez had been employed by Runkle, who was acting for himself and his co contractors, to raise the amount required to be deposited as a guarantee for the fulfilment of a contract, and in pursuance of this employment Martinez had borrowed the sum of $64,000 from the plaintiff Burnham.

"Third. Runkle, Gilson, and Lyles undertook to repay this sum of $64,000 to Martinez at any time he should ask for the same, if it should be demanded by the city in consequence of their not having carried out the contract for the water works, or for any cause for which the city might retain the deposit, and as a remuneration and for the payment of interest to Martinez they assigned to him the amount of $25,000, payable monthly, at the rate of one and $\frac{37}{100}$ per cent from the amounts they should receive for the works. This undertaking fell through in consequence of the final abandonment of the contract, but the fact remains that it was the understanding of all the parties that Martinez was to be repaid the sum of $64,000, with interest, and also to be remunerated for his services or expenses.

"Fourth. Subsequently to these proceedings Runkle became the assignee of all the rights and interests of his co-contractors under their contract with the city of Havana, and thenceforward was solely entitled to all the profits that might accrue from its performance and liable for the consequences of its non-performance.

"Fifth. Runkle failed to perform the contract for the water works, and by reason of his default the sum deposited with the city of Havana as a guarantee was forfeited, and he became liable for such damages as were sustained by the city on account of his failure. He also became responsible to Martinez for the repayment of the guarantee deposited, with interest, and expenses incurred in effecting the loan from Burnham, amounting in all to the sum of $83,087.36, as per ac- 219] count* stated between Burnham and Martinez on the 4th of August, 1884.

"Sixth. Runkle, being desirous of procuring a full and general release from all liability on account of his connection with the contract for the loan and water works, executed in due form on the 25th of June, 1884, a letter of attorney to José M. Mestre, who was in the city of Havana, authorizing him 'to demand, collect, and receive such sum or sums of money and property of any kind' belonging to Runkle, 'under or in connection with the contracts for the loan and water works, made in consequence of the public bid therefore on the 18th of March, 1882, and which loan and contract were awarded to me (him) together with Walter H. Gilson and Maddison & Co., and also Joseph H. Lyles,' . . . 'and to do all things necessary in the judgment of my said attorney and to obtain my release from all liability as one of the contractors in connection with the said loan and water works, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present,' etc.

"Seventh. By virtue of the authority conferred on him by the aforesaid power of attorney, Mestre, on the fourth day of August, 1884, acting for and in the name of Runkle, entered into a written agreement of stipulation in the Spanish language with Burnham, of which the following is a translation:

"'This present is to certify, to which I desire to give all the force of a public instrument, that I, Mr. S. J. Burnham, having received from Mr. Lino Martinez the sum of sixty-four thousand dollars, gold, on account of the sum of $83,087.36, which results in my favor from the account that under this date has been presented to Mr. Lino Martinez in relation to the drafts drawn on the 24th of March, 1882, by Mr. H. J. Overman upon Mr. E. C. Maddison, of London, and indorsed to my order by the said Mr. Lino Martinez, the which were protested for nonpayment and protected in due course by the Messrs. Baring *Brothers & Company, [220 of London, as the representatives of the Messrs. J. C. Burnham & Company, have agreed in regard to the balance of $19,087.36 that still remains unpaid as follows:

"'Recognizing, as I recognize, Mr. Daniel Runkle as the assignee of Mr. Walter Gilson, who in his turn was the assignee of Mr. E. C. Maddison, for himself and for the firm of Maddison and Company, I bind myself to place at the disposal of said Mr. Runkle the shares of the Charnwood Forest Railway Company, of the nominal value of fourteen thousand pounds sterling, which the aforesaid Messrs. Maddison & Company deposited in my hands and transferred to me as guarantee for the reimbursement of the amount of the aforesaid drafts and the expenses and interest relating thereto so soon as such balance of $19,087.36 shall be satisfied by the aforesaid Mr. Runkle, which it is to be done within the period of three months counting from the date hereof, it being left to his discretion either to do so directly or to direct that if the said shares deposited there be sold (in accordance with such instruction that for such purpose he may give) such portion as may be necessary for the reimbursement of such balance of $19,087.36, which being covered, the remaining shares shall remain all at the free disposal of Mr. Runkle, as well as any balance in cash that may arise on the partial sale of such shares.

"'The sum owing shall carry interest at nine per cent per annum until its complete payment.

"'Mr. José Manuel Mestre, as the attorney-

in-fact of Mr. Runkle, subscribes this present stipulation by way of assent in the name of his principal.

"'That in order that it may have all its due effect this is done and signed in triplicate of the same tenor, one for each party, at Havana, the 4th of August, 1884.

"'*Memorandum as to Corrections.*

"'NOTA.—At the moment of signing Mr. S. J. Burnham stated that he assigns and transfers to Mr. Candido Zabarte y Paris all the rights and rights of action that belong to him 221] *under the foregoing instrument, subrogating him in his place and stead by reason of having received from him the aforesaid balance of $19,087.36, but on the understanding that said Burnham remains always bounded to sell the shares of stock in question to the order of Mr. Runkle, as set forth, and to deliver to the latter the balance of the proceeds of the sale and the shares remaining. Dated as above.

"'(Signed) José Man'l Mestre.
"'L. Martinez.
"'S. J. Burnham.
"'Cando Zabarte Paris.

"'As witnesses:
"'E. Coscallucla.
"'Antonio Pais.'

"Eighth. Runkle had no property or debts belonging to him in the city of Havana, and the letter of attorney was executed for the sole purpose of authorizing Mestre to procure his release from any and all liability as a contractor in connection with the water works, and there is no proof that Mestre received notice of the revocation of the letter before he signed the agreement with Burnham.

"Ninth. Martinez exerted himself to obtain from the authorities of Havana the release of Runkle and the return of the deposit money in consideration of Runkle entering into the agreement with Burnham.

"Tenth. The right of action accruing to Burnham under the agreement was assigned by him to Candido Zabarte y Paris, and by the latter to Francisco G. Mediavilla."

From the facts thus found the court then drew the following legal conclusions:

That the agreement of August 4, 1884, was assented to by Runkle through Mestre, who had full power under the letter of attorney to bind his principal. The consideration of the agreement on the part of Runkle was his release from all liability under his contract with the city of Havana, and the return of the deposit money, both of which purposes were accomplished through the instrumentality of Martinez.

222] *Judgment was entered for the plaintiff for $19,087.36, with interest at the rate of nine per cent from August 4, 1884, to date of entry thereof.

Defendant excepted to the findings of fact and to the conclusions of law deduced therefrom, and brought the case, by error, here.

Messrs. **Hamilton Wallis** and **Wm. D. Edwards** for plaintiff in error.

Messrs. **Frederic R. Coudert,** *Robert O. Babbitt* and *Charles Frederic Adams* for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

1. By not resting on his motion for a nonsuit, and by thereafter offering his own evidence, the defendant waived his motion, and the overruling thereof cannot be assigned for error here. *Union Pac. R. Co.* v. *Snyder, ante*, p. 597, and authorities there cited.

2. The exceptions taken during the progress of this trial are numerous. We will content ourselves with examining the merits of those which have been specifically assigned as error.

The plaintiff offered in evidence an account, growing out of the purchase and protest of the draft, and kept between Martinez and Burnham, which was objected to, on the ground that it was *res inter alios.*

Runkle, Gilson, Lyles, and Maddison & Co. were parties to the water works contract. In order to furnish the $64,000, which was to be deposited with the city of Havana, Martinez bought a draft drawn by an agent of Maddison & Co. on that firm in London. This draft, on being indorsed and guaranteed by Martinez, was discounted by Burnham, who forwarded it to London for collection. There it was protested for non-payment. The result was that Burnham held Martinez and Maddison & Co. on the draft, which was taken *supra* protest, by Baring Brothers, at the request of Burnham. Maddison & *Co. [223 thereupon deposited with Burnham, as collateral to secure their obligation on the draft, certain shares of the "Charnwood Forest Railroad Company." Inasmuch as Runkle appears, both in the contract sued upon and in the power of attorney upon which the contract is predicated, as the assignee of Maddison & Co., and as standing in their place and stead, we think it clear that the account was not *res inter alios* as to him. He represented Maddison & Co., and held their rights, and, therefore, the account was as much admissible against him as it would have been against the firm.

3. For the purpose of showing that the power of attorney, under which Mestre acted as the agent of Runkle, had been revoked, the defendant offered a series of telegrams addressed to Olcott, the attorney-at-law of Runkle in New York, which read as follows:

"Havana, July 23, 1884.

"To Olcott, 35 Broadway, N. Y.:

"Telegraph if power is coming to-morrow steamer.

"Mestre.
"Martinez."

"Havana, July 18, 1884.

"To Olcott, 35 Broadway, N. Y.:

"The powers received are insufficient. It is urgent to send by to-morrow's steamer new Spanish power, in Spanish, from Runkle, Lyles, Gilson, and Maddison & Co., to Martinez, Mestre, confirming the power of March 6th and June 26th, amplifying them specially, to cancel the contract to loan, to accept return of deposit, giving common council liberty of action, and to execute a general release; all well explained.

"Mestre.
"Martinez."

"Havana, July 22, 1884.

"To Olcott, 35 Broadway, N. Y.:

"Send, anyhow, first steamer, power according telegram eighteenth.

"Mestre.

"Martinez."

224] *"To Runkle, Lyles, Gilson, care Olcott, 35 Broadway, N. Y.:

"I urge forward pending powers. I protest against damage delay.

"Martinez."

These telegrams were rejected on the ground that they had not been properly proved. Whether their rejection was warranted is unnecessary to be considered. The telegrams called for a confirmation of the existing power, and not for its revocation. If they had been admitted, they could not have affected the question of the revocation of the power. Their rejection being immaterial to the result, no reversal for error in this particular can be had. *Carazos* v. *Trevino*, 73 U. S. 6 Wall. 773 [18: 813]; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 123 [22: 827]; *Home Ins. Co.* v. *Baltimore Warehouse Co.* 93 U. S. 527 [23: 868]; *Union Consol. S. Min. Co.* v. *Taylor*, 100 U. S. 37 [25: 541].

4. Martinez was asked whether, pending the negotiations in Havana for the settlement of the transactions, out of which the present contract grew, he had exacted from Mestre, agent of the defendant, any agreement as to the debt due to Burnham, as a part of the final adjustment. This question was objected to, on the ground that it was an attempt to show the assumption by parol of an obligation, when such obligation, if it existed, must result from the written contract. We think the objection was untenable. The question was asked the witness not for the purpose of proving a liability on the written contract, but in order to show the relations existing between the parties at the time the authority given by the power of attorney was acted on. The obligation of course must result from the text of the written contract, or by necessary implication therefrom. Testimony, however, was admissible to show the condition of affairs at the time the agent acted, not in order to vary or change the written contract, but to throw light upon the situation. *Le Roy* v. *Beard*, 49 U. S. 8 How. 451 [12: 1151].

5. The numerous other exceptions to the admissibility of evidence found in the record are, we think, not well taken. We have considered them all. The requests for findings made by the defendant upon the whole case, 225] as we have seen, were as *follows: "1st, that it does not appear that Mestre had any authority to assume an obligation on the part of the defendant; 2d, that the contract of August 4th, 1884, does not impose any liability upon the defendant." These requests involved both questions of law and fact, and were refused, and exceptions were reserved to their refusal. The findings of fact made by the court below are binding here, if there be any evidence to support them. *St. Louis* v. *Rutz*, 138 U. S. 226 [34: 941].

It is contended that there is no evidence to show that the power of attorney, which is relied on, was an existing power at the time the contract was signed by Mestre as Runkle's agent. This position is not supported by the record. True, there is evidence tending to show that Mestre, the agent of Runkle in Havana, requested enlarged powers from Runkle, and there is also evidence tending to show the arrival at Havana, on the day on which the contract was made, of an instrument conferring the enlarged powers which Mestre deemed desirable to justify him in dealing with the city of Havana. There is, however, no evidence that the second power, if received, revoked the power which is in evidence. As to the letter which Runkle wrote to Mestre, and which, it is contended, was a revocation of the power, its contents imply the very reverse. There was certainly no reason why Runkle should have said to Mestre that he "would like" a particular provision as to the Maddison & Co. liability inserted in the contract, unless the agent had authority to deal with reference to this matter. Indeed, although Runkle and Olcott his attorney, were both examined, and although they both referred to the alleged new power of attorney, their testimony seems sedulously to avoid any statement that the new power revoked the power of June 25. If the new power of attorney was sent, and revoked the one relied on here, Runkle or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents. Their silence must necessarily make against them on the question of revocation. Mansfield, *J.*, in *Roe* v. *Harvey*, 4 Burr. 2487. The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to* [226 the suspicion that the stronger evidence would been to his prejudice was expressly adopted in the case of *Clifton* v. *United States*, 45 U. S. 4 How. 242 [11: 957].

This leaves only for consideration the question of whether the power authorized the contract with Burnham and whether that contract bound Runkle for the debt sued on. It will be observed that the power of attorney expressly designates Runkle as the assignee of Lyles and Gilson and the "transferee" of Maddison & Co., and then authorizes the agent "for name, and in my name, place, and stead, to ask, demand, collect, and receive such sum or sums of money and property of all or any kinds to which in any capacity aforesaid I have, or may have, the right or claim or demand, under or in connection with the contracts for the loan and water works in the Island of Cuba, made in consequence of the public bidding therefor in the city of Havana, in the Island of Cuba, on the 18th day of March, 1882, . . . to compound and compromise all such claims as I may have aforesaid, . . . and to obtain my release from all liability as one of the contractors in connection with the said loan and water works." The contention is that this power, while it authorized the agent to enforce any demands which Runkle may have had, did not authorize him to assume an obligation on behalf of Runkle. The finding below is that, at the time the

power was exercised, it was necessary that the agent, in order to obtain his principal's discharge by the city of Havana, should settle the Martinez-Burnham liability.

In addition to these findings, the face of the power of attorney indicates the necessity of the agent's action in order to carry out the purposes of the power. The power itself states that Runkle is the assignee or "transferee" of all those who had been parties with him to the water works contract. It represents him as the "transferee" of Maddison & Co., and as entitled to all of Maddison & Co's rights. We have seen that Maddison & Co. were bound, with Martinez, to Burnham on the draft which Burnham had discounted and which was protested, and that the stock of Maddison & Co. was pledged to secure payment of the draft. A settlement of Runkle's 227]*relations, as the assignee of Maddison & Co., necessarily included an adjustment of the debt of Burnham under the very terms of the power of attorney. This power was evidently executed not alone for the purpose of adjusting the water works contract with the city of Havana, but also with the object of arranging the debt due to Burnham, back of which was the stock which had been pledged by Maddison & Co., and which belonged to Runkle as their assignee.

We now come to the consideration of the contract itself, which, it is contended, did not justify the conclusion that Runkle had assumed the indebtedness to Burnham. The contract recites the drawing of the draft upon Maddison & Co., the endorsement by Martinez, and the protest. It credits the receipt from the city of Havana of the $64,000, which had been deposited on account of the loan and water works contract, and states a balance due on the draft to Burnham. In stating the balance thus due, it "recognizes" Runkle as the assignee, binds Burnham to place the Charnwood Forest Railroad stock at the disposal of Runkle upon the payment of the debt, and binds him also, in the event of the sale of the stock, and the application of the proceeds thereof, to the debt, to pay over to Runkle any balance that might remain. It is insisted that this contract does not make Runkle ultimately liable for any deficiency, and that, therefore, the contract imports no debt on his part. This claim necessarily contradicts the finding of the court below, which is that Runkle had assumed responsibility for the balance, and it also contradicts the contract itself. The stock was not primarily Runkle's, but Maddison & Co's. Any dealing with Runkle, and by Runkle, as owner of the stock, and as assignee of Maddison & Co., imported that Runkle had succeeded to the claims of Maddison & Co. and, by fair inference, to all their obligations with reference to this part of the transaction. Indeed, the careful manner in which the contract states the drawing of the draft, its protest, and the transfer by Maddison & Co. to Runkle, seems to have been intended to emphasize the fact that Runkle, in acquiring the rights of Maddison & Co., had put himself in their place and stead. 228] That Runkle was the *general assignee of Maddison & Co., and considered himself as not only entitled to their rights, but also as the representative of their obligations in connection with the loan and water works contract, results from the terms of the power of attorney, in which he authorizes the agent not only to acquire Maddison & Co's rights, but to stipulate for the discharge of their obligation. In other words, the contract, read in connection with the terms of the power of attorney, leaves no doubt that Runkle was dealing and treating in the capacity of a person who was not only entitled to the rights, but was also subject to the liabilities of all the original parties to the loan and water works contract. This view is strengthened by the fact that, although Runkle testified on the trial, the assignment from Maddison & Co. to him was not offered in evidence, nor even referred to. The failure to produce it, or to testify in reference to it, when its contents were peculiarly within the knowledge of Runkle, justifies the presumption that its provisions would have been unfavorable to Runkle's position.

Judgment affirmed.

JOHN M. BURKE, *Appt.*,
v.
RICHARD H. DULANEY ET AL., Exrs.

(See S. C. Reporter's ed. 228-239.)

Parol evidence contradicting written contracts—negotiable instruments—evidence on non-delivery—present contract—conditional delivery.

1. A written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract.
2. A negotiable instrument, in the hands of an innocent holder for value, cannot be contradicted, to his prejudice, by evidence of an oral agreement or understanding between the original parties varient from the terms of their written contract.
3. Evidence which does not contradict the terms of the writing in suit, nor vary their legal import, but tends to show that the written instrument was never in fact delivered as a present contract is not in contradiction of the writing and is admissible between the original parties thereto.
4. The rule that excludes parol evidence in contradiction of a written agreement has no application if the writing was not delivered as a present contract.
5. The effect of the delivery and the extent of the operation of the instrument, such as a promissory note, may be limited, as between the original parties thereto, by the conditions with which delivery is made.

[No. 326.]

Argued and Submitted March 28, 1894. Decided April 23, 1894.

NOTE.—*As to construction of written contracts, how far a question for the court*, see note to Ward v. United States, 20: 792.

As to contracts; their interpretation and validity, see note to Bell v. Bruen, 11: 89.

As to oral evidence as applicable to written contracts, see note to Bradley v. Washington, A. & G. Steam Packet Co. 10: 72.

As to parol evidence of previous negotiations; when admissible to affect a written contract, see note to Union Mut. L. Ins. Co. v. Mowry, 24: 674.

APPEAL from a judgment of the Supreme Court of the Territory of Idaho, affirming the judgment of the District Court of the First Judicial District of said territory in favor of the plaintiff, H. Grafton Dulaney, for whom the appellees were afterwards substituted as his executors against John M. Burke, defendant, for the recovery of the sum of $5692.80 being the amount of a promissory note, made by said Burke. *Reversed, and cause remanded for a new trial.*

The facts are stated in the opinion.

Mr. **W. B. Heyburn,** for appellant:

This note was given at the time under an agreement that its delivery was conditional, and that it was not to be paid. This fact was sought to be proven by the appellant, and the court below refused to admit the evidence. The answer raises this defense squarely, and in law it was a good defense, and the refusal to receive the evidence was error.

Schindler v. *Mulheisen*, 45 Conn. 153; *McFarland* v. *Sikes*, 54 Conn. 250; *Benton* v. *Martin*, 52 N. Y. 570; *Kennedy* v. *Goodman*, 14 Neb. 585; *Maltz* v. *Fletcher*, 52 Mich. 484; *Colman* v. *Post*, 10 Mich. 422; *Catlin* v. *Birchard*, 13 Mich. 110; *Clarke* v. *Tappin*, 32 Conn. 66; *Dicken* v. *Morgan*, 54 Iowa, 684; *Bowker* v. *Johnson*, 17 Mich. 46.

Mr. **Leigh Robinson,** for appellees:

Parol evidence of an agreement, made contemporaneously with a promissory note, which contains an absolute promise to pay at a special time, is not admissible.

Brown v. *Spofford*, 95 U. S. 482 (24: 510).

Parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making, or indorsing of a bill, cannot be permitted to vary, qualify, or contradict, or add to or subtract from the absolute terms of the written contract.

Forsythe v. *Kimball*, 91 U. S. 291 (23: 352).

Evidence is inadmissible to show that the note was not intended to be a promissory note, but was given as a memorandum not to be enforced against the maker.

Burnes v. *Scott*, 117 U. S. 582 (29: 991).

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the testator of the appellees, upon a writing purporting to be the promissory note of the appellant for forty-three hundred and eight dollars and eighty cents, dated Salt Lake City, Utah, August 10, 1883, and payable one year after date, for value received, at the bank of Wells, Fargo & Co. in that city, with interest at the rate of six per cent per annum from date until paid.

229] *The defendant, Burke, denied his liability upon the note, and at the trial below was sworn as a witness on his own behalf. In support of his defense, as set forth in the answer filed by him, he stated the circumstances under which the note was given. He said: "Mr. Dulaney bought this group of mines—the Live Yankee and the Mary Ellen. He came to the Walker House in Salt Lake, and wanted me to run them for him. I said I would not do it unless I got a show to get some interest in the property. He says, I will carry an interest for you, and you can take it if you want it, and if not, you can give it back to me after you see the property." To this testimony the plaintiff objected, and the defendant, admitting that the agreement referred to by him was oral, the objection was sustained. To this ruling he excepted.

Being asked what he did after giving the note in suit, he answered: "I gave the note, I worked on the property, which was done some time in September; worked the property until March; settled up all of its debts, paid them, notified Dulaney I wanted nothing more to do with the property; that I was going to Idaho territory, to Cœur d'Alêne mines, and as I was ready to give him a deed at any time he would send me my note. That is all." Objection being made by the plaintiffs to this testimony, the defendant offered to prove "that at the time of the giving of the note and prior thereto, Dulaney, the payee of the note, agreed with Mr. Burke, the maker of the note, that the note should be given to represent the price of the interest that Mr. Burke was to have, conditioned upon his demanding it after an inspection of the mining property mentioned." He offered also to prove that after inspecting the property and testing it, the defendant notified testator that he did not want the interest; that he was prepared to make a deed for the interest to the latter, and demanded the delivery of his note. All this evidence was excluded by the court upon motion of the plaintiffs, to which ruling the defendant excepted.

The defendant having stated that the conversation with the testator above referred to, and which was excluded by the court, took place prior to the execution of the note, he *offered to prove that at the time the note 230 was made, the same agreement was made orally between him and the testator. This testimony was also excluded, and he excepted.

The following question was propounded to him at the trial: "State whether or not prior to your making the note the plaintiff agreed with you that you could explore, work, and develop the mining claims mentioned in the answer, and if at any time before the maturity of the said note you should desire so to do that he would relinquish said option of purchase—that you could relinquish your said option of purchase, and that he, plaintiff, would cancel the note and accept the deed in full discharge of the note and the cancellation thereof." The defendant having admitted that the agreement referred to in the question was oral, the court excluded the evidence, and he excepted. The court also refused to allow him to state whether he examined, worked, and developed the mining claims mentioned in his answer, and whether he had refused to take such claim under the agreement with the plaintiff.

At the trial the defendant offered in evidence a deed executed by him to the plaintiff, conveying to the latter, in consideration of the surrender of the note in question, all his right, title, and interest in the above property—the same deed that had been filed by the defendant with his answer. The court held this evidence to be inadmissible unless the defendant proposed to show that the plain-

tiff accepted the deed. To this ruling the defendant excepted. The defendant was not present when Dulaney took a deed from the owner of the mining property, nor was it ever delivered to him.

The general rule that a written contract cannot be contradicted or varied by evidence of an oral agreement between the parties before or at the time of such contract, has been often recognized and applied by this court, especially in cases in which it was sought to deprive bona fide holders of or parties to negotiable securities of the rights to which they were entitled according to the legal import of the terms of such instruments. *Renner* v. *Bank of Columbia*, 22 U. S. 9 Wheat. 587 [6: 167]; *Brown* v. *Wiley*, 61 U. S. 20 How. 442 [15: 965]; *Specht* v. *Howard*, 83 U. S. 16 Wall. 564 [21: 348]; *Forsythe* v. *Kimball*, 91 U. S. 291 [23: 352]; *Brown* v. *Spofford*, 95 U. S. 474 [24: 508]; *Martin* v. *Cole*, 104 U. S. 30 [26: 647]; *Burnes* v. *Scott* 117 U. S. 582 [29: 993]; *Falk* v. *Moebs*, 127 U. S. 597 [32: 266].

233] *Several of these cases were cited in the opinion of the court below, and have been cited here, as supporting the exclusion of the evidence which the appellant offered to introduce. 2 Idaho, 686. It is supposed that *Burnes* v. *Scott*, is particularly in point for the appellees. That was an action by the indorsee of a negotiable note against the maker. The defendant in that case offered to prove that the note was not intended by him or by the payee as a promissory note, but was given to and was received by the payee as a mere memorandum of the estimated value of the payee's interest in certain railroad bonds placed in the hands of the maker, and which were to be accounted for in the settlement of certain partnership affairs in which the maker and payee were interested; and that upon such settlement it would appear that the payee had received, prior to the giving of the note, more than his proper share of the partnership assets, and, therefore, was not entitled to claim anything in virtue of such memorandum. This court held the evidence inadmissible upon the ground that, by an alleged contemporaneous verbal agreement, it varied and contradicted the written contract of the parties. If that action had been brought by the original payee against the maker, and if the evidence above referred to had been excluded, a different question would have been presented. But, as we have seen, the issue in *Burnes* v. *Scott*, was between the indorsee of a negotiable note and the maker. The rule is settled that a negotiable instrument, in the hands of an innocent holder for value, cannot be contradicted, to his prejudice, by evidence of an oral agreement or understanding between the original parties varient from the terms of their written contract.

The authorities cited do not determine the present case. The issue here is between the original parties to the note. And the evidence offered by the appellant, and excluded by the court, did not in any true sense contradict the terms of the writing in suit, nor vary their legal import, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor according to its terms from the time of such delivery, but was left in the hands of Dulaney, to become an absolute obligation* of the [234 maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question. In other words, according to the evidence offered and excluded, the written instrument, upon which this suit is based, was not—except in a named contingency—to become a contract, or a promissory note which the payee could at any time rightfully transfer. Evidence of such an oral agreement would show that the contingency never happened, and would not be in contradiction of the writing. It would prove that there never was any concluded, binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is, undoubtedly, prima facie, indeed, should be deemed strong, evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired, and to show that there never was any complete, final delivery of the writing *as the promissory note of the maker*, payable at all events and according to its terms. The rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract. The authorities supporting these views are numerous, and to some of them it will be well to refer.

In *Ware* v. *Allen*, 128 U. S. 591, 595 [32: 563, 564], which was an action upon a written instrument, the defense was that it was understood between the parties at the time the instrument was signed that it should not be of any effect unless in certain named contingencies, which, it was shown, never occurred. *Mr. Justice* Miller, speaking for this court, said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a* question of contradicting or vary- [235 ing a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter"—citing *Pym* v. *Campbell*, 6 El. & Bl. 370, 373; *Davies* v. *Jones*, 16 C. B. 625; *Wallis* v. *Littell*, 11 C. B. N. S. 369; *Wilson* v. *Powers*, 131 Mass. 539; and *Pawling* v. *United States*, 8 U. S. 4 Cranch, 219 [2: 601].

Pym v. *Campbell*, above cited, was an ac-

tion upon an alleged agreement by the defendants to purchase from the plaintiff an interest in an invention of the latter. The defendants gave in evidence that, in the course of negotiations with the plaintiff, they got so far as to agree upon the price at which the invention should be purchased, if bought at all, and had appointed a meeting at which the plaintiff was to explain his invention to two engineers, when, if they approved, the machine would be purchased. At the appointed time the defendants and the two engineers attended, but the plaintiff did not come, and the engineers went away. Shortly after they were gone the plaintiff arrived. One of the engineers was found, and expressed a favorable opinion. The other could not then be found. It was then proposed that, as the parties were together and might find it troublesome to meet again, a writing should be then drawn up and signed, which, if the absent engineer approved the invention, should be the agreement; but if he did not approve it, should not be one. The absent engineer did not approve of the invention when he saw it, and the defendants contended that there was no bargain. The jury were directed that if it was agreed among the parties before the paper was signed that it should not operate at an agreement until the absent engineer approved of the invention, they should find for the defendants. A verdict was accordingly returned for the defendants. Upon a rule *nisi* for a new trial on the ground of misdirection, the cause was heard before the court of Queen's Bench. Erle, *J.*, said that, while the production of a paper purporting to be an agreement of a party, with his signature attached, affords a strong pre-[236] sumption *that it is his written agreement, and if, in fact, he did sign the paper *animo contrahendi*, the terms contained in it were conclusive, and could not be varied by parol evidence, yet, if it were proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party could not fix it as an agreement upon those so signing. "The distinction in point of law," he said, "is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is no agreement at all is admissible." Crompton, *J.*, said that he knew of no rule of law estopping parties from showing that a paper, purporting to be a signed agreement, was in fact signed on the terms that it should not be an agreement till money was paid or something else done. "The parties," he observed, "may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an agreement, and is admissible." Lord Campbell, *Ch. J.*: "I agree. No addition to or variation from the terms of a written contract can be made by parol; but in this case the defense was that there never was any agreement entered into. Evidence to that effect was admissible; and the evidence given in this case was overwhelming. It was proved in the most satisfactory manner that before the paper was signed it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till Abernethie had been consulted, and found to approve of the invention; and that the paper was signed before he was seen only because it was not convenient to the defendants to remain. The plaintiff assented to this, and received the writing on those terms. That being proved, there was no agreement." See also *Lindley* v. *Lacey*, 17 C. B. N. S. 585; *Clever* v. *Kirkman*, 33 L. T. N. S. 672; *Gudgeon* v. *Bessel*, 6 El. & Bl. 986; 2 Taylor, Ev. (8th ed.) § 1135.

The case of *Wilson* v. *Powers*, above cited, was an action brought by the payee against the sureties in a promissory note. The defense was that the sureties had been discharged *from liability by a written [237] agreement between the payee and the principal, which was delivered to the principal, whereby the time of payment was extended. To this the plaintiff replied, and sustained his position by proof, that the writing signed by him, and which was relied upon as discharging the sureties, was delivered as a proposition merely, and upon the agreement that it should become binding only upon the assent of the sureties. The supreme judicial court of Massachusetts said: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced."

In *Benton* v. *Martin*, 52 N. Y. 570, 574, the principle is thus stated: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so, also, as between the original parties and others having notice, the want of consideration may be shown." To the same effect are *Juilliard* v. *Chaffee*, 92 N. Y. 529, 535, and *Reynolds* v. *Robinson*, 110 N. Y. 654, in the latter of which it was said that the rule was now well established that "parol evidence is admissible to show that a written paper which, in form, is a complete contract, of which there had been a manual tradition, was, nevertheless, not to become a binding contract until the performance of some condition precedent resting in parol."

The same doctrine was announced in *McFarland* v. *Sikes*, 54 Conn. 250. That was an action upon a *note, which, the defend-[238] ant alleged, had been executed and delivered to the plaintiff upon an agreement that it should be canceled under certain named circumstances, and in the event he demanded, by a

named day, that it be returned to him. The trial court having ruled that the facts relied upon by the defendant did not constitute a defense, the supreme court of errors of Connecticut, reversing the judgment, said: "The error was in applying to the case the familiar and well established rule that parol evidence is inadmissible to contradict or vary a written contract. A written contract must be in force as a binding obligation to make it subject to this rule. Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be prima facie evidence that it had been delivered; but it would be only prima facie evidence. The fact could be shown to be otherwise and by parol evidence. Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note in its terms is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them."

For the reasons stated, and without considering the case in other aspects, we are of opinion that it was error to exclude the evidence offered by the defendant tending to show that the writing sued on was not delivered to or received by Dulaney as the promissory note of the defendant, binding upon him as a present obligation, enforcible according to its terms, but was delivered to become an obligation of that character when, but not before, the defendant examined and, by working them, tested the mining properties purchased by the plaintiff, and elected to take the stipulated interest in them. According to the evidence so offered and excluded, the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what 239] *Burke was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election, within a reasonable time, to take such interest, was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves.

The judgment is reversed and the cause is remanded, that a new trial may be ordered, and further proceedings had in conformity with this opinion.

STATE OF CALIFORNIA, by its ATTORNEY GENERAL, *Plff.*,
v.
SOUTHERN PACIFIC COMPANY (a corporation) *Defendant.*

(See S. C. Reporter's ed. 239-245.)

Order for filing and taking testimony.

Ordered that depositions heretofore placed in the custody of the clerk of this court, as taken in this cause, may be opened and filed, together with the map exhibits therein referred to; a commissioner is also appointed to take testimony herein offered by either of the parties, and to receive and return such documents and maps illustrative of the alleged title of the city of Oakland as said city may offer, and forward the same to the clerk who shall open and file the same.

[No. 9, Original.]

Submitted March 12, 1894. Decided April 30, 1894.

THE state of California, by its Attorney General, W. H. H. Hart, Plaintiff, moved this court, as follows, on March 12, 1894:

First: That the court make an order directing that the depositions heretofore taken upon notice and the stipulation of the parties in the above entitled action, now in the custody of the clerk of this court, be opened and filed in this cause, and the same be printed as a part of the record whenever said record shall be printed; and that the map exhibits now in the custody of said clerk, referred to by the witnesses in their several depositions, be also filed by said clerk in said cause; and that said depositions and map exhibits may be used as evidence upon the hearing of said case, subject to the objections therein specified, in the same manner as if the same had been regularly taken and returned in pursuance of the order herein applied for, a printed copy of which testimony and of the map exhibits has been deposited with the clerk of this court, to which plaintiff refers.

Second. That this court make an order designating one of its members, or some other person or officer, to take, in the state of California, such further testimony and evidence in the above entitled cause as may be offered by either of the parties hereto.

Third. That the person or officer designated to take such testimony as aforesaid, have the power and be instructed to return such testimony as may be offered by either of the parties to said action, and to receive and return such documents and maps illustrative of the alleged title of the city of Oakland as said city may deem proper to offer, pursuant to the order of this court made on March 12, 1894, and that said officer so appointed notify the respective parties and the city of Oakland of his appointment; and thereupon either of the parties shall be authorized, within ten days thereafter, or as soon as convenient, to proceed before said officer or person to take additional evidence, and said person or officer to receive and take such documents and maps as may be offered by said city of Oakland under the said order of March 12, 1894, as hereinbefore spec-

ified; and that the taking and receiving of said evidence, documents, and maps shall be completed and certified by said person or officer and forwarded to the clerk of this court on or before the first Monday of July, 1894; upon the receipt whereof, the clerk of this court is hereby instructed to open and file the same, and thereafter to have printed the record in this cause (embracing the depositions heretofore taken) upon the parties hereto paying therefor, the record to be thereupon filed in this court; that there be printed in addition to the requisite number of copies for this court, ten copies for the plaintiff, ten copies for the defendant, and ten copies for the city of Oakland.

That in printing such record it shall not be necessary for the clerk to print copies of the map exhibits; provided, there shall be furnished to the court a sufficient number of the map exhibits required by the rules of this court and one copy thereof to each of the parties hereto; and one copy to the said city of Oakland.

Fourth. That the parties hereto and the city of Oakland are hereby permitted, during the vacation of this court, to file their briefs and points in said action with the clerk of said court without further order of the court.

Fifth. That the court make an order setting down this cause for trial and hearing on the second Monday of October, 1894, or as soon thereafter as may be convenient for the court.

Sixth. That such other and further orders be made as to the court may seem meet.

For the purpose of the hearing and consideration of this motion plaintiff refers to—

The order of this court made March 12, 1894, marked Exhibit "A."

The stipulation signed by the parties, attached, marked Exhibit "B."

The statement of the attorney general of the the state of California, solicitor for plaintiff, marked Exhibit "C."

The consent of the defendant to the granting of the orders asked for, marked Exhibit "D."

Exhibit "A" is as follows:

Title of Cause.

In Equity—No. 9, Original.

On consideration of the motion of the city of Oakland, California, to be joined by intervention as co-complainant in this cause.

It is now here ordered by the court that said motion be and the same hereby is denied, but leave is given to that city to file briefs, accompanied by such documents and maps, illustrative of its alleged title, as it may be advised, March 12, 1894.

Exhibit "B" is as follows:

Title of Cause.

In Equity—No. 9, Original.

Now come the parties to the above entitled suit, by their respective solicitors, and state to the court as follows:

That on the 17th day of January, 1894, it was stipulated and agreed between the parties to the said suit, by their solicitors, as follows: "The defendant herein having given the plaintiff notice of the taking of the depositions of Horace W. Carpentier and others, for the purpose of using said testimony as evidence upon the trial of this cause, and whereas some doubt may arise as to the legality of the taking of the same; and whereas, the said plaintiff also desires to take certain testimony to be used on the trial of said action, and, in order to obtain the testimony desired by each of the parties hereto, therefore, it is hereby stipulated by and between the parties hereto, that the testimony may be thus taken of said Horace W. Carpentier, and of such other persons, as each of the parties hereto may determine from time to time until the testimony is closed, subject to such objections as either of the parties may deem proper to make.

"Said testimony may be taken before John A. Robinson, Commissioner of the United States Circuit Court for the Northern District of California, and the same may be used upon the trial of this cause the same as if taken in any other manner agreeable to the court, and may be used by either party with the same effect as though taken upon an order regularly made by the honorable Supreme Court of the United States, and the same may be used upon said trial upon any and all issues that may be made, either upon amendment of the pleadings, or otherwise."

That under and in pursuance of the said stipulation the defendant took, before the said John A. Robinson, Commissioner of the United States Circuit Court for the Northern District of California, the depositions of certain persons, as witnesses on its behalf, in the above entitled suit, namely: Horace W. Carpentier, G. F. Allardt, Calvin Brown, L. J. LeConte, G. L. Lansing, E. B. Ryan, R. J. Wilkinson, and the plaintiff took before said commissioner the depositions of certain persons, as witnesses on its own behalf, namely: Lyman Bridges, G. D. Flack, L. J. LeConte, Charles Morris and J. R. Wilkinson.

That the defendant, on the examination of the witness, Horace W. Carpentier, offered in evidence on its behalf certain documents, which were marked by the said commissioners as defendant's exhibits, Nos. 1 to 66, inclusive, and the defendant, in connection with the testimony of its witnesses, introduced in evidence certain map exhibits, which were marked by the said commissioner from No. 1 to No. 8, both inclusive.

That the plaintiff, on examination of witnesses on its behalf, offered certain exhibits, which were marked by the said commissioner, respectively, as "Plaintiff's Exhibit A," "Plaintiff's Exhibit B," and Plaintiff's Exhibit C," and Map Exhibit No. 8.

That on the 9th day of February, 1894, the parties by W. H. H. Hart, attorney general, solicitor for plaintiff, and Harvey S. Brown, solicitor for defendant, filed a stipulation, in writing, as to certain facts bearing upon the issues in said suit, wherein it was agreed as follows:

"It further is stipulated that this case shall be submitted to the court for its decision upon the amended bill and answer herein and replication thereto, and upon the depositions and exhibits hereto annexed, and upon map exhibits referred to in the said depositions, numbered from 1 to 8, both inclusive, and upon this stipulation."

(The depositions and exhibits referred to being the depositions and exhibits taken and of-

fered by the parties before the commissioner, as mentioned.)

That John A. Robinson, the commissioner, transmitted by mail to the clerk of this court, in sealed packages, the said stipulation in writing as to facts, and the said depositions and exhibits, and the said packages are in the hands of the clerk, unopened.

Wherefore, the said parties, by their solicitors, hereby stipulate that an order be made and entered herein directing that the said packages be opened by the clerk of the court, and that the said stipulation as to facts, and the said depositions of the said witnesses for the parties, respectively, taken before the said John A. Robinson, Commissioner of the United States Circuit Court for the Northern District of California, and the said exhibits offered by them, and marked by the said commissioner, as mentioned, be filed by the clerk in this cause, and further directing that the said depositions and the said exhibits offered by them, and marked by the said commissioner as mentioned, be filed by the clerk in this cause, and further directing that the said depositions and the said exhibits shall and may be used by the parties, respectively, upon the hearing or trial of the above entitled cause, with the same effect as if the same had been taken and offered in evidence before the said commissioner, under an order of this court duly appointing him an examiner to take the testimony and proofs on behalf of the parties to the said cause, and to certify and to return such testimony and proof to this court.

Wm. H. H. Hart,
As Attorney General of California,
Solicitor for Plaintiff.
Harvey S. Brown,
Solicitor for Defendant.

Aylett R. Cotton,
Of Counsel for Plaintiff.

Exhibit "C" is as follows:

Title of cause.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, the attorney general of California and solicitor for the plaintiff in the above entitled action, having devoted much time to the preparation of said cause, is very desirous of having the same brought to hearing during his term of office, which expires on the first Monday in January, 1895, and he therefore hopes it will be agreeable to the court to set the cause for hearing early in the next term.

Much time has been given to the taking of the depositions and preparing the map exhibits which are mentioned in the motion hereto attached. The depositions, including the exhibits connected therewith, have been printed, making nearly six hundred pages, and copies of the same as printed, and also of the map exhibits, have been filed with the clerk for such examination as this honorable court may deem proper to make of the same. The map exhibits present different views of the harbor of Oakland, and show that harbor accurately.

The undersigned desires that the orders be made in accordance with the motion hereto attached, permitting these depositions and map exhibits to be used in evidence upon the hearing of this cause, subject to the objections specified therein.

Wm. H. H. Hart,
As Attorney General of California,
Solicitor for Plaintiff.

Exhibit "D" is as follows:

Title of Cause.

The defendant in the above entitled cause hereby consents to the granting of the orders in accordance with the plaintiff's motion hereto attached, and accepts service of said motion.

Harvey S. Brown,
Solicitor for Defendant.

Messrs. **Wm. H. H. Hart,** Atty. Gen. of California, and **Aylett R. Cotton** for plaintiff.

Mr. **Harvey S. Brown,** for defendant.

By the Court:

The motion of the state of California, by its attorney general, in this behalf, having been considered:

*It is hereby ordered that depositions [245 heretofore placed in the custody of the clerk of this court, as taken in this cause, may be opened and filed, together with the map exhibits therein referred to.

And it is further ordered that William A. Maury, Esq., of the District of Columbia, be and he is hereby designated and appointed a commissioner to take testimony herein, and he is hereby empowered and instructed to take and return such testimony as may be offered by either of the parties hereto, and to receive and return such documents and maps illustrative of the alleged title of the city of Oakland as said city may deem proper to offer, pursuant to the order of this court made herein on March 12, 1894.

It is further ordered that said commissioner notify the respective parties and the city of Oakland of his appointment; and, thereupon, within ten days thereafter, or as soon as convenient, he shall proceed to take such evidence as either of the parties hereto may produce, and he shall receive and take such documents and maps as may be offered by the city of Oakland under said order of March 12, 1894, as hereinbefore specified; and that the taking and receiving of said evidence, documents, and maps shall be completed and certified by said commissioner and forwarded to the clerk of this court on or before the first Monday of September, 1894; upon the receipt whereof the clerk is hereby instructed to open and file the same.

It is further ordered that in printing the record it shall not be necessary for the clerk to print copies of map exhibits; *provided*, there shall be furnished to the court a sufficient number of map exhibits as required by the rules; and that the parties hereto, and the city of Oakland, are hereby permitted, during the vacation of this court, to file their briefs and points in said cause with the clerk without the further order of the court; and the question of setting said cause for hearing is hereby reserved until the next term.

246] *RE* CITY NATIONAL BANK OF FORT WORTH, TEXAS.

(See S. C. Reporter's ed. 246-252.)

Mandamus to United States circuit court.

Mandamus directing the United States circuit court to vacate or modify its decree entered upon the mandate of this court on the disposition of an appeal from that court, is the proper remedy, if the mandate of this court has been disregarded, but if not, the application for leave to file a petition for mandamus should be denied.

Submitted April 9, 1894. Decided April 30, 1894.

APPLICATION for leave to file a petition for mandamus directing the Circuit Court of the United States for the Northern District of Texas to vacate or modify a decree heretofore entered by that court in a certain cause therein pending, wherein Hunter and others were complainants and the City National Bank of Fort Worth, Texas, was defendant, on the ground that in rendering such decree the circuit court departed from the mandate of this court sent down on the disposition of an appeal from a former decree in the cause. *Denied.*

See *City Nat. Bank of Ft. Worth* v. *Hunter*, 129 U. S. 557 (32: 752), S. C. *ante*, p. 534.

The facts are stated in the opinion.

Mr. **A. H. Garland** for petitioner.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an application for leave to file a petition for mandamus directing the Circuit Court of the United States for the Northern District of Texas to vacate or modify a decree heretofore entered by that court in a certain cause therein pending, wherein Hunter and others were complainants and the City National Bank of Fort Worth, Texas, was defendant, on the ground that in rendering such decree the circuit court departed from the mandate of this court sent down on the disposition of an appeal from a former decree in the cause as reported in *City Nat. Bank of Ft. Worth* v. *Hunter*, 129 U. S. 557 [32: 752].

We do not feel required to restate the case as set forth at length when it was then before us. Briefly, on May 20, 1880, one O'Neal was indebted to Hunter, Evans & Co., and also to the City National Bank, each of whom claimed to hold a lien, to secure the indebtedness, on certain cattle owned by O'Neal. One Dawson was desirous of purchasing the cattle, and the result was that the parties in interest entered into three written agreements, under which the cattle were sold and delivered to Dawson, he executing a note for the purchase price, payable to the order of Hunter & Co. and the bank, to be paid and the proceeds distributed according to certain terms and stipulations agreed on. The note was delivered upon its execution to Henry E. McCulloch, who was selected by Hunter & Co. 247] and the bank, as their joint agent, *to accompany the cattle and receive and distribute the proceeds as sales were made by Dawson. Certain amounts were received and distributed accordingly. Shortly after, and on May 31, Hunter & Co. filed a petition in Montague county, Texas, against O'Neal and Dawson, to foreclose a mortgage given by O'Neal to them, on the cattle then in possession of the latter, and sequestrated the cattle. Thereupon Dawson replevied the cattle, and gave a bill of sale of them to the bank, which furnished the security upon the replevin bond and agreed to hold the parties harmless from any liability thereon. The bank notified McCulloch that his agency had ceased, and took possession of the herd through its agent, one Ellis, who had a power of attorney from the bank to make title to the cattle as sold off by Dawson and receive the proceeds. The suit of Hunter & Co. in Montague county was removed to the circuit court, and they there filed an amended bill, September 30, 1881, to which they made the bank a party defendant, and prayed in the alternative that, if they were mistaken in seeking a foreclosure, a decree be rendered against Dawson and the bank for the amount of money coming to them from the proceeds of the cattle. The cause was heard in the circuit court and a decree rendered, which, upon appeal to this court by the bank, was reversed and the cause remanded, with a direction to enter a decree in conformity with the opinion. The opinion found the amount due from O'Neal to Hunter & Co. February 20, 1880, to which certain interest was to be added as pointed out, down to the date at which Dawson paid the balance due on his note into the bank, a matter not made clear on that record, and also directed the amount of the bank's debt to be ascertained by adding certain interest to O'Neal's note held by it down to the same date. From these two indebtednesses the *pro rata* to which complainants and the bank were entitled out of the fund to be distributed, was to be computed, and from the amount to come to complainants according to this computation certain deductions were directed to be made, and the balance to be paid out of the money deposited by Dawson, as of the date of such deposit, the bank retaining the remainder. After the *cause was remanded the par- [248 ties entered into the following stipulation:

"It is agreed between Hunter, Evans & Co., on the one part, and the City National Bank of Fort Worth, Texas, on the other part, that the proceeds of the cattle in controversy in this case were paid over to James F. Ellis, one of the securities on the replevin bond, who for himself and as agent for the other securities on said bond, accompanied said cattle to the Indian territory and collected the balance due on the note from Dawson to Hunter, Evans & Co. and said City National Bank, and that said Ellis, on behalf of himself and said other securities on said bond, deposited said amount collected by him in said City National Bank as a general deposit, with the understanding that said money should remain on deposit in said bank to abide the determination of this suit, for the purpose of indemnifying them, said securi-

NOTE.—*As to when mandamus will issue*, see note to M'Cluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion, see note to Ex parte Morgan, 29: 135.

ties, against any loss by reason of their signing said bond.

"Said deposit was made in the name of the 'Dawson bond account,' and the amount has remained and still remains on general deposit as aforesaid in said bank.

"It is further agreed that said deposit was made at the following dates and in the following amounts respectively:

"1. June 26, 1880, three thousand one hundred and twenty-eight dollars.

"2. August 3, 1880, five thousand dollars.

"3. August 6, 1880, five thousand six hundred and forty-four dollars.

"Total amount deposited, thirteen thousand seven hundred and seventy-two dollars, which, as other general deposits, has been used by the bank as other of its funds.

"It is further agreed that this agreement shall stand in lieu of answer to plaintiffs' bill of discovery, and answer to same is hereby waived."

The circuit court thereupon rendered a decree, providing, among other things, that Hunter & Co. recover of the bank the sum of $12,084.85, together with interest thereon from date of decree at the rate of eight per cent. per annum, and the costs after September 30, 1881, the date of the filing of 249] *complainants' amended bill, all prior costs being adjudged against Hunter & Co. The bank then prosecuted an appeal to this court, assigning as error that the circuit court included, in the recovery against the bank, interest on complainants' portion of the money, and awarded costs. The contention was that the allowance of the interest was inconsistent with the mandate of this court, and the amount thus questioned was "nearly or quite $4000." When the appeal came to be considered we found ourselves compelled to dismiss it, because the sum in dispute was not sufficient to give us jurisdiction, and no appeal lies from a mere decree for costs. *City Nat. Bank of Ft. Worth* v. *Hunter*, *ante*, p. 534.

Application is now made for mandamus, and this is the proper remedy, if the mandate of this court has been disregarded, but, if not, the application for leave to file should be denied.

We are of opinion that whether or not the proceeds of the cattle were received and retained by the bank under such circumstances as to render it liable to Hunter & Co. for interest on their *pro rata* share, was a matter which was necessarily so far left at large by our former decree that we cannot hold that the mandate was disregarded by the decree rendered thereunder by the circuit court.

The Dawson note was held in trust for Hunter & Co. and the bank, payment to be worked out from the cattle through the agency of McCulloch, and when the bank terminated McCulloch's agency, took possession of the herd, and received the proceeds of the cattle from Ellis, it received the *pro rata* share of Hunter & Co. in trust for them, as 252] the litigation* turned out, and nothing in the directions we gave prevented the circuit court from holding the bank to a liability to pay interest thereon if, in its judgment, it was justified in so doing by the facts disclosed on the hearing. Ellis was the agent of the bank and the money was kept and used by the bank, being carried on the books to the credit of the "Dawson bond account," subject to the determination of this suit. The language of the stipulation that the amount collected was deposited by Ellis as a "general deposit," and used "as other general deposits," "as other of its funds," does not change the legal effect of the transaction so far as Hunter & Co. were concerned, who had nothing to do with the agreement of the bank to indemnify Dawson's sureties on the replevin bond. The use of their part of the money under the circumstances may have induced the circuit court to arrive at the result complained of. We are not, however, called on to say whether the allowance of the interest was or was not correct, as the only question is whether that court disobeyed the mandate, which we do not think it did.

As to the costs, we are also clear that the action of the circuit court was not precluded by the former decision.

Leave to file the petition must therefore be denied.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Appt.*,
v.
A. G. CLARK, County Auditor of Kidder County, North Dakota, ET AL.

(See S. C. Reporter's ed. 252-273.)

Collection of tax, when enjoined—suit by railroad company.

1. No one can have an injunction against the collection of a tax until he has paid so much of the tax assessed against him as it can be plainly seen he ought to pay.
2. The suit in equity by the Northern Pacific Railroad Company to enjoin the collection of the taxes imposed upon its property in certain counties of North Dakota is without equity, because of the failure to aver that the company had tendered or paid the gross earnings tax for the year 1889 (or the tax assessed by the county auditors) and it is not entitled to the equitable relief prayed without first tendering or paying such taxes.

[No. 1045.]

Argued April 12, 1894. Decided April 30, 1894.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, of propositions of law upon which that court desired the instructions of this court, in a suit in equity brought by the Northern Pacific Railroad Company, plaintiff, against A. G. Clark, auditor of the county of Kidder, North Dakota *et al.*, to enjoin the collection of certain taxes upon the lands of the

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NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

company in Kidder county, Stutsman county, Richland county, and McLean county, in that state, etc. *Eighth question certified in the affirmative.*

See same case in circuit court, 47 Fed. Rep. 681.

The facts are stated in the opinion.

Mr. **Fred M. Dudley,** for appellent:

This suit is not without equity because of the failure to aver that the complainant has tendered or paid the "gross earnings tax" for the year 1889, and said complainant is entitled to the equitable relief prayed without first tendering or paying such tax.

In states where a court of equity exercises a jurisdiction to set aside, or to restrain the collection of illegal assessments or taxes, the relief will not be granted unless the plaintiff pays such portion of the tax or assessment as is lawful and justly due.

Pom. Eq. Jur. § 393; *Morrison* v. *Hershire*, 32 Iowa, 271.

The rule is confined in its application, by the courts, to cases where the tax is excessive, or is partly legal and partly illegal.

Cooley, Taxn. (2d ed.) 763, and note; *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 (23: 663).

"Gross earnings percentage" cannot be made a condition precedent to the granting of an injunction under this rule, unless the "gross earnings percentage" be a tax on these lands. That it is not, is self evident.

The exemption from assessment and levy of taxes in the ordinary manner, made by the "gross earnings law," did not depend upon the payment of the three per centum of the gross earnings in the first instance, but upon the filing with the secretary of the territory of a resolution adopted by the railroad company and attested by its secretary, accepting the provisions of the act and subjecting the corporation to its terms.

As the "gross earnings law" required the payment of a certain percentage upon the gross earnings of each year, the earnings of that year must be completed before any payment can be made; thus for the year 1889, no payment could be made prior to 1890, when by the terms of the act the percentage was to be paid in two parts, one half on or before February 15, and one half on or before August 1; nevertheless the exemption was complete for the year 1889.

The "gross earnings act" having provided an exclusive remedy for failure to pay the percentum by a distraint by the territorial treasurer, the railroad company is entitled to an order restraining the counties from seeking to collect another and unauthorized tax. Further, the failure to pay the gross earnings percentum is a question between the territorial officials and the railroad company; with it the county officials have nothing to do.

Since the failure to pay the "gross earnings" per centum would not give the counties the right to tax these lands as other lands are taxed, it is not essential to negative such failure in the bill of complaint; and no inference can be drawn from the absence of an averment, that no such payment has been made; and that portion of the opinion of the circuit court, holding that there is no equity in complainant's bill, is founded upon an assumed fact that is not in the record.

There was, and is, no "gross earnings" percentage due, and there is no one authorized to receive such money.

Before any payment became due under the act for 1889, it was repealed by the adoption of the constitution as repugnant to it.

Where a statute requires a certain tax to be collected and the act prescribing the method of such collection is repealed before the collection is made, or the tax due, and there is no saving clause, the right to make such collection is gone, and all proceedings for the collection of the tax, after such repeal, are void.

McQuilkin v. *Doe*, 8 Blackf. 581, 583; *Marion Twp. Gravel Road Co.* v. *Sleeth*, 53 Ind. 35, 41; *Tivey* v. *People*, 8 Mich. 128, 130, 131; *Hunt* v. *Jennings*, 5 Blackf. 195, 33 Am. Dec. 465; *Abbott* v. *Britton*, 23 La. Ann. 511; *French* v. *State*, 53 Miss. 651; *Musgrove* v. *Vicksburg & N. R. Co.* 50 Miss. 677.

Prior to the time it became due in February, or certainly prior to January 1, when the gross earnings upon which the tax was to be computed, were completed, there was no amount due whatever. The territory had no vested right in any sum; its claim at best amounted to no more than an inchoate right. With the repeal of the act without a saving clause, all possibility of this inchoate claim ripening into a perfect right was extinguished. There never was, therefore, any amount due the territory or state under the "gross earnings law" as the percentage upon the earnings for 1889; and the company is not, and never has been, under any obligations, legal or equitable, to pay or tender such sum.

Backwell, Tax Titles, §§ 1047, 1049; Cooley, Taxn. (2d ed.) 18; *Bleidorn* v. *Abel*, 6 Iowa, 5; *Van Inwagen* v. *Chicago*, 61 Ill. 81; *Com.* v. *Standard Oil Co.* 101 Pa. 119; *St. Joseph County Comrs.* v. *Ruckman*, 57 Ind. 96; *Bennet* v. *Hargus*, 1 Neb. 419; *Butler* v. *Palmer*, 1 Hill, 324.

A valuable consideration for the exemption from taxation was, in fact, given by the railroad company and accepted and retained by the state.

Northern Pac. R. Co. v. *Carland*, 5 Mont. 146.

Under the provisions of the Act of Congress approved July 15, 1870 (16 Stat. at L. 291) the lands granted to the Northern Pacific Railroad Company could not be taxed until the company had paid "into the treasury of the United States the cost of surveying, selecting and conveying" the lands granted to the company. The railroad company did not, prior to 1887, pay such fees upon lands owned by it, and hence its lands were not taxable.

Northern Pac. R. Co. v. *Rockne* ("*Northern Pac. R. Co.* v. *Traill County*") 115 U. S. 600 (29: 505).

There was, therefore, subject to taxation within the territory, but a small amount of personal property of the company.

The railroad company insisted that it was beyond the power of the territory to lay a tax upon the interstate earnings, as such a tax would be a tax upon interstate commerce; and that the gross earnings upon which the percentage was to be computed must be restricted

to territorial earnings. In August, 1887, acting upon this construction, it refused to make the second payment for 1886, claiming that the first payment was more than was due for the entire year, computing the amount to be paid upon the territorial earnings alone, and that such payment satisfied the entire amount due for the year.

The railroad company brought suit to enjoin the sale of its property, basing its action upon the grounds stated. The case having been carried to the territorial supreme court, the company's position was there sustained in a decision rendered October 13, 1888.

Northern Pac. R. Co. v. *Raymond*, 2 Inters. Com. Rep. 321, 1 L. R. A. 732, 5 Dak. 356.

The act of March 7, 1889, required the payment of all sums and interest due under the act of 1883, as a condition precedent to the acceptance of the contract. It further required any company which had not paid such percentages or made a return of its earnings on both territorial and interstate traffic under the act of 1883, to make such return within thirty days from the date of the act, "and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of such taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889.

The Northern Pacific Railroad Company accepted this act; and, as a condition precedent, made a return to the territorial treasurer of its earnings on interstate as well as territorial traffic for the years in which it had not made such return under the act of 1883, and paid the percentage thereon April 4, 1889.

In addition thereto, the company obligated itself to pay in August, 1889, the last half of the gross earnings percentage for 1888 computed on both territorial and interstate traffic.

If the supreme court of the territory construed the act of 1883 correctly in *Northern Pac. R. Co.* v. *Raymond*, 2 Inters. Com. Rep. 321, 1 L. R. A. 732, 5 Dak. 356, and *Northern Pac. R. Co.* v. *Barnes*, 2 N. D. 310, and this court cannot question that construction, so far as it determines the meaning of the territorial act. *Stutsman County* v. *Wallace*, 142 U. S. 293, 306 (35: 1018, 1022).

This immense sum of over $175,000 must be considered as a cash consideration for the exemptions contained in the act of 1889. Certainly the counties cannot justly complain of a lack of equity while they retain this sum, amounting to double the entire tax assessed upon the lands.

The railroad company has paid, under this law, into the territorial treasury, a sum far greater than the taxes upon the lands for the same year could have amounted to. And in all of these views that payment is an incontrovertible answer either to discrimination or lack of equity. In either of the views considered, the attempt by the counties to tax these lands after the state has collected more than the amount of the tax in consideration of exemption, occupies the same moral plane as the exercise of the blackmailer's art.

Messrs. **E. W. Camp** and *W. H. Standish*, for appellees:

The appellant's counsel, while admitting that the amount to be paid as a condition precedent to invoking the aid of a court of equity is the amount conceded to be due, and while conceding that the appellant had obligated itself to pay an amount equal to 3 per centum of its gross earnings for and during the year 1889 as consideration for exemption from taxation upon its other property for that year, nevertheless seeks to excuse the appellant for its neglect to fulfill this obligation.

As to the first excuse offered, while the tax imposed was not a tax directly upon the lands, it was a tax imposed in lieu of all other taxes, including taxes with which the lands would otherwise be chargeable. This is the only ground upon which the appellant claims exemption from such taxes under this act. For the purpose of this discussion, we must, of course, admit the validity of this act and that the exemption it offered could have been made effective for the year 1889. This being the case, payment of the tax imposed by the act would have discharged all claims for taxes upon the lands for that year. Unless, then, those claims had been already discharged by mere acceptance of the act, they remain still undischarged, so long as payment of the tax imposed by the act is deferred, and the amount of that tax must be deemed to be the amount "conceded to be due" and which should be paid as a condition precedent to invoking the aid of a court of equity. But it is urged that those claims had been already discharged by mere acceptance of the act, which necessitates notice of the second excuse offered, viz: that the acceptance of the act, and not payment thereunder, created the exemption as to the lands.

We cannot so read the act. In the first section, after providing for payment of the per centum, it is expressly provided as follows:

"And the payment of such amount annually as aforesaid, shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid."

This is the very provision under which the appellant claims exemption, and yet it expressly makes that exemption dependent upon payment. But, as if to make assurance doubly sure, the proviso in section 7 expressly declares that—

"Any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid, shall be subject to assessment and taxation in the same manner as individuals."

Could language be plainer?

The third excuse offered is that the act itself was repealed prior to the time when the first installment became due, and there was no one authorized to receive the money; and that, consequently, there is no "gross earnings" percentage due.

It is impossible to construe this statement in any other light than as an avowed unwillingness on part of appellant to pay the amount which it concedes to be due as consideration for the exemption claimed. If the obligation

was complete at time of acceptance (which is not disputed) the continuance of that obligation could not be made to depend upon the continuance in effect of the act under which it arose. The repeal of that act might, or might not, have weakened the remedy for enforcement; but in either event the obligation itself continued the same.

No attempt to discharge the obligation contracted for the year 1889 has been shown. It would seem as though the least that the appellant could have done, had it desired to do equity, would have been to aver its willingness to discharge that obligation, on the contrary, its unwillingness to do so is manifest.

Mr. Justice **Jackson** delivered the opinion of the court:

253] *This case, under the style of the *Northern Pac. R. Co.* v. *Walker*, 148 U. S. 391 [37: 494], was before this court at October term, 1892, and the jurisdiction of the circuit court not appearing upon the face of the record, it was remanded with leave to amend. The appellant accordingly, on June 6, 1893, filed in the Circuit Court of the United States for the District of North Dakota its amended bill of complaint, in which, after setting forth its creation and organization under and by virtue of an Act of Congress approved July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound on the Pacific Coast by the Northern Route," and certain acts and joint resolutions of Congress supplementary thereto and amendatory thereof, it was alleged that for the purposes of laying out, locating, constructing, furnishing, and maintaining a railroad and the telegraph line between the points indicated there was granted to it by Congress every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of the railroad line as the company might adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of the railroad line whenever it passed through any state, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, free from pre-emption or all other claims at the time the line of the railroad should be definitely fixed, and the plat thereof be filed with the Commissioner of the General Land Office; that the railroad company duly accepted the terms, conditions, and impositions of said Act of Congress, and that on the respective dates of May 26, 1873, and July 20, 1880, it definitely fixed the line of its railroad 254]*through certain counties in the territory of Dakota (now the state of North Dakota) and filed plats thereof in the office of the Commissioner of the General Land Office; that the line of railroad so fixed extends opposite to and past the lands set forth and described in the schedules made a part of the bill; that prior to December 20, 1880, it had completed that portion of the railroad and telegraph line extending on, over, and along the line of definite location of the railroad, and that the President of the United States, from time to time, after the same had been examined by commissioners, had accepted the railroad and telegraph line as having been constructed and completed in all respects as required by the Act of July 2, 1864, and the acts and joint resolutions supplementary and amendatory thereof.

The bill further alleged that the lands on each side of the railroad, and every portion thereof, were within forty miles of the company's line of road so definitely fixed; that they were public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and no entry or application to make entry for the lands was made or was pending when the lists of definite location were filed in the office of the Commissioners of the General Land Office on May 26, 1873, and July 20, 1880; that the described lands had been surveyed by United States surveyors, and had been reported to be agricultural in their character and non-mineral; and that the lands were not on July 2, 1864, or May 26, 1873, and July 20, 1880, known as mineral lands, etc.; that the company had prior to the year 1889, in accordance with the direction of the Secretary of the Interior, duly prepared and filed lists in the United States land offices in the land districts in which the lands were situated respectively, describing the lands and claiming them as a portion enuring to it under and by virtue of the Act of Congress approved July 2, 1864, which lists were duly allowed and approved by the United States district land officers, to whom the fees prescribed by law were paid by the company, and which were retained by the United States; that the lists of lands so filed were duly transmitted by the district land officers to the Commissioner of the General Land Office *for his approval; [255 that since the lists were filed and transmitted to the Commissioner of the General Land Office, the Commissioner, under the direction of the Secretary of the Interior, had required the company to file in the office of the Commissioner, or in the office of the land office districts in which the lands were respectively situated, an affidavit made by some person acquainted with the character of the lands, setting forth and showing that the same were non-mineral, and that until such affidavits had been filed the Commissioner refused to approve the lists; that the company had not, nor had any one in its behalf, filed affidavits of persons having knowledge of the mineral or non-mineral character of the lands set out in the lists.

The bill then proceeds to state that none of the lands described had ever been certified or patented to the railroad company, and that neither the United States, nor any of its officers or agents, had ever ascertained and determined what specific lands in the state of North Dakota passed to the railroad company by virtue of the Act of July 2, 1864, although the railroad company had repeatedly petitioned to have this done; that the United States and its officers had refused to certify to the company the lands described in the schedules of the bill, but held the lists suspended and unapproved upon the claim that the lands may be mineral in character, and as such excepted from the grant to the company, or that the lands may not have been free from claims or rights reserved in the grant, or that the question as to whether title to the lands had passed to the railroad company under and by virtue of the

granting Act, and acts amendatory thereof; that said matters were still in controversy, and pending before the Commissioner of the General Land Office and the Secretary of the Interior.

It is further alleged that the railroad company had no other right, title, claim, interest, property, or possession in or to any of the lands or premises described in the bill except such right, title, claim, interest, property, or possession as it may have obtained under and by virtue of the acts and resolutions of Congress, and its compliance with the conditions thereof.

It is then averred that on March 7, 1889, the 256] legislature of *the territory of Dakota passed an act, which was duly approved by the governor of the territory, entitled "An act providing for the levy and collection of taxes upon the property of railroad companies in this territory," in and by which it was, among other things, enacted and provided: "In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated within this territory belonging to the corporation owning or operating such railroads, upon the capital stock, or business transactions of said railroad company, there shall hereafter be paid into the treasury of this territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad arising from the operation of such railroad as shall be situated within the territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided;" that the railroad company did, within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, filed with the secretary of the territory of Dakota, accept and become subject to the provisions of the Act of March 7, 1889; that within thirty days of its passage the railroad company, as required by the act, prepared and filed with the treasurer of the territory, in the manner required by the provisions of chapter 99 of the Session Laws of the territory for the year 1883, an account of the gross earnings of the company, both territorial and interstate, for the years 1886 and 1887, and paid into the treasury the entire amount of taxes claimed by the territory on local and interstate earnings remaining unpaid at the time of filing such account for said years, such payment being as follows, to wit: For the last half of the year 1886, $38,095 31; for the year 1887, $65,585.46. Such sums so paid, as provided for in the territorial act of March 7, 1889, were percentages computed entirely upon gross earnings of the company derived from domestic business, the percentage for the same years computed upon the 257] gross earnings derived from *interstate business having been previously paid by the company, as required by the provisions of the territorial act of 1883.

It was also alleged that, at the same time, the company paid into the treasury of the territory one half of the entire amount due for the year 1888, amounting to $46,937.09, and that before August 15, 1889, it had paid the remainder of the amount due for the year 1888; that the sums so paid into the treasury for the year 1888 were percentages computed upon the gross earnings of the company for that year, derived from both domestic and interstate business, the former amounting to $11,446.78 and the latter to $82,427.40, and it was alleged that all the percentages derived from interstate business so paid into the treasury were not due from the company, except by virtue of the act of March 7, 1889, and the company's acceptance thereof, and that they were paid as a consideration for the exemption from taxation provided for by that act, and for no other reason.

It is then charged that, notwithstanding the premises, in the year 1889 the county auditors for the counties of Kidder, Stutsman, Richland, and McLean, under the authority of the laws of the territory of Dakota, had assessed the company's lands situate in their respective counties for purposes of county taxation, and that they had advertised the lands as described in the schedules to the bill, for sale, and were about to wrongfully sell the same for the nonpayment of taxes so levied, together with penalties and costs, and to issue certificates of sale for the same in the form prescribed by the laws or North Dakota, and unless restrained by the order of the court they would sell the lands, and issue certificates of sale thereafter, whereby the rights of the railroad company in and to the lands would be irreparably injured, and lead to multiplicity of suits concerning the title thereto.

It was further claimed on the part of the railroad company that the taxes so assessed and levied upon the lands were a cloud upon the title of the railroad company thereto; that if sold and certificates were issued to the purchaser, such certificates would constitute a cloud upon the title of the company in and to the lands so sold; that the counties were bankrupt, *and that if the railroad company [258 should pay the taxes and then bring an action against them to recover the amount thereof, it would require a multiplicity of suits, and such judgments as might be recovered would be worthless.

The bill further averred that the amount of the taxes levied upon the lands, together with the costs and penalties claimed by the county auditors to have accrued thereon, and for which the lands had been advertised for sale, and were about to be sold, were as follows: Upon the lands in Kidder county, $12,820 67; upon the lands in Stutsman county, $8863 39; upon the lands in Richland county, $4094.37; and upon the lands in McLean county, $4048.17—the amount of such tax, penalty, and cost upon each tract of land being particularly shown in the schedules attached to the bill.

The prayer of the bill was to the effect that the county assessments and taxes so levied upon the lands of the railroad company might be declared illegal and void, and a cloud upon the title of the company, and that the defendants, and each of them, their deputies and successors in office, be restrained from selling or attempting to sell the lands or any portion thereof, or from issuing tax certificates therefor.

The defendants appeared and demurred to the amended bill on the ground that, according to the showing made therein, the plaintiff was not entitled to the relief sought. The circuit court sustained the demurrer and dismissed the bill on the ground that the act of 1889 was void, because it violated the Organic Act, which provided that the legislative assembly of the territory shall not make any discrimination in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value; secondly, that the bill was without equity in failing to allege payment or tender of the gross earnings tax for the year 1889. 47 Fed. Rep. 681.

From this judgment the railroad company appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and that court, desiring instructions upon certain questions persented by the assignments of error filed in the cause, certified to this court various propositions **259**] of law, as to *whether the railroad company acquired such title to the odd numbered sections of land within the place limits of the grant of July 2, 1864, which were not mineral, and which, at the dates of the grant and of the filing of the map of definite location in the office of the Commissioner of the General Land Office, were not reserved, sold, granted, or otherwise appropriated, as to render them taxable before being patented and certified to the railroad company; whether the company was taxable on such lands by the territories after the filing of the map of definite location of its railroad, and full compliance with the terms and conditions of the granting Act, while the United States refused to patent and certify such lands to the company; whether chapter 107 of the Laws of Dakota for 1889, being an act entitled "An Act Providing for the Levy and Collection of Taxes upon the Properties of Railroad Companies in this Territory," approved March 7, 1889, was void as a regulation of interstate commerce; whether the act of March 7, 1889, was in conflict with the 5th and 14th amendments of the Constitution of the United States, and with the organic law of the territory, as an attempt to exempt from taxation the lands granted by the Act of July 2, 1864; whether the act of March 7, 1889, should be construed as granting an exemption for the year 1889, or to be in force and effect only after the year 1890. The eighth and remaining question certified is as follows: "Is said bill without equity because of the failure to aver that the complainant has tendered or paid the 'gross earnings tax' for the year 1889; and is said complainant entitled to the equitable relief prayed without first tendering or paying such tax?"

264] *In the view we take of the case, the answer to the last question will dispose of the suit, and render it unnecessary to enter upon the consideration and determination of the other propositions of law on which instructions are asked.

By an act of the legislature of the territory, approved March 9, 1883, chapter 99, Laws of 1883, it was provided that all railroad companies, except railroads operated by horse power, owned and operated within the territory, should pay two per centum on the gross earnings of their railroads for a period of five years, and thereafter three per centum on the gross earnings, in lieu of all other taxes upon said railroads and the capital stock and business thereof. The payment of this percentage was to be made at designated dates in each year, and penalties were imposed upon the companies failing to comply with the provisions of the law as to the making of returns of earnings and paying the percentages imposed by the act. The moneys so received and collected were to be apportioned between the territory and the several counties through which the railroads respectively ran.

This act of 1883 left the railroad companies no choice as to whether they would pay the designated percentage on their gross earnings, or remain subject to taxation upon their property in the ordinary method. It was compulsory upon them. It is not material to the present case to consider whether this act was constitutional or not; it was repealed by the act of legislature approved January 29, 1889. Now, it is shown by the bill that at the time the act of 1883 was repealed the appellant was in default of the payment of the percentages due upon its gross earnings for the years 1886, 1887, and 1888.

On March 7, 1889, the legislature of the territory of Dakota passed an act, entitled "An Act Providing for the Levy and Collection of Taxes upon Property of Railroad Companies in this Territory,"* which went into force and effect immediately after its passage.

*This act is by its terms nothing but a [**265** tax law, and while it adopted the same rule of percentages on the gross earnings as provided in the act of 1883, it differed from that act in not being compulsory upon the railroad companies, for it left to them the election as to which of two modes of taxation they should accept or submit to. It practically gave to the railroad companies the choice of having their property taxed as other property in the territory, by assessment and levy, or of taking the benefits of the act upon the terms and conditions provided therein. It was, by section 7, made a condition of *the acceptance of the [**269** act that "any railroad company assessed under chapter 99 of the Laws of 1883 shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assess-

**Be it enacted by the Legislative Assembly of the Territory of Dakota:*

1. *Percentage of gross earnings to be paid in lieu of other taxes.*—In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, upon the capital stock or business transactions of said railroad company, there shall hereafter be paid into the treasury of this territory an amount equal to a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operating of such railroad, as shall be situated within this territory, both upon territorial and interstate traffic, in case the railroad company owning or operating such line shall accept and become subject to this act as hereinafter provided.

Every such railroad corporation or person owning or operating or that may hereafter own or operate any line of railroad in this territory which shall have accepted this act shall pay to said treasurer each year "for the first five years" after the approval of this act an amount equal to three per centum of such gross earnings, "and for and in each and every year after the expiration of such

ments under said laws of 1883, including taxes on both territorial and interstate earnings, before they can avail themselves of the provisions of this act." It was further provided that any company failing to strictly comply with the provisions of the act within the time provided should be immediately subject to assessment and taxation upon its property in the same manner as the property of individuals was assessed and taxed.

The companies accepting the benefits of the act were not only to pay arrearages under the law of 1883, but were also to pay a percentage of gross earnings for the current year of 1889, it being provided that "if such acceptance was filed on or before the 15th day of February in any year such companies should pay one half of said amount on said 15th day of February and the balance on the 15th day of August next following. Should such acceptance be filed before the 15th day of August and after the 15th day of February in any year, then an amount equal to three per centum of such account shall be paid in full on or before the 15th day of August in each year."

It is shown by the bill that the appellant accepted the provisions and benefits of the act within thirty days after March 7, 1889, and it thereby became liable to pay the required percentage on its gross earnings on or before the 15th of August, 1889. It is also shown by the bill that within thirty days after the passage of the act it paid the arrearages of percentages on its gross earnings accruing under the act of 1883, for the years 1886, 1887, and 1888; but it is not alleged that it made payment, or tender of payment, of the percentage on its gross earnings for the year 1889, or any portion thereof, although by the express provisions of the act a percentage on a portion of such gross earnings was due and payable on the 15th day of August, 1889.

The moneys to be received and collected by the territorial *treasurer under this act [270 from the railroad companies which accepted its provisions were to be apportioned between the territory and the several counties, respectively, through which the railroads run, or in which the companies had lands subject to taxation, in the manner pointed out in section 6 of the act. The several counties, whose auditors are made defendants in the present

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five years an amount equal to two per cent of said gross earnings," and the payment of such amount annually as aforesaid shall be and is in full of any and all other taxation and assessment whatever upon the property aforesaid.

Said payments shall be made, except as hereinafter provided, one half on or before the 15th day of February, and one half on or before the 1st day of August in each year. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company. An abstract shall be furnished by said company to the treasurer of this territory on or before the 1st day of February in each year, the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of such company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers, employés of said company, or other persons, and if any person so examined by the governor or other authorized person shall knowingly or willfully swear falsely, concerning the matter aforesaid, every such person is declared to have committed perjury; and for the purpose of securing to the territory the payment of the aforesaid per centum it is hereby declared that the territory shall have a lien upon the railroad of said company, and upon all property, estate, or effects of said company whatsoever, personal, real, or mixed, and the lien hereby secured to the territory shall have and take precedence of all demands, decrees, and judgments against said company.

2. *When company shall fail to make return.*—If any such railroad company having accepted this act shall fail to make return of its gross earnings as aforesaid, or of any part thereof, at the time and in the manner provided by law, and such default shall continue during the period of thirty days, such company shall be subject to a penalty of an amount equal to ten per cent of the tax imposed upon such company by this act, and the treasurer of the territory shall forthwith ascertain the amount of such percentage justly due from such company, as near as may be, from such evidence as may be available, and shall thereupon collect such amount so ascertained, together with the said penalty thereon.

The amount so ascertained by the territorial treasurer as in this section provided shall, together with the said penalty thereon, be by him entered in the books of his office and such entry when so made shall stand in the place of the report required by law to be made by such company, and shall in all courts within this territory be evidence of the amount of such tax and penalty and of the other facts stated therein in pursuance of this act.

3. *Neglect to pay taxes.*—In case any railroad company which shall have accepted the provisions of this act shall fail or neglect to pay the amount reported at the time and in the manner hereinafter provided, for a period of thirty days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten per centum thereof as a penalty for such failure or neglect to pay.

4. *Territorial treasurer to distrain.*—At any time after the expiration of the period of thirty days after the amount as above provided has become due and payable under the provisions of this act, the territorial treasurer or his deputy shall distrain sufficient goods, chattels, or other movable property, if found within this territory, to pay the said amount due from such corporation, together with the penalty thereon as hereinafter provided, and shall immediately advertise the sale of the same in at least three newspapers published within this territory, stating the time when and the place where such property shall be sold, such sale shall take place at some point on the railroad of such delinquent company, and at least four weeks' notice of the time and place of such sale shall be given; such delinquent company, its successors or assigns, may pay in such amount and penalty at any time before the sale of the property distrained as herein provided, and thereupon further proceedings in connection with such distress shall cease, and the property distrained shall be delivered to the owner thereof.

5. *Land subject to taxation.*—The lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, contracted to be sold or leased; and on or before the first day of April of each year each railroad company having lands within the territory shall return to the county clerk of each county within this territory full and complete lists, verified by the affidavits of such officers of the company having knowledge of the facts, of all lands of such company situated within such county, sold, or contracted to be sold, or leased, during the year ending the last day of December preceding, and the list furnished on or before the first day of April, A. D. 1889, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, prior to the last day of December, 1888.

6. *How taxes apportioned.*—The moneys received and collected by the territorial treasurer in pursuance to this act shall be disposed of by him as follows: In case the railroad company paying such tax owns no land granted in aid of the construction of its railroad, one third of the same shall be retained in the territorial treasury for the use of the territory, and the remainder shall be apportioned among the several counties into or through which

case, were therefore interested in the gross earnings tax which the appellant was required to pay for the year 1889 in lieu of all other ordinary taxes upon its property.

The gross earnings act remained in force until November 2, 1889, when it was repealed by the repugnant provisions contained in the constitution of the state of North Dakota, as adopted and approved by Congress, and the claim is now made by the appellant that the repeal relieves it from liability to pay any percentage on its gross earnings for the year 1889, or any part thereof, because the same was not payable until after 1890; and that it was not liable to assessment and taxation on its property because it had accepted the provisions of the gross earnings act of 1889.

This contention, if correct, would relieve the appellant from any burden in the way of taxation for the year 1889, but such a claim as this cannot possibly be sustained. The act of March 7, 1889, clearly intended that the gross earnings tax, therein provided for, as to all companies which would accept its provisions, should supply revenue for the territory and the counties for the year 1889. It is equally clear from the whole act as a tax law, that the railroad company had to pay the required percentage on its gross earnings for that year, and that such percentage was payable in part on the 15th day of August in that year. It is not therefore correct to say that no part of the gross earnings were payable until 1890; but, if that were not the case, having accepted the provisions of that act and thus becoming liable to pay the designated percentage of its gross earnings in lieu of taxes for the year 1889, that liability would not be discharged by the subsequent repeal of the gross earnings act of 1889. If the company was released from the gross earnings tax by the repeal of the act, its property immediately became subject to assessment and taxation* in [271 the manner provided for the assessment and taxation of property of individuals in the territory, and it would not vitiate any such assessment made on the part of the counties that happened to be made prior to the repeal of the act of 1889. Such assessment would remain in full force and effect after the repeal of the act and until satisfied.

It is next contended by the appellant that its payment of arrearages, claimed to be due under the act of 1883, was a consideration for the exemption of its property from taxation for the year 1889. This position cannot be sustained,

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the railroad or railroads of such companies run, in proportion to the number of miles of main track situated in such counties respectively. In case the railroad company paying such tax owns land granted in aid of the construction of its railroad, then thirty per cent of the tax paid by such company shall be retained in the territorial treasury for the use of the territory, and forty per cent shall be apportioned among the several counties into or through which the railroad or railroads of such company run, in proportion to the number of miles of main track situated in such counties, respectively, and thirty per cent shall be apportioned among the several counties in which lands forming a part of its land grant are situated, in proportion to the number of acres of surveyed and unsold lands in said counties.

7. *Any railroad company.*—Which, at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this territory, may at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99 of the Laws of 1883 shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said laws of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and taxation of the property of individuals of this territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883, by paying all taxes claimed on gross earnings both territorial and interstate, or by filing an account of gross earnings both territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889. Any railroad company that may be hereafter organized in this territory, or that shall hereafter become the owner of or engaged in operating any lines of railroad in this territory, may accept and become subject to the provisions of this act by filing a resolution of its board of directors in the manner as hereinbefore provided.

In case any such railroad company shall accept and become subject to the provisions of this act, it shall at the time of filing such acceptance render an account of gross earnings both territorial and interstate, in the manner as hereinbefore provided, and shall pay at the time of rendering such account, all amounts claimed by the territorial auditor as tax due on the local and interstate earnings of such company for the current or any preceding year, and shall thereafter pay an amount equal to 3 per centum of such account, as follows: If such acceptance is filed on or before the fifteenth day of February in any year, such company shall pay one half of said amount on said fifteenth day of February, and the balance on the fifteenth day of August following. Should such acceptance be filed before the fifteenth day of August and after the fifteenth day of February in any year, then an amount equal to 3 per centum of such account shall be paid in full on or before the fifteenth day of August in each year. Thereafter accounts shall be rendered and payment made in the manner provided in this act; provided, that any company failing to promptly and strictly comply with the provisions herein set forth and to pay all sums herein provided to be paid shall be subject to assessment and taxation in the same manner as individuals.

8. *In case of non-acceptance.*—The railroads and property of all railroad companies owning or operating lines of railway in this territory, which companies shall not accept and become subject to the provisions of this act, shall not be entitled to the exemption in this act contained, but shall be subject to taxation in such manner as shall be provided by law.

9. *Repeal or amendment.*—This act shall be subject to repeal or amendment by any future legislature, and nothing herein contained shall be construed as a repeal of any revenue law now in existence, as applicable to any railroad company which shall not accept the provisions of this act as herein provided.

10. *Effect when.*—This action shall take effect and be in force from and after its passage.

Approved March 7, 1889

for, by the terms of the act of 1889, the payment of those arrearages was simply a condition upon which the railroad company was allowed to accept the benefits of that act, which was not an act exempting the property of the railroad company from taxation, but merely substituted one mode of taxation for another upon the terms and conditions specified. One of the terms on which the railroad was allowed to accept the gross earnings tax, in lieu of the ordinary tax upon its property, was that it should pay the arrearages which the territory claimed under the act of 1883. No exemption from taxation for the year 1889 was contemplated. The railroads accepting the act were required to pay the gross earnings tax for that year in addition to such arrearages. It can not, therefore, be properly claimed that the payment of these arrearages constituted a consideration for any exemption from taxation, or that such payment raised any equity on the part of the appellant against the payment of taxes for 1889, whether such taxes were imposed in the shape of a percentage on the gross earnings for that year, or in the shape of the ordinary assessment upon its property.

There is nothing in the allegations of the bill showing affirmatively that the company did not possess the equitable title or ownership in the lands described and assessed. Nor do the averments of the bill negative the fact that the appellant was properly chargeable with taxes on the lands coming within the grant of July 2, 1864, and within the limits of the line of definite location of its road. Payment of the gross earnings tax, imposed by the act of 1889, would 272| have discharged *all claims for taxes upon the company's lands for that year, but no ground is shown by the bill for releasing the appellant for the payment of either the percentage tax on its gross earnings, or from the payment of the assessment upon its lands made by the county auditors. By section 7 of the act of 1889, its failure to promptly and strictly comply with the provisions thereof, and pay all sums therein provided to be paid, subjected the company to assessment and taxation in the same manner as individuals. It did not comply with the provisions of the act in paying the percentage of gross earnings due on the 15th day of August, 1889, and thereupon its property became liable to assessment and taxation as the property of individuals in the several counties

Being liable to pay either the percentage on gross earnings in accordance with the provisions of the act of 1889, or the tax upon its lands, as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of those modes of taxation.

In *Taylor* v. *Scott* ("*State R. Tax Cases*") 92 U. S. 575, 616, 617 [23: 663, 674], the rule is established that before an injunction will be granted in such cases as the present, a party must pay or tender what can be seen to be due on the face of the bill, and, speaking for the court in that case, *Mr. Justice* Miller said that the duty of making such a tender or payment before any injunction will be allowed is laid down "as a rule to govern the courts of the United States in their action in such cases." This rule was repeated in *German Nat. Bank* v. *Chicago* v. *Kimball*, 103 U. S. 732, 733 [26: 469], where it was treated as a fatal objection to the bill that there was no offer to pay any sum as a tax which the party ought to pay, and, again speaking for this court, *Mr. Justice* Miller there said: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay," etc.

Applying this rule to the present case, it is clear that the *appellant's bill was prop-[273 erly dismissed for failing to pay, or tender to pay, taxes which he ought to have paid on its property, or, in lieu thereof a percentage of its gross earnings.

Our response, therefore, to the eighth question certified is, that the bill was without equity, because of the failure to aver that the plaintiff had tendered or paid the gross earnings percentage for the year 1889 (or the tax assessed by the county auditors) and was not entitled to the equitable relief prayed without first tendering or paying such taxes.

The answer of the court to that question will accordingly be certified to the Circuit Court of Appeals for the Eighth Circuit.

Mr. Justice **Brewer** dissented.

JACOB C. MANN, *Appt.*,
v.
THE TACOMA LAND COMPANY.

(See S. C. Reporter's ed. 273-286.)

Tide lands—legislation of Congress—public lands—Valentine scrip—state of Washington.

1. The title to tide lands is in the state.
2. The general legislation of Congress in respect to public lands does not extend to tide lands.
3. The term "public lands" does not include tide lands; the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.
4. The holders of the Valentine scrip issued under the Act of Congress of April 5, 1872, had no right to locate the same on tide lands, and the entry of such lands in the local land office, and the receipt issued by the local land officers were unauthorized acts and gave no right to a patent.
5. The state of Washington, when it excluded from its claim of title lands which the government had in the due administration of its land department disposed of by a patent did not mean thereby to exclude every tract for which a local

NOTE.—*As to pre-exemption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands: how construed, see note to Watts v. Lindsey, 5: 423.

As to title to water by appropriation; common law rule: rule of mining states, see note to Atchison v. Peterson, 22: 414.

land officer might wrongfully issue a receiver's receipt.

[No. 875.]

Argued April 18, 19, 1894. Decided April 30, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Washington, sustaining a demurrer and dismissing a suit in equity brought by Jacob C. Mann, plaintiff, against The Tacoma Land Company, defendant, to restrain the defendant from entering and trespassing upon certain premises. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On July 12, 1890, appellant as plaintiff filed his bill in the Circuit Court of the United States for the District of Washington to restrain the defendant from entering and trespassing upon certain premises. Subsequently, by leave of the court, an amended bill was filed. In that, plaintiff claimed title to three separate tracts. The allegations as to one were as follows:

"2. That on the 29th day of October, 1889, **274**]the following *described premises were unoccupied and unappropriated lands of the United States, not mineral, and unsurveyed, to wit: Commencing at a point which is three thousand nine hundred and sixty feet west of the southeast corner of section 34, in township 21 north, of range 3 east, of the Willamette meridian, running thence north thirteen hundred and twenty feet, thence west thirteen hundred and twenty feet, thence south thirteen hundred and twenty feet, thence east thirteen hundred and twenty feet to place of beginning, and containing forty acres.

"3. That on the said 29th day of October, 1889, your orator, under and by virtue of an Act of the Congress of the United States, entitled 'An Act for the Relief of Thomas B. Valentine,' approved April 5, 1872, selected said tract of land as aforesaid described, at the United States land office at Seattle, Washington territory, that being the land office for the district in which said lands were situated, and thereupon filed with the register and receiver of said land office certificate of location No. E. 222 for forty acres, issued by virtue of a decree rendered by the Supreme Court of the United States upon the 6th day of January, 1874, for the claim of Thomas B. Valentine, or his legal assignee, under said Act of Congress aforesaid, together with a description by metes and bounds of said described premises and a map of said tract, and on the 30th day of October, 1889, said selection was allowed, and your orator received from said register and receiver a certificate for said lands, entitling your orator to a patent to said lands when the same should have been surveyed by authority of the government of the United States.

"4. That by virtue of said selection and certificate your orator is the owner of said described premises and entitled to the sole and exclusive possession of the same."

The title to the other two tracts was acquired in a similar way, except that plaintiff did not claim to have himself entered them, but only to hold by deed from the locators. The character of the lands and the use to which plaintiff intended to put them were thus stated:

"14. That all the lands described in this amended bill are *lands over which the [**275** tide ebbs and flows to a distance of 80 chains, and are what are designated on the plats and surveys of the United States as 'mud flats bare at low water,' and are overflowed at high water at a uniform depth of from 2 to 4 feet by the waters of Commencement bay, at the head of Puget Sound, in Pierce county, state of Washington, and are situated about three fourths of a mile from the line of low water of said Commencement bay and at the mouth of the stream known as 'Puyallup river,' and are valuable and suitable for the construction of wharves, warehouses, commercial purposes, and for agricultural uses."

"19. That your orator intends filling in said lands aforesaid and erecting thereon warehouses and other buildings, over and across which lands general traffic may be carried on to and from the city of Tacoma."

It is upon these lands that the bill alleged that the defendant was trespassing. The certificates of location under which these tracts were entered, being what is known as "Valentine scrip," were issued under the authority of the Act of Congress of April 5, 1872, entitled "An Act for the Relief of Thomas B. Valentine," which authorized the Circuit Court of the United States for the District of California to hear and decide upon the merits of the claim of Thomas B. Valentine to a certain specified Mexican grant. The third section of the Act is as follows:

"Sec. 3. That an appeal shall be taken from the final decision and decree of the said circuit court to the Supreme Court of the United States, by either party, in accordance with the provisions of the tenth section of said Act of March third, eighteen hundred and fifty-one, within six months after the rendition of such final decision; and a decree under the provisions of this Act, in favor of said claim, shall not affect any adverse right or title to the lands described in said decree; but in lieu thereof, the claimant, or his legal representatives, may select, and shall be allowed, patents for, an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States land laws, and, if *unsurveyed when taken, [**276** to conform, when surveyed, to the general system of United States land surveys; and the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall be authorized to issue scrip, in legal subdivisions, to the said Valentine, or his legal representatives, in accordance with the provisions of this Act: *Provided*, That no decree in favor of said Valentine shall be executed nor be of any force or effect against any person or persons; nor shall land scrip or patents issue as hereinbefore provided, unless the said Valentine shall first execute and deliver to the Commissioner of

the General Land Office a deed conveying to the United States all his right, title, and interest to the lands covered by said Miranda grant." 17 Stat. at L. 649.

Proceedings were had under this statute in the circuit court, and a decree was rendered in favor of the claimant, which afterwards and on January 6, 1874, was affirmed by this court. The facts respecting this grant are thus stated by the Secretary of the Interior in a decision quoted by plaintiff's counsel:

"On investigation of the facts relative to the Miranda grant, I find that on October 8, 1844, Manuel Micheltorena, Mexican governor of California, granted to Juan Miranda the place known as Rancho Arroyo San Antonio, bounded by the laguna and arroyo of the same name and the pass and estero of Petaluma, containing three square leagues, more or less.

"California was acquired from Mexico by the treaty of Guadalupe Hidalgo, and by the eighth article of said treaty the United States stipulated to protect the property rights of all residents within the ceded territory in the same manner that the property rights of its own citizens were protected.

"This treaty did not, *proprio vigore*, operate as a confirmation of Mexican grants, but on the contrary, being executory in character, it addressed itself to the political department of the government, and the duty devolved upon Congress of providing means for its enforcement.

"Congress, therefore, by Act approved March 3, 1851, established a board of land commissioners, with power to investigate the validity of said grants and titles, with right to appeal to the United States district and Supreme Courts.

277] *"The Miranda grant was presented for confirmation to the board of land commissioners by Valentine, and also by the grantees of one Ortega, who was Miranda's son-in-law. These parties claimed adversely to each other, and Valentine finally withdrew his claim, intending, it is alleged, to intervene in the district court. Before the case was reached for trial in said court the Supreme Court had rendered a decision which precluded him from asserting his title by intervention. Ortega's claim was, therefore, prosecuted by his grantees, until finally rejected by the Supreme Court of the United States.

"After the claim of the grantees of Ortega was rejected the lands were disposed of like other public lands, and the proceeds covered into the treasury.

"Subsequently, Valentine produced satisfactory evidence that the land had been lawfully granted to Miranda by the Mexican authorities and conveyed to him by mesne conveyances, and Congress passed the Act granting to Valentine an amount of scrip equal to the amount of land contained in said grant." 6 Copp, Land Owner, 28.

To this bill a demurrer was filed, and on October 22, 1890, a decree was entered sustaining the demurrer and dismissing the bill, from which decree of dismissal plaintiff has brought his appeal to this court.

Messrs. **Theodore H. N. McPherson** and **Edwin B. Smith**, for appellant:

These certificates practically conveyed the land and were evidences of title thereto, supporting a bill in equity brought to protect the same, almost *ex necessitate*, before the patent issues; although ejectment for pre empted land, or any other action at law (for such land) can only be maintained upon a patent; but scrip like ours is the full equivalent of a patent.

Carroll v. *Safford*, 44 U. S. 3 How. 461 (11: 680); *Langdon* v. *Sherwood*, 124 U.S. 74 (31:344); *Pike* v. *Wassell*, 94 U. S. 715 (24: 310).

The selections by Valentine's assignees passed the fee out of the United States and vested it in them as grantees. The scrip and application became the instruments of title and conferred on them the legal title as effectually as could have been done by a patent.

Larriviere v. *Madegan*, 1 Dill. 457.

The statutory scrip makes Mr. Valentine's selection under it a "taking" of the selected land, which "shall" be followed by the usual formal patent.

Cushman v. *Smith*, 34 Me. 247; *Bonaparte* v. *Camden & A. R. Co.* Baldw. 225; *Re Dorrance St.* 4 R. I. 245.

Having authority from Congress to take by selection, all the proceedings required to be thereafter had in the premises are purely ministerial; not themselves a transfer of title, but evidence of one already completed, to which this statute imperatively entitles the scrip holder.

Missouri, K. & T. R. Co. v. *Kansas Pac. R. Co.* 97 U. S. 498 (24: 1096); *Morrow* v. *Whitney*, 95 U. S. 555 (24: 457), 112 U. S. 695 (28: 872.

Where an act is directed, or power to perform it is conferred, there is included all necessary, or usual, or proper modes and means of accomplishing the end.

Valentine v. *Piper*, 22 Pick. 92, 33 Am. Rep. 715; *Decker* v. *Freeman*, 3 Me. 338; Story, Sales, § 70; 17 Ops. Atty. Gen. 100, 101.

Mann acquired a vested interest in the land when his selection and location were made.

Simmons v. *Wagner*, 101 U. S. 260 (25: 910); *Wirth* v. *Branson*, 98 U. S. 121 (25: 87); *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 (18: 339).

The scrip and application became the instruments of title, and conferred upon him the legal title as effectually as could have been done by the issue of the patent.

Larriviere v. *Madegan*, 1 Dill. 457; *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 513 (10: 271); *United States* v. *Hughes*, 52 U. S. 11 How 568 (13: 816).

A grant by government of a certain quantity of land, to be afterwards surveyed and laid off within a territory, vests in the grantee a present and immediate interest.

Fremont v. *United States*, 58 U. S. 17 How. 542 (15: 241); *Tameling* v. *United States Freehold & E. Co.* 93 U. S. 663 (23: 1003); *Palmer* v. *Low*, 98 U. S. 17 (25: 64).

The effect of selection, under similar statutes, conferring a power to choose has been sufficiently defined by this court.

Lessieur v. *Price*, 53 U. S. 12 How. 59 (13: 893); *Knight* v. *United Land Asso.* 142 U.S. 183 (35: 981).

Messrs. **Samuel Dickson** and **Frederick D. McKenney**, for appellee:

If the Act of Congress of April 5, 1872, authorized the location of the scrip upon the shores of navigable waters, it would be unconstitutional. No case has yet arisen calling for a decision of this question.

Barney v. *Keokuk*, 94 U. S. 338 (24: 228); *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387 (36: 1018).

The shore below the common high water mark belongs to the state as trustee for the public.

3 Kent, Com. 427; *Barker* v. *Bates*, 13 Pick. 255, 23 Am. Dec. 678; *State* v. *Sargent*, 45 Conn. 372; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 414 (10: 1014); *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 68 (23: 63); *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 490 (26: 1150); *Huse* v. *Glover*, 119 U. S. 546 (30: 489); Gould, Waters, § 21.

The Act of 1872 did not authorize the location of the Valentine scrip upon the shores and tide waters of the United States.

Savannah v. *State*, 4 Ga. 26; *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96).

Soil which is flowed by tide, whether reclaimed from the water or not, is not land.

United States v. *Gratiot*, 39 U. S. 14 Pet. 537 (10: 578).

Under the general laws of the states the land could not be appropriated under the bed of navigable rivers.

Freytag v. *Powell*, 1 Wharf. 536; *Poor* v. *McClure*, 77 Pa. 219; *Norfolk* v. *Cook*, 27 Gratt. 433; *Chapman* v. *Hoskins*, 2 Md. Ch. 485; *Tatum* v. *Sawyer*, 9 N. C. 226; *Taylor* v. *Underhill*, 40 Cal. 471; *People* v. *Morrill*, 26 Cal. 336; *Haight* v. *Keokuk*, 4 Iowa, 213; *Meyers* v. *St. Louis*, 8 Mo. App. 236; *Carson* v. *Blazer*, 2 Binn. 475, 4 Am. Dec. 463; *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272 (19: 74).

The words "public lands" mean such lands as are subject to sale or of disposal under the general laws.

Newhall v. *Sanger*, 92 U. S. 761 (23: 769); *Ivanhoe Min. Co.* v. *Keystone Consol. Min. Co.* 102 U. S. 167 (26: 126).

Mr. **Joseph H. Parsons**, for Langie, intervenor.

Mr. Justice **Brewer** delivered the opinion of the court:

The single question in this case is as to the title of plaintiff to the premises. The lands are tide lands, covered and uncovered by the flow and ebb of the tide, and are situated in Commencement bay, near to the city of Tacoma. He does not claim by any grant from the state of Washington, nor by any Act of Congress specifically granting him these lands, or in terms providing for the location of scrip upon tide lands, but insists that, although the statute under which this scrip was issued only authorized its location upon "unoccupied and unappropriated public lands," he had a right to locate it upon these tide lands, and acquire full title thereto.

That the title to tide lands is in the state is a proposition which has been again and again affirmed by this court, some of the earlier opinions going so far as to declare that the United States had no power to grant to individuals such lands at any time, even prior to the admission of the state and during the territorial existence. However, in the recent case of *Shively* v. *Bowlby*, *ante*, p. 331, after a careful review of the authorities, it was held that the denial in those opinions of the power of Congress to make such a grant was not strictly correct; but it was also held that, although Congress could, it had never undertaken by general laws to dispose of such lands, and in the summing up at the close of the opinion it was stated: "The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below highwater mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under *them, to the control of | 284 the states, respectively, when organized and admitted into the Union."

It is unnecessary, in view of this recent examination of the question, to enter into any discussion respecting the same. It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands. There is nothing in the Act authorizing the Valentine scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the scrip might be located on the unoccupied and unappropriated public lands, but the term "public lands" does not include tide lands. As said in *Newhall* v. *Sanger*, 92 U. S. 761 [23: 769]: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23: 634]; *Doolan* v. *Carr*, 125 U. S. 618 [31: 844].

Further, in the Act providing for the admission of Washington, Montana, and the two Dakotas, into the Union (25 Stat. at L. 677) among the conditions imposed was this: "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof." No one can for a moment suppose that it was the thought of Congress to change the whole policy of the government and reserve to the nation the title and control of the soil beneath the tide waters and those of navigable streams. Indeed, in the constitution of Washington (art. 17, § 1) there is an express assertion of the title of the state to the tide lands within its borders.

That there was no intent in the Valentine Scrip Act to make any exception to the general rule is evident not merely from the use of a term having such an accepted meaning, but from the further provision that the land "if unsurveyed when taken, to conform, when surveyed, to the general system of United

States land surveys," for under that general system surveys are not extended to tide lands, nor those under navigable rivers above tide waters.

In *Barney* v. *Keokuk*, 94 U. S. 338 [24: 285] 228], it was said: "The *United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

But it is claimed that there is a peculiar equity attaching to the Valentine scrip because the Miranda grant in fact embraced tide lands, and was of great value—$2,000,000 as stated in the debate in Congress. It is said by counsel that "the intention of Congress, as indicated by this Act, under the circumstances, was manifestly to give Valentine the right of selection of lands of the United States belonging to the same classes as were to be found in the Miranda grant, which he relinquished. The import of the language is precisely this, and the contract to be equal requires the construction which the language plainly means. Any other construction would be against the just intentions of the national legislature."

So far as respects the great value of the Miranda grant, it was that which was created by the building up of a city within its borders, and not something which inhered in the land itself. So that when Valentine failed to secure a confirmation of that grant, he was not losing property which was of the value of $2,000,000 when granted by the Mexican government, but only losing the opportunity to appropriate $2,000,000 worth of value created by the labors of others upon lands to which they supposed they had title.

Further, as appears from the statement made by the Secretary of the Interior, he had lost all legal right to this land, for when a commission had been provided for investigating the validity of such claim, he presented his claim for confirmation and then withdrew it. Congress had fulfilled all obligations to him growing out of the treaty with Mexico, and when by his own act he had forfeited his legal claims to the land, it was a mere act of grace by which was given to him the right to select an equal amount of land elsewhere. If Congress had thought that it was necessary in order to do justice that he should be permitted to select an equal quantity of land of like character, it was easy to have expressed that intention. Having failed to do so, and 286] omitted any reference *to tide lands, its donation to him is to be construed as any other grant of the government, and no unexpressed and unsuggested intention should be attributed to Congress—certainly no intention to make the people of the state of Washington, who otherwise would receive these tide lands for their general benefit, suffer by reason of his neglect to properly assert his claim to lands in the state of California. There is, therefore, nothing in this matter of the Valentine scrip to take the case out of the rule laid down in *Shively* v. *Bowlby*.

Reliance is also placed on article 17, section 2, of the constitution of the state of Washington, which reads: "The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States; provided, the same is not impeached for fraud." In respect to this it is enough to say that these lands were not patented. It is doubtless true, as said by this court in *Stark* v. *Starr*, 73 U. S. 6 Wall, 402, 418 [18: 925, 929], that "the right to a patent once vested is treated by the government when dealing with the public lands as equivalent to a patent issued." But here there was no right to a patent. The entry in the local land office, and the receipt issued by the local land officers, were unauthorized acts, and gave no right to a patent; and it cannot be supposed that the state of Washington, when it excluded from its claim of title lands which the government had in the due administration of its land department disposed of by a patent, meant thereby to exclude every tract for which a local land officer might wrongfully issue a receiver's receipt.

These are all the matters involved in this case. We see no error in the ruling of the circuit court, and its decree is affirmed.

MILTON L. BAER, *Plf. in Err.*, [287

v.

MORAN BROTHERS COMPANY, a corporation.

(See S. C. Reporter's ed. 287-289.)

Case followed—tide lands—what are.

1. Mann v. Tacoma Land Co. *ante*, p. 714, followed.
2. The condition of the shore or tide lands is not changed by the magnitude of the surrounding tract which, covered and uncovered by the flow and ebb of the tide, exists between the upland and navigable waters, or the use to which it may subsequently be put.
3. Lands alternately covered and uncovered by the tide and between the dry upland and the navigable waters are "tide lands," and covered by the rule in respect to such lands.

[No. 683.]

Argued April 18, 19, 1894. Decided April 30, 1894.

IN ERROR to the Supreme Court of Washington, to review a judgment of that court, affirming a judgment of the Superior Court of King County in that state, sustaining a demurrer and dismissing a suit brought by Milton L.

NOTE.—*As to navigable waters; what are, in United States; streams and inland waters as highways*, see note to United States v. The Montello, 22: 391.

As to errors in surveys and description in patents for lands; how construed, see note to Watts v. Lindsey, 5: 423.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

That patents for lands may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to title to water by appropriation; common law rule; rule of mining states, see note to Atchison v. Peterson, 22: 414.

As to alluvion or accretion and reliction; right to, and ownership of; by what law title to is determined; rule of division among riparian owners, see note to Kennedy v. Hunt, 12: 829, and to St. Clair County v. Lovingston, 23: 59.

Baer, against Moran Brothers Company, to recover the possession of a tract of land. *Affirmed.*

The facts are stated in the opinion.

Messrs. **T. H. N. McPherson, John H. Mitchell,** *Beriah Brown, Jr.*, and *M. L. Baer* for plaintiff in error.

No counsel for defendant in error.

Mr. W. C. Jones, Atty. Gen. of the State of Washington, for the State of Washington, Intervenor.

Messrs. John P. Fay, F. D. McKenney and *S. F. Phillips*, for George F. Dearborn, Intervenor.

Mr. Joseph H. Parsons, for Louis Langie, Intervenor.

Mr. Justice **Brewer** delivered the opinion of the court:

This case comes before us on error to the supreme court of Washington. The questions are mainly similar to those in the case of *Mann* v. *Tacoma Land Co.* just decided.

The plaintiff described the land in his complaint as "at the time of its selection by said plaintiff unoccupied and unappropriated public land of the United States not mineral, in this, that the said tract of land was situated in the territory of Washington, was a portion of the tide flats, covered and uncovered by the ebb and flow of the tide, was un-**288**| covered at *ordinary low tide and was covered with water at ordinary high tide, and had never been set apart by the United States for any particular use." This shows that the land at the time of its entry was, strictly speaking, tide lands, and, with this as the sole description, there would be nothing to distinguish the case from the one just decided. There is, however, this further description: "Beginning at a point 688 feet south and 660 feet west of the east one fourth post of sec. 6, t'p 24 N., R. 4 E., W. M., thence west 150 feet, thence south 210 feet, thence east 150 feet, thence north 210 feet to place of beginning, being the premises covered by Moran Brothers Company's foundry and machine shops."

Upon this plaintiff contends that the premises are not to be taken as a part of the shore or tide lands bordering on navigable water, inasmuch as they are shown to be devoted to manufacturing uses; that this court will take judicial knowledge of what are known as "mud flats," lying on and adjacent to the waters of Puget Sound, and that the land in dispute is a part of a large tract of over 3000 acres of such "mud flats," extending or a distance of from two and one half miles in length to three miles in width, on the outskirts of a bay on Puget Sound, and near the city of Seattle, as shown by the official maps of the United States Coast and Geodetic Survey. But the averment of the complaint is that the land was unoccupied at the time of its selection by the plaintiff, and its condition as a part of the shore or tide lands is not changed by the magnitude of the surrounding tract which, covered and uncovered by the flow and ebb of the tide, exists between the upland and navigable waters, or the use to which it may subsequently be put.

We do not understand that we can take judicial notice of the nature and extent of the tide lands or "mud flats" in the vicinity of this particular tract. Even if we could, or if the area thereof was shown to be as great as is stated by counsel in the brief, it would not change the fact that the land thus alternately covered and uncovered and between the dry upland and the navigable water is land which may be used in facilitating approach to the navigable waters from the upland, *and is strictly within the des- |289 cription of "tide lands," and covered by the rule in respect to such lands.

We see nothing to distinguish this case from the one just decided, and, therefore, the judgment of the supreme court of the state of Washington is affirmed.

J. W. BRENNAN, *Plff. in Err.*,

v.

CITY OF TITUSVILLE.

(See S. C. Reporter's ed. 289-308.)

License tax—regulation of commerce—power of state—police power—burden upon interstate commerce—tax upon goods—void state law—unconstitutional law.

1. A manufacturer of goods, which are legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods.
2. A regulation as to the manner of sale of subjects of commerce whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is a regulation of commerce.
3. Whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained.
4. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby.
5. Nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress.
6. A license tax required for the sale of goods is in effect a tax upon the goods themselves.
7. A license tax imposed by a state upon an agent of a citizen of another state for the privilege of selling his goods in the former state, is a direct burden on interstate commerce, and therefore beyond the power of the state.

NOTE.—*As to power of Congress to regulate commerce*, see note to Gibbons v. Ogden, 6: 23, and to Brown v. Maryland, 6: 678.

As to tonnage tax, see note to Inman SS. Co. v. Tinker, 24: 118.

As to interstate commerce; regulation of; power of Congress; how far exclusive, see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to Harmon v. Chicago, 37: 216.

8. No state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.

[No. 902.]

Submitted Jan. 5, 1894. Decided April 30, 1894.

IN ERROR to the Supreme Court of the State of Pennsylvania, to review a judgment of that court, affirming the judgment of the court of common pleas of Crawford county, in that state, sentencing J. W. Brennan to pay a fine of $25, and costs for the violation of an ordinance imposing a tax for a license for soliciting orders for and selling goods in the city of Titusville. *Reversed, and case remanded for further proceeding.*

Statement by *Mr. Justice* **Brewer:**

On May 12, 1890, plaintiff in error was convicted in the court of the city recorder of the city of Titusville, Pennsylvania, of a violation of an ordinance, entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and sentenced to pay a fine of $25 and costs. From that sentence he appealed to the court of common pleas of Crawford county. In that court the case was tried upon the following agreed statement of facts:

"1. J. A. Shephard is a manufacturer of picture frames and maker of portraits, residing in Chicago, in the state of Illinois, of which state he is a citizen and in which city he has his manufactory and place of business. **290]** *"2. In the prosecution of said business he employs agents who, under his direction, solicit orders for pictures and picture frames in the state of Pennsylvania and in other states of the Union, by going personally to residents and citizens of said state of Pennsylvania and other states and exhibiting samples of his pictures and frames, going when necessary, from house to house in said state of Pennsylvania and other states.

"3. The defendant, J. W. Brennan, was an agent of the said J. A. Shephard, employed by him to travel and solicit orders for said pictures and frames in the manner stated, upon a salary and also upon commission upon the amount of his sales, at the time of his arrest, May 25, 1889, upon a warrant issued by the authorities of the city of Titusville, in the state of Pennsylvania.

"4. Upon receiving orders for pictures and picture frames, the agents of the said J. A. Shephard forwarded the same to him at Chicago, in the state of Illinois, where the goods were made, and from there shipped by said J. A. Shephard to the purchasers in Titusville, in the state of Pennsylvania, by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shephard, at Chicago, in the state of Illinois. J. W. Brennan, the agent employed by J. A. Shephard, was engaged in conducting the business in the manner stated at the time of his arrest, May 25, 1889. The said J. W. Brennan, at the time of his arrest and before, had not been otherwise employed than as stated, and was acting solely for the said Shephard.

"5. The city of Titusville had enacted an ordinance, in force at the date of the arrest of said J. W. Brennan, which in the 12th section thereof provides in words and figures as follows:

"'That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums, according to the* time for which said li- **[291** cense shall be granted, viz: For one day, one dollar and fifty cents; one week, $5.00; three months, $10.00; one year, twenty-five dollars; provided, that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers residing and doing business in said city.'

"And the said ordinance further provides, in the 18th section thereof, as follows:

"'That any person or persons failing to obtain a license as required by this ordinance shall, upon conviction thereof before any magistrate, alderman, or justice of the peace of said city, forfeit and pay a fine not exceeding one hundred dollars, nor less than the amount required for a license to such person or persons, together with twenty per cent added as a penalty, with costs of suit; and in default of payment thereof shall undergo a confinement in the city or county prison for a period not exceeding ninety days, or perform hard labor on the streets or elsewhere in said city not exceeding such period.'

"6. At the time of his arrest the defendant Brennan was not and had not been selling by sample to manufacturers or licensed merchants or dealers residing in said city of Titusville, and was not, within the provision of the 12th section of said ordinance, soliciting to such excepted persons.

"7. The defendant, J. W. Brennan, at the time of his arrest had not obtained a license as required by said ordinance, and had not paid to the treasurer of the city of Titusville the license fee provided by said ordinance.

"8. The defendant was arrested, tried, convicted, and sentenced to pay a fine of $25 and costs of suit under said ordinance, on the 29th day of May, 1889, before W. M. Dame, city recorder of the city of Titusville.

"If the court should be of opinion upon the facts stated that the defendant, J. W. Brennan, was liable to take out a license and pay the license fee provided by said ordinance, then judgment to be entered for the plaintiff, the city of Titusville, for $25 and costs of suit. If the court should be of opinion that said Brennan was not so liable then judgment to be entered for the defendant, with costs of suit."

*Upon these facts, on May 20, that **[292** court entered judgment against him for $25 and costs. From that judgment he appealed to the supreme court of the state, which court, on October 5, 1891, affirmed the judgment.

Thereupon he sued out a writ of error from this court.

Mr. **Roger Sherman,** for plaintiff in error:

Until the sale has been completed in the state to which the article has been imported, and it has thereby become mingled in the common mass of property within that state, there exists no power in the state, nor in any of her municipalities, to interfere, by any action with the free exportation of the commodity.

Robbins v. *Shelby County Taxing Dist.* 120 U. S. 497 (30: 697), 1 Inters. Com. Rep. 45; *Leisy* v. *Hardin*, 135 U. S. 100 (34:128), 3 Inters. Com. Rep. 36.

The business carried on was strictly within the rule prohibiting state or municipal interference.

A state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce.

Rothermel v. *Meyerle*, 3 Inters. Com. Rep. 315, 9 L. R. A. 366, 136 Pa. 250-256

This was an indirect tax upon Mr. Shephard's business and property.

Welton v. *Missouri*, 91 U. S. 275 (23: 347); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *McCall* v. *California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181; *Minnesota* v. *Barber*, 136 U. S. 314 (34: 455), 3 Inters. Com. Rep. 185; *Patterson* v. *Kentucky*, 97 U. S. 501 (24: 1115); *Crowley* v. *Christensen*, 137 U. S. 86 (34: 620); *Brimmer* v. *Rebman*, 138 U. S. 78 (34: 862), 3 Inters. Com. Rep. 485.

Mr. **George A. Chase,** for defendant in error:

All rights are held subject to the police power of the state.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 25 (24: 989.)

The police power extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects.

Barbier v. *Connolly*, 113 U. S. 27 (28: 923).

The 14th Amendment was not designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.

Hayes v. *Missouri*, 120 U. S. 68 (30: 578); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253); *Munn* v. *Illinois*, 94 U. S. 113 (24: 77); *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595.

The authority of the states over commerce not wholly internal, particularly in respect to the police power, and their power to tax the subjects of interstate commerce is evidenced by the recent decisions of this court in several important cases.

Maine v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Philadelphia & S. Mail SS. Co.* v. *Pennsylvania*, 122 U. S. 326 (30: 1200); *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57; *Budd* v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45.

The fee required to be paid by the ordinance under which this suit originated is not a tax, in the common acceptance of that term, but a license fee.

Cooley, Taxn. 386; Burroughs, Taxn. § 79; Cooley, Const. Lim. 202, and note.

If it be a license fee or license tax it cannot be a regulation of commerce.

License Tax Cases, 72 U. S. 5 Wall. 471 (18: 500); *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479 (21: 470); *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418 (20: 449).

It is competent for the legislature to grant a city or town power to require the payment of money as the condition of exercising particular employment. This is not in the nature of a tax which must be general, but of an excise on special vocations.

Dill. Mun. Corp. (4th ed.) § 357, note 3 and cases cited.

This power is recognized and affirmed by the supreme court of Pennsylvania in several cases.

Warren Borough v. *Geer*, 117 Pa. 207; *Com.* v. *Gardner*, 7 L. R. A. 666, 133 Pa. 284; *Titusville* v. *Brennan*, 14 L. R. A. 100, 143 Pa. 642.

Mr. Justice **Brewer** delivered the opinion of the court:

The question in this case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state *can send an agent into another state [298] to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods.

It is true, in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the state can tax for the privilege of selling to one class it can for selling to another, or to all. In either case it is a restriction on the right to sell, and a burden on lawful commerce between the citizens of two states. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, is surely a regulation of commerce. It must be borne in mind that the goods which the defendant was engaged in selling, to wit, pictures and pictures frames, are open to no condemnation, and are unchallenged subjects of commerce. There is no charge of dealing in obscene or indecent pictures, or that the pictures, or the frames, were in any manner dangerous to the health, morals, or general welfare of the community. It must also be borne in mind that the ordinance is not one designed to protect from imposition and wrong either minors, habitual drunkards, or persons under any other affliction or disability. There is no discrimina-

tion except between manufacturers and licensed merchants on the one hand, and the rest of the community on the other, and unless it be a matter of just police regulation to tax for the privilege of selling to manufacturers and merchants it cannot be to tax for the privilege of selling to the rest of the community. The same observation may also be made in respect to the places and manner in which the sales were charged to have been made. It is as much within the scope of the police power to restrain parties from going to a store or manufactory as from going to a dwelling-house for the purposes of making a sale. We do not mean to say that none of these matters to which we have referred are 299] *within the reach of the police power; but simply that the conditions on the one side are no more within its reach than those on the other, so that if, under the excuse of an exercise of the police power, this ordinance can be sustained, and sales in the manner therein named be restricted, by an equally legitimate exercise of that power almost any sale could be prevented.

But again, this license does not purport to be exacted in the exercise of the police but rather of the taxing power. The statute under which the ordinance in question was passed is found in Laws of Pennsylvania, 1874, pages 230 to 271. Clause 4 of section 20, page 239, grants authority "to levy and collect license tax on . . . hawkers, peddlers, . . . merchants of all kinds, . . . and regulate the same by ordinance."

The ordinance itself is entitled "An ordinance to provide for the levy and collection for general revenue purposes of annual license taxes in the city of Titusville," and the special section requires a license for transacting business, the license being graded in amount by the time for which it is obtained. This license, therefore, the failure to take out which is the offense complained of, and for which defendant was sentenced, is a license for "general revenue purposes" within the very declarations of the ordinance. Even if those declarations had been the reverse, and the license in terms been declared to be exacted as a police regulation, that would not conclude this question, for whatever may be the reason given to justify, or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained. Thus, in *New Orleans Gas Light Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661 [29: 516, 520], this court, by *Mr. Justice* Harlan, said:

"Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.

"Illustrations of interference with the rightful authority of the general government by state legislation which was *defended [300 upon the ground that it was enacted under the police power, are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several states. In *Henderson* v. *Wickham*, 92 U. S. 259 [23: 543], the court, speaking by *Mr. Justice* Miller, while declining to decide whether in the absence of action by Congress, the states can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving from foreign countries, said, that no definition of the police power, and 'no urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' (p. 271.) *Chy Lung* v. *Freeman*, 92 U. S. 275 [23: 550]. And in *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527], *Mr. Justice* Strong, delivering the opinion of the court said that 'the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.'"

In *Walling* v. *Michigan*, 116 U. S. 446, 460 [29: 691, 695], in the opinion delivered by *Mr. Justice* Bradley, it was said: "The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby."

In *Leisy* v. *Hardin*, 135 U. S. 100, 108 [34: 128, 132], 3 Inters. Com. Rep. 36, *Mr. Chief Justice* Fuller commenced the opinion of the court with this general statement of the law applicable to questions of this kind:

"The power vested in Congress 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is coextensive with the subject on which it acts and cannot be stopped at the external *boundary of a state, [301 but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 [6: 23]; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678].

"And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the state, unless placed there by congressional action."

And, in the still later case of *Crutcher* v. *Kentucky*, 141 U. S. 47, 59 [35: 649, 652], *Mr. Justice* Bradley referred to the matter in these words:

"But the main argument in support of the decision of the court of appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

So in the case of *Minnesota* v. *Barber*, 136 U. S. 313 [34: 455], 3 Inters. Com. Rep. 185, in which a law of the state of Minnesota, ostensibly a law for inspection of meats, was declared unconstitutional, the court distinguished in the opinion by *Mr. Justice* Harlan between that which is mere inspection and in the legitimate exercise of the police power, and that which, under the guise of inspection, is a direct burden upon and obstruction to interstate commerce. Very similar to this was the case of *Brimmer* v. *Rebman*, 138 U. S. 78 [34: 862], 3 Inters. Com. Rep. 485, in which also an inspection statute of the state of Virginia was set aside for the same reason.

Because a license may be required in the exercise of the police power it does not follow that every license rests for its validity upon such police power. A state may legitimately make a license for the privilege of doing a business one means of taxation, and that such was the purpose of this ordinance 302] *is obvious, not merely from the fact that in the title it is declared to be for "general revenue purposes," but also from the further fact that, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which by the ordinance a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city.

Even if it be that we are concluded by the opinion of the supreme court of the state that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 444 [6: 678, 687], in which a state law requiring an importer to take out a license and pay $50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution. *Chief Justice* Marshall said:

"But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a* particular mode of doing the forbid- [303 den thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made."

In *Welton* v. *Missouri*, 91 U. S. 275, 278 [23: 347, 348], *Mr. Justice* Field said:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves."

In *Leloup* v. *Mobile*, 127 U. S. 640, 645 [32: 311, 313], 2 Inters. Com. Rep. 134, are these words from *Mr. Justice* Bradley:

"Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a state may lawfully exact it it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And notwithstanding the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and to that extent to regulate it.

These questions of interference by state regulations with interstate commerce have been frequently before this court, and it may not be unwise to examine a few of them. *Welton* v. *Missouri*, 91 U. S. 275 [23: 347], presented these facts: Welton was indicted and convicted for acting as a peddler under a statute defining a peddler to be one "going from place to place to sell" goods not the growth, produce, or manufacture of the state, and prohibiting any one from peddling without a license. The conviction was set aside by this court. *It is true that the case [304 turned largely upon the fact of discrimination between products of other states and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.

Robbins v. *Shelby County Taxing Dist.* 120 U. S. 489 [30: 694], 1 Inters. Com. Rep. 45,

was a case closely in point. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sales of goods for a Cincinnati firm, exhibiting samples for the purpose of effecting such sales, his employment being that which is usually denominated that of a drummer. This business was declared by a statute of Tennessee to be a privilege for which a license tax was required. Robbins was convicted of a violation of that statute. The statute made no discrimination between those who represented business houses out of the state and those representing like houses within the state. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the ground that whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for business houses outside of the state (and who were, therefore, engaged in interstate commerce) any burden by way of a license tax. The opinion by *Mr. Justice* Bradley is elaborate and enters fully into a discussion of the question, citing many authorities. It affirms in the strongest language the exclusive power of Congress over interstate commerce; that its failure to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and that whatever may be the extent to which the police power of the state can go, it cannot go so far as to uphold any regulations directly affecting interstate commerce.

In the case of *Leloup* v. *Mobile*, 127 U. S. 640 [32: 311], 2 Inters. Com. Rep. 134, a license tax sought to be imposed by the state upon a telegraph company engaged in interstate commerce, was declared beyond the powers of the state.

Asher v. *Texas*, 128 U. S. 129 [32: 368], 2 Inters. Com. Rep. 241. In that case, a statute requiring from "every commercial trav-[305] eler, drummer, salesman, *or solicitor of trade, by sample or otherwise, an annual occupation tax of $35" was declared inoperative so far as it affected one soliciting orders for a business house in another state, and the case of *Robbins* v. *Shelby County Taxing Dist.* was expressly reaffirmed.

The same doctrine was applied in *Stoutenburgh* v. *Hennick*, 129 U. S. 141 [32: 637], to the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license there as required by an act of the legislative assembly of the District of Columbia.

In *Lyng* v. *Michigan*, 135 U. S. 161, 166 [34: 150, 153], 3 Inters. Com. Rep. 143, it was said:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *McCall* v. *California*, 136 U. S. 104 [34: 391], 3 Inters. Com. Rep. 181, it appeared that McCall was an agent in San Francisco, California, engaged in soliciting business for an Eastern railroad corporation, but not engaged in selling tickets for that company, or receiving, or paying out, money on its account, yet it was held that he was engaged in interstate commerce, and the license tax imposed upon him for the privilege of doing such business was unconstitutional. *Mr. Justice* Lamar, reviewing the prior cases and replying to the objection that this only indirectly affected the commerce of the road, said (p. 111 [393]):

"The test is, was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent."

In *Crutcher* v. *Kentucky*, 141 U. S. 47 [35: 649], an act of the state of Kentucky which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business without first obtaining a license from the* state, and, as pre-[306] liminary thereto, that he should satisfy the auditor of the state that the company he represented was possessed of an actual capital of at least $150,000, was held to be a regulation of commerce and invalid. *Mr. Justice* Bradley, speaking for the court, observed (p. 61 [653]):

"The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as at give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

Within the reasoning of these cases it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was, therefore, beyond the power of the state.

The case of *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 1 [36: 601], 4 Inters. Com. Rep. 79, is no departure from the rule of decision so firmly established by the prior cases. At least, no departure was intended, though as shown by the division in the court, and by the dissenting opinion of *Mr. Justice* Harlan, the case was near the boundary line of the state's power. In that case the plaintiffs were in a general commission business, not acting for any particular firm within or without the state. Of the power of a state to impose a license tax upon such a general business there can be no question. The license required by

the statute was $50 per annum, plus .10 on every $100 of capital invested, or, if no capital was invested, 2½ per cent on the gross yearly commissions, and at the time of taking out the license the licensees were required to give bond to make return and pay such 2½ per cent at the end of the year. The plaintiffs, for the year 1887, paid each the sum of $50, 307] and having no capital, *executed bonds for the return and payment of the 2½ per cent. At the end of the year 1887 they failed to make such return and payment, and the authorities refused to issue new licenses for the succeeding year until that was done. Plaintiffs' contention was that, as to one of them, all, and as to the others, most, of their commissions were received on sales of goods forwarded by non-resident parties. On that ground they refused to perform the stipulation of their bonds. It was held that the tax was an entirety, and was not affected by the variable and adventitious results of business from year to year. It could hardly be contended that if the license tax exacted in advance for the privilege of engaging in such business was a fixed sum, a party paying the tax could, on a failure to secure and do any business, recover the tax so paid, for the tax is not for the business done, but for the privilege of engaging in business. So, when the plaintiffs in that case applied for their licenses at the beginning of the year they assumed the whole liability imposed by the state. That all of it was not paid at once did not affect the measure of liability. Suppose the tax, a fixed sum, had been payable one half at the commencement and the other half at the close of the year, would it be thought that, having paid the first half at the commencement of the year, they could resist payment of the second half on the ground that half of their commissions were received on goods shipped from outside the state? In other words, the tax imposed was for the privilege of doing a general commission business within the state, and whatever were the results pecuniarily to the licensees, or the manner in which they carried on business, the fact remained unchanged that the state had, for a stipulated price, granted them this privilege. It was thought by a majority of the court that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the plaintiffs who had sought the privilege of engaging in a general business should be bound by the contracts which they had made with the state therefor. In the opinion in that case, by the *Chief Justice*, the authorities which are referred to in this opinion, were cited, and the general rule was announced 308] *as is here stated. We only refer thus at length to that case to show the distinction between it and this case, and to notice that in the opinion was reaffirmed the proposition that "no state can levy a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on."

For these reasons the judgment of the supreme court of the state of Pennsylvania is reversed, and the case remanded for further proceedings in conformity with this opinion.

MORRIS BLITZ, *Plf. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 308-318.)

Cross examination of witness—refusal of new trial—U. S. Rev. Stat. § 5511—indictment for violation of Federal statute—certainty—one count may refer to another—imprisonment—may commence after expiration of another sentence.

1. The extent to which a cross-examination of witness may be allowed to test his accuracy or credibility, is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error, especially where the question asked on cross-examination has no reference to any matter disclosed on the examination-in-chief.
2. The refusal of a court of the United States to grant a new trial cannot be reviewed upon writ of error.
3. An indictment under U. S. Rev. Stat. § 5511 for knowingly personating and voting under the name of another, should clearly show that the accused actually voted for a representative in Congress.
4. In an indictment for a violation of a Federal statute it should not be left in doubt, or to mere inference, from the words of the indictment, whether the offense charged is one within Federal cognizance.
5. There must be such certainty in an indictment as will inform the accused of the precise nature of the charge against him.
6. One count may refer to matter in any other count of an indictment so as to avoid unnecessary repetitions, even if the count referred to is insufficient.
7. It is not error in a judgment in a criminal case to make one term of imprisonment commence when another terminates.
8. Where the term of imprisonment under the judgment on the third count of an indictment was made to commence from the expiration of the judgment on the first count, and the judgment on the first count is reversed on error, the term of imprisonment on the third count should commence on the date fixed for it to commence on the first count.

[No. 1102.]

Argued April 13, 1894. Decided April 30, 1894.

IN ERROR to the District Court of the United States for the Western District of Missouri, to review a judgment of conviction and sentence to imprisonment of Morris Blitz upon the first and third counts of an indictment for a violation of U. S. Rev. Stat. § 5511, the first count being for unlawfully etc., personating and voting and attempting to vote in the name of another person, etc., and the third

NOTE.—*As to indictment for murder; sufficiency of statement of time and place of death*, see note to Ball v. United States, 35: 377.

As to when one of two persons jointly indicted may be a witness for the other, or for the state against the other, see note to Benson v. United States, 36: 991.

count being for unlawfully, etc., voting at an election for representative in the Congress of the United States more than once. Judgment upon first count reversed, and cause remanded with directions to arrest judgment upon that count; judgment on third count affirmed.

The facts are stated in the opinion.

Mr. **John C. Fay** for plaintiff in error.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

By section 5511 of the Revised Statutes of the United States it is provided:

"If, at any election for representative or delegate in Congress, any person knowingly personates and votes, or attempts to vote, in the name of any other person, whether living, dead, or fictitious; or votes more than once at the same election for any candidate for the same office; or votes at a place where he may not be lawfully entitled to vote; or votes without having a lawful right to vote; or does any unlawful act to secure an opportunity to vote for himself or any other person; or by force, threat, intimidation, bribery, reward, or offer thereof, unlawfully prevents any qualified voter of any state, or of any territory, from freely exercising the right of suffrage, or by any such means induces any voter to refuse to exercise such right, or compels, or induces, by any such means, any officer of an election in any such state or territory to receive a vote from a person not legally qualified or entitled to vote; or interferes in any manner with any officer of such election in the discharge of his duties; or by any such means, or other unlawful means, induces [310] any officer of an election or *officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty or any law regulating the same; or knowingly receives the vote of any person not entitled to vote, or refuses to receive the vote of any person entitled to vote, or aids, counsels, procures, or advises any such voter, person, or officer to do any act hereby made a crime, or omit to do any duty the omission of which is hereby made a crime, or attempt to do so, he shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or by both, and shall pay the costs of the prosecution."

Under this statute an indictment was found against the plaintiff in error in the District Court of the United States for the Western Division of the Western District of Missouri. That indictment was as follows:

"The grand jurors of the United States of America, duly chosen, selected, impaneled, sworn, and charged to inquire of and concerning crimes and offenses in the western district of Missouri and western division thereof, on their oaths present that on the 8th day of November, A. D. 1892, at Kansas City, in the county of Jackson and state of Missouri, there was then and there an election duly and in due form of law had and held for choice of representative in the Congress of the United States, which said place aforesaid was then and there a portion of the fifth congressional district of Missouri.

"And the grand jurors aforesaid upon their oaths aforesaid do further find and present that at the said election one Morris Blitz did then and there unlawfully, falsely, knowingly, and feloniously personate and vote and attempt to vote in the name of another person other than his own name to these grand jurors unknown, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

"And the grand jurors upon their oaths aforesaid, in the name and by the authority of the United States, do further find and present that at said election the said Morris Blitz did *then and there, in the western division [311 of the western district of Missouri, unlawfully, falsely, knowingly, and feloniously vote at a place, to wit, at the sixth precinct in the second ward in said city, where he was not then and there lawfully entitled to vote, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States."

"And the grand jurors aforesaid upon their oaths aforesaid, in the name and by the authority of the United States, do further find and present that at the said election the said Morris Blitz did then and there, in the western division of the western district of Missouri, unlawfully, knowingly, and feloniously vote at said election for a candidate for the same office for representative in the Congress of the United States more than once, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

A verdict of guilty having been returned upon each count of the indictment, the defendant moved for a new trial and in arrest of judgment upon written grounds filed. The motion for a new trial was denied, and the motion in arrest of judgment was sustained as to the second count of the indictment, and overruled as to the first and third counts. Thereupon the defendant was sentenced upon the first count to imprisonment in the penitentiary for the period of one year and a day, such imprisonment to begin on the 28th day of November, 1893—on which day the sentence was pronounced—and, upon the third count, to imprisonment for a like period, to begin upon the expiration of the sentence upon the first count.

1. The first assignment of error relates to the refusal of the court below to permit Wachs, a witness for the prosecution, to answer a certain question propounded to him on cross examination. Upon examination-in-chief the witness stated that he was a special deputy of the United States marshal at the general election in November, 1892; that during the whole of the day of the election he was at the voting place in precinct number six, in Kansas City, Missouri, and that he saw *Blitz, whom he [312 had known by sight for about three years, vote twice at that poll, once in the morning about 10 o'clock, and again in the afternoon between three and four o'clock. Upon cross-examination he was asked, "Why did you not arrest Blitz when you saw that he had voted?" The

witness was not allowed to answer this question, and to that action of the court the defendant excepted.

The question was clearly irrelevant, and was properly excluded. The reasons, whatever they may have been, that induced the witness not to arrest the defendant when the latter voted the second time at the same election, did not throw any light upon the issue to be determined. If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose—especially where, as in this case, the question had no reference to any matter disclosed by the examination in-chief—is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inquiry whether the defendant is guilty or not guilty of the specific offense charged in the indictment.

2. The overruling of the motion for new trial is next assigned for error. We had supposed that it was well undertood by the bar that the refusal of a court of the United States to grant a new trial cannot be reviewed upon writ of error. *Parsons* v. *Bedford*, 28 U. S. 3 Pet. 133, 447 [7: 782, 737]; *New York Cen & H. R. R. Co.* v. *Fraloff*, 100 U. S 24 [25: 531]; *Wabash R. Co.* v. *McDaniels*, 107 U. S. 456 [27: 606].

3. The third assignment of error relates to the overruling of the motion to arrest the judgment upon the first and third counts of the indictment.

We are of opinion that this motion should have been sustained in respect to the first count. The statute makes it an offense for any person to knowingly personate and vote, or attempt to vote, in the name of another person, whether living, dead, or fictitious, at an election for representative or delegate in Congress. It appears in **313**] this case—and if it did *not appear, the court would judicially know—that the election referred to in the introductory part of the indictment was a general one at which voters were at liberty to vote at the same poll, by printed ballot, not only for a representative in Congress, but for state officers, including presidential electors. It was one election for all such officers, and the exercise of the privilege of voting was manifested by one act upon the part of the voter, namely, depositing in the ballot box a general ballot showing, upon its face, for what officers he voted.

The first count charged that the defendant knowingly personated and voted, and attempted to vote, in the name of another person to the grand jurors unknown, at an election had and held for choice of representative in the Congress of the United States. But that was not, except by inference, a charge that the defendant, in fact, voted for representative in Congress. He may have voted only for state officers, and yet it could be said, not unreasonably, that he voted at an election had and held for representative in Congress. If, in voting for a state officer at such election, he knowingly personated and voted in the name of another, it was an offense against the state, punishable alone by the state, although the general election at which he voted was one at which a representative in Congress was chosen. The object of section 5511 was to prevent frauds that would affect the vote for representatives in Congress, and not to bring elections for state officers under the control of the general government. It was consequently held, in Coy's case, that a conspiracy by unlawful means to induce the officers of election, appointed by the state, to omit the duty imposed upon them by the state law, in respect to the custody and safe keeping of sealed returns showing the results of an election held for both state officers and for representatives in Congress, was an offense against the United States, although the only purpose of the conspirators may have been to obtain the custody of such returns for the purpose of fraudulently changing them so far as they applied to certain state officers. This court, speaking by *Mr. Justice* Miller, said: "The object to be *attained by these acts [**314** of Congress is to guard against the danger and the opportunity of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result." Again: "The manifest purpose of both systems of legislation is to remove the ballot box as well as the certificates of the votes cast from all possible opportunity of falsification, forgery, or destruction; and to say that the mere careless omission, or the want of an intention on the part of persons who are alleged to have acted feloniously in the violation of those laws, excuses them because they did not intend to violate their provisions as to all the persons voted for at such an election, although they might have intended to effect the result as regard some of them, is manifestly contrary to common sense, and is not supported by any sound authority." *Ex parte Coy*, 127 U. S. 731, 754, 755 [32: 274, 279].

It is not to be inferred from the decision in that case that section 5511 is applicable to any act or omission of duty upon the part of an officer of election, or of a voter or other person, except such act or omission of duty as affected or might affect the integrity of the election for a representative in Congress. The conspiracy charged in that case did imperil the integrity of the vote for representative in Congress, because the returns of the election related to representative in Congress as well as to state officers, and were liable to be falsified if they passed, before certificates of election were issued, into the hands of unauthorized persons. But this reasoning has no application to the present case. Voting, in the name of another, for a state officer, cannot possibly affect the integrity of an election for representative in Congress. With frauds *of that [**315** character the national government has no concern, and, therefore, an indictment under sec-

tion 5511 for knowingly personating and voting under the name of another, should clearly show that the accused actually voted for a representative in Congress, and not simply that in voting he falsely personated another at a general election at which such representative was or could have been chosen. In cases like the present one, it should not be left in doubt, or to mere inference, from the words of the indictment, whether the offense charged was was one within Federal cognizance. *United States* v. *Morrissey*, 32 Fed. Rep. 147; *United States* v. *Seaman*, 23 Fed. Rep. 882. The general rule that an indictment for an offense purely statutory is sufficient if it pursues substantially the words of the statute, is subject to the qualification, fundamental in the law of criminal procedure, "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense." *United States* v. *Simmons*, 96 U. S. 360, 362 [24: 819, 820]; *United States* v. *Hess*, 124 U. S. 483, 488 [31: 516, 518]. As said in *United States* v. *Carll*, 105 U. S. 612 [26: 1135], it is not sufficient to set forth the offense in the words of the statute, "unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

The want of care in framing the first count is further shown by the the fact that although voting, and attempting to vote, knowingly, in the name of another, for representative in Congress, may be distinct offenses, under the statute, the indictment charges that the defendant did knowingly "personate and vote *and* attempt to vote" in the name of another person. If the attempt to so vote was immediately followed by voting, then the allegation that the accused attempted to vote was unnecessary. The first count leaves it in doubt whether it was intended to charge two distinct offenses, or only the offense of voting in the name of another person. This defect alone might not have been sufficient, after verdict, as ground for 316| *arresting the judgment on that count. But it is referred to as supporting or illustrating the rule that enjoins such certainty in an indictment as will inform the accused of the precise nature of the charge against him.

In respect to the third count of the indictment, but little need be said. It is clearly sufficient, for it charges that "at said election" the defendant voted more than once for representative in Congress. Such double voting is made an offense by the statute. The only question that could arise upon the third count is whether the words of the first count, referring to the election had and held on the 8th day of November, 1892, for representative in Congress, can be drawn through the second count into the third count by the words "at the said election." As the election named in the first count is the only one specifically described in the indictment, there can be no doubt that the words "at said election" in the third count refers to the election described in the first count.

In *Com.* v. *Clapp*, 16 Gray, 238, when the question was as to the sufficiency of the description of the prosecutor and the defendant in the second count on which the defendant was convicted, it was held that that count could be supported by reference to the first count upon which the defendant was acquitted, the court observing that in the most approved books of forms, ancient and modern, it is found, almost invariably, when an indictment contains more than one count, that all the counts, after the first, omit the description of the defendant, which is contained and is necessary in the first, and describe him only as "the said A. B." In *Phillips* v. *Fielding*, 2 H. Bl. 123, 131, Gould, *J.*, recalled the case of an indictment for forgery, in which there were three counts for forgery and three for the utterance; in the first count the prisoner was particularly described, and the grand jury having rejected the three first counts, an objection was raised that the remaining counts described him, "the said A. B.," by reference to the first. But all the judges, he said, held the description to be good. So, in 1 Chitty's Crim. Law, 250: "Though every count should appear upon the face of it to charge the defendant with a distinct offense, yet one *count may refer to| 317 matter in any other count so as to avoid unnecessary repetitions; as, for instance, to describe the defendant as 'the said, etc.;'" and "though the first count should be defective, or be rejected by the grand jury, this circumstance will not vitiate the residue." See also 2 Gabbett, Crim. Law, 248; *Reg.* v. *Huntley*, 8 Cox, C. C. 260; *Reg.* v. *Waverton*, 17 Q. B. 562.

While repetition may be avoided by referring from one count to another, and, therefore, within the principles of the adjudged cases, a subsequent count of an indictment may be sustained, even if it refers to allegations in a previous count or counts which have been adjudged to be insufficient, the reference should be sufficiently full, in effect, "to incorporate the matter going before with that in the court in which it is made." 1 Bishop, Crim. Proc. § 431; Whart. Crim. Pl. & Pr. § 299.

As judgment was pronounced on both the first and third counts; as the term of imprisonment under the judgment on the third count was to commence from the expiration of the judgment on the first count; and as no judgment should have been pronounced upon the first count, the contention of the plaintiff is that the cause must be remanded with directions for a new trial.

In *Kite* v. *Com.* 11 Met. 581, 585, it appeared that the accused was sentenced for a named period to confinement at hard labor, to take effect from and after the expiration of three previous sentences specified. The judgment was objected to as erroneous and void, because there was not three former sentences, legal and valid, and, therefore, no fixed time from which the punishment on the last sentence should begin. *Chief Justice* Shaw, referring to this objection, and delivering the unanimous judgment of the court, said that it was not error in a judgment in a criminal case to make one term of imprisonment commence when another terminates. "It is as certain," he said, "as the nature of the case will admit, and there is no other mode in which a party may be sentenced on several convictions.

Though uncertain at the time, depending upon 318] a possible contingency that the* imprisonment on the former sentence will be remitted or shortened, it will be made certain by the court. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires, and then, by its terms, the sentence in question takes effect as if the previous one had expired by lapse of time. Nor will it make any difference that the previous judgment is reversed for error. It is voidable only, not void, and until reversed by a judgment, it is to be deemed of full force and effect, and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect." See also *Dolan's Case*, 101 Mass. 219, 223.

In these views we concur. A reversal of the judgments on both the first and third counts in this case could only result in another trial upon the third count, the first count being insufficient. But as there has been a trial upon the third count, the sentence, in respect to that count, should stand, and the term of imprisonment under it be held to commence from the 28th day of November, 1893, the date fixed by the judgment below for imprisonment to begin under the sentence on the first count.

The judgment upon the first count must be reversed, and the cause remanded with directions to arrest judgment upon that count. The judgment below, so far as it relates to the third count, is affirmed.

WILLIAM H. McBROOM, *Plff. in Err.*,
v.
THE SCOTTISH MORTGAGE & LAND INVESTMENT COMPANY OF NEW MEXICO, LIMITED.

(See S. C. Reporter's ed. 318-331)

Statute of New Mexico as to usury—contract, how far valid—excess of interest—action for—limitation.

1. The statute of New Mexico does not permit the receiving of usurious interest, by way of, or under the guise of, "discount, commission, agency, or any other subterfuge."
2. Where a statute prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might lawfully be taken.
3. Under the statute of New Mexico a contract of loan providing for usurious interest is not void, except as to interest in excess of what the statute allows to be charged, collected or received.
4. Where the contract of loan is not void, except as to the excess of interest stipulated to be paid, the lender is not liable to an action for excess of interest paid, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid.
5. Under the statute of New Mexico, the limitation of three years, within which the borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and, therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt with legal interest.

[No. 1028.]

Submitted Jan. 5, 1894. Decided March 5th, 1894.

IN ERROR to the Supreme Court of the Territory of New Mexico, to review a judgment of that court, reversing the judgment of the District Court of the Fourth Judicial District of that Territory, in favor of the plaintiff, William H. McBroom, in an action brought by him as plaintiff, against the Scottish Mortgage & Land Investment Company, for the recovery of double the amount of money paid in excess of the lawful rate of interest upon a loan, made by said company to the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Mr. **Frank Springer,** for plaintiff in error:

The transaction in question was usurious, and was the act of the company.

Fowler v. *Equitable Trust Co.* 141 U. S. 384 (35: 786); *Sherwood* v. *Roundtree*, 32 Fed. Rep. 113; *New England Mortg. Secur. Co.* v. *Gay*, 33 Fed. Rep. 636.

The cause of action accrued upon payment of the bonus, or, at all events, upon the first payment of interest for a fixed period, in addition to the bonus.

Fisher v. *Beasley*, 1 Dougl. 235; *Wade* v. *Wilson*, 1 East, 195; *Scurry* v. *Freeman*, 2 Bos. & P. 381; *Wood* v. *Grimwood*, 10 Barn. & C. 689; *Seawell* v. *Shomberger*, 6 N. C. 200; *Grow* v. *Albee*, 19 Vt. 543; *Nelson* v. *Cooley*, 20 Vt. 204; *Harvey* v. *National L. Ins. Co.* 60 Vt. 209; *Com.* v. *Frost*, 5 Mass. 53; *Stevens* v. *Lincoln*, 7 Met. 525; *Smith* v. *Robinson*, 92 Mass. 132; *First Nat. Bank of Peterborough* v. *Childs*, 130 Mass. 520, 39 Am. Rep. 474; *Kirkpatrick* v. *Houston*, 4 Watts & S. 115; *Lamb* v. *Lindsey*, 4 Watts & S. 449; *Brown* v. *Second Nat. Bank of Erie*, 72 Pa. 209; *Kearney* v. *First Nat. Bank of Clarion*, 129 Pa. 577.

There can be no *locus penitentiae*, where the whole contract was unlawful.

Harvey v. *National L. Ins. Co.* 60 Vt. 209; *Brown* v. *Second Nat. Bank of Erie*, 72 Pa. 209.

Usury laws are made for the protection of the borrower, and when violated, the parties are not *in pari delictu*.

Brown v. *McIntosh*, 39 N. J. L. 22; *Farmers & M. Nat. Bank* v. *Dearing*, 91 U. S. 29 (23: 196); *Oates* v. *First Nat. Bank of Montgomery*, 100 U. S. 249 (25: 584).

Whenever a statute provides a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful.

Bartlet v. *Viner*, Skin. 322; Tyler, Usury, 374; 1 Parsons, Cont. 458; Sedgw. Stat. & Const. L. § 71; 4 Am. & Eng. Enc. Law, p. 872, § 49.

NOTE.—*As to lex loci, as to usury*, see note to Slacum v. Pomery, 3: 205.

That purchase of obligation at less than face value is not usury, see note to Nichols v. Fearson, 8: 623.

As to new securities for usurious loan, when valid, see note to Walker v. Bank of Washington, 11: 494.

That taking interest in advance is not usury, see note to Fleckner v. Bank of United States, 5: 631.

As to usury by national banks, see note to Farmers & M. Nat. Bank v. Dearing, 23: 196.

That usury in a substituted security revives original; valid claim is not invalidated by being included in a usurious security, see note to Newell v. Nixon, 18: 305.

The statutory prohibition is equally efficacious, and the illegality of a breach of the statute is the same, whether a thing be prohibited absolutely, or only under a penalty.

1 Kent, Com. 467; Tyler, Usury, 374.

Every contract made for or about a thing prohibited and made unlawful by statute, is a void contract, although the statute does not mention that it shall be so.

Clark v. *Protection Ins. Co.* 1 Story, 132; *Hayden* v. *Davis*, 3 McLean, 276.

If money is loaned at an usurious interest, in violation of a statute making the charging or receiving of such interest a misdemeanor, and imposing a penalty for so doing, the whole contract is void for principal and interest.

Bank of United States v. *Waggener*, 34 U. S. 9 Pet. 399 (9: 171); *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 353 (5: 634); *Dill* v. *Ellicott*, Taney, 233; *Bandel* v. *Isaac*, 13 Md. 224; *Lazear* v. *National U. Bank of Baltimore*, 52 Md. 78, 36 Am. Rep. 355; *Harris* v. *Runnels*, 53 U. S. 12 How. 83 (13: 903); *Tiffany* v. *Boatman's Sav. Inst.* 85 U. S. 18 Wall. 384 (21: 869); *Miller* v. *Ammon*, 145 U. S. 421 (36: 759); *Fowler* v. *Throckmorton*, 6 Blackf. 327; *Cincinnati Mut. Health Assur. Co.* v. *Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Barton* v. *Port Jackson & U. F. Pl. Road Co.* 17 Barb. 404; *Seneca County Bank* v. *Lamb*, 26 Barb. 596.

Messrs. **Andrieus A. Jones** and **Eugene A. Fiske**, for defendant in error:

The facts proven show that the consummated transaction as to the defendant was not usurious.

Bank of United States v. *Waggener*, 34 U. S. 9 Pet. 397 (9: 170); *Condit* v. *Baldwin*, 21 N. Y. 222, 78 Am. Dec. 137; *Palmer* v. *Call*, 7 Fed. Rep. 737, 116 U. S. 98 (29: 559); *Estevez* v. *Purdy*, 66 N. Y. 449.

The cause of action did not accrue upon payment of $6500 to Dinkel and Vincent, nor upon the first payment of interest for a fixed period.

Simpson v. *Warren*, 15 Mass. 460; *Smith* v. *Robinson*, 92 Mass. 132; *Hawkins* v. *Welch*, 8 Mo. 492; *Jackson* v. *Garner*, 79 Ga. 415; *Kendall* v. *Crouch*, 88 Ky. 199; *First Nat. Bank of Peterborough* v. *Childs*, 130 Mass. 520, 39 Am. Rep. 474; *Hall* v. *First Nat. Bank of Fairfield*, 30 Neb. 99; *Harvey* v. *National L. Ins. Co.* 60 Vt. 209; *Hardin* v. *Trimmier*, 30 S. C. 391; *Hintermister* v. *First Nat. Bank of Chittenango*, 64 N. Y. 212; *Johnson* v. *National Bank of Gloversville*, 74 N. Y. 329, 30 Am. Rep. 302; *Dickerson* v. *Thomas*, 67 Miss. 777.

The notes given by the plaintiff to the defendant are not void, even if the loan was usurious.

Pratt v. *Short*, 79 N. Y. 445, 35 Am. Rep. 531; *Pangborn* v. *Westlake*, 36 Iowa, 548; *Harris* v. *Runnels*, 53 U. S. 12 How. 79 (13: 901); *Miller* v. *Ammon*, 145 U. S. 426 (36: 762); *Farmers & T. Bank* v. *Harrison*, 57 Mo. 509; *Lazear* v. *National U. Bank of Baltimore*, 52 Md. 78; *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 353 (5: 634); *Bernhisel* v. *Firman*, 89 U. S. 22 Wall. 170 (22: 766); *Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555 (25: 212); *Farmers & M. Nat. Bank* v. *Dearing*, 91 U. S. 29 (23: 196); *Ootes* v. *First Nat. Bank of Montgomery*, 100 U. S. 250 (25: 584); *Fritts* v. *Palmer*, 132 U. S. 289 (33: 319).

Mr. Justice **Harlan** delivered the opinion of the court:

The defendant in error, the Scottish Mortgage & Land Investment Company of New Mexico, Limited, is a private corporation organized under the laws of Great Britain for the purpose, among others, of lending money in this country on the security "of real or heritable or of leasehold estate," or "of cattle, sheep, or other live stock, and movable goods and chattels."

That company agreed to loan McBroom, the plaintiff in error, the sum of $65,000, payable six years after date with interest at the rate of twelve per cent per annum. As evidence of the loan he executed and delivered his principal note for the above amount and six interest notes, one for $2842.19, payable December 31, 1866, five for $7800 each, payable, respectively, December 31, 1887, 1888, 1889, 1890, 1891, and 1892, and one for $4965, payable August 20, 1892. These notes were secured by a deed of trust upon certain lands and by a chattel mortgage upon cattle, horses, and other personal property.

The amount so borrowed was paid to McBroom by the company in the latter part of September, 1886, and out of the sum received he paid to Dinkel, the company's agent in New Mexico, through whom the loan was negotiated, the sum of $6500.

McBroom's interest note for $2842.19, falling due December 31, 1886, was paid by him at its maturity. Aside from the bonus of $6500 received by the company's agent, no other payment on account of this debt has ever been made.

By the statutes of New Mexico it is provided that "in written contracts for the payment of money it shall not be legal to recover more than twelve per cent interest per *annum;" [321 that "any person, persons, or corporation who shall hereafter charge, collect or receive from any person a higher rate of interest than twelve per cent per annum shall be guilty of a misdemeanor, and upon conviction thereof before the district court or a justice of the peace shall be fined in a sum of not less than twenty-five dollars nor more than one hundred dollars; and such person, persons, or corporation shall forfeit to the person of whom such interest was collected or received, or to his executors, administrators, or assigns, double the amount so collected or received upon any action brought for the recovery of the same within three years after such cause of action accrued;" and that "the provisions of this act shall also apply to any person, persons, corporation, or officer of the same who may charge, receive, or collect a higher rate of interest than twelve per cent per annum by means of discount, commission, agency, or any other subterfuge." Act of April 3, 1884, N. M. Sess. Laws, 1884, chap. 80; N. M. Comp. Laws, 1884, §§ 1736-1738.

McBroom brought this action under the above statute to recover from the defendant in error double the amount alleged to have been collected and received by the corporation in excess of the legal rate of interest. The declaration, in one count, charges that the $6500 paid to the company's agent, and the $2842.19 paid in discharge of the interest note maturing December 31, 1886, were in excess of what the

company was authorized by the statute to charge, collect, or receive, and upon that basis judgment was asked for $18,660.20. At the trial the plaintiff withdrew all claim except for an amount double the sum of $6500 paid to Dinkel, the company's agent.

There was a verdict and judgment against the company for $13,000. The judgment was reversed by the supreme court of the territory and the cause was remanded with directions to proceed in accordance with the opinion of that court. Subsequently, at the request of McBroom, in order to facilitate an appeal by him to this court, the judgment was so modified that a *venire de novo* was not awarded, and upon the facts in the record, the supreme court of the territory adjudged that the compa-
322] ny go hence without day, and *recover its costs in that court as well as in the court of original jurisdiction. The judgment of the court below, therefore, became a final one. *Scottish Mortg. & L. I. Co.* v. *McBroom* (N. M.) 30 Pac. Rep. 859.

The general grounds upon which the court below proceeded were that the contract in question was valid to the extent of the principal sum and the legal interest; that all payments made by the borrower, whether such payments were made on account of usury or as bonus or commission, should be applied in reduction of the debt; and that the borrower was not entitled to recover the statutory penalty while any portion of the amount really loaned, with legal interest, after crediting all payments, remained unsatisfied.

If, when receiving the bonus of $6500 from the borrower, Dinkel, the agent of the defendant in New Mexico, represented his principal, the contract in question was usurious; for that sum and the aggregate amount of the notes given for interest exceeded the highest rate of interest that could be charged, collected, or received, under the laws of New Mexico, on the sum loaned to McBroom. Upon this point the court below said: "In the view that we have taken of the matter it is immaterial to determine whether Dinkel was an agent or whether as an officer he was a part of the corporation, so that a transaction with him was a transaction with the corporation itself; for the fourth article of the agreement between him and the home office, as already shown, provided that all such commissions and bonuses should enure to the benefit of the company. In view of this provision of his contract and of the fact that the company had knowledge of each step taken by him it is to be presumed that he was acting for the company. The facts in this case bring it clearly within the rule laid down by the Supreme Court of the United States in the case of *Fowler* v. *Equitable Trust Co.* 141 U. S. 384 [35: 786], wherein a foreign corporation (whose agent in the state accepted a commission from the borrower on loans procured from such foreign corporation) was held to have received the proceeds of the usurious transaction, the commission paid to the agent being in excess of the highest rate of interest allowed by law." We
323] entirely concur in these views. *The statute of New Mexico does not permit the receiving of usurious interest, by way of, or under the guise of, "discount, commission, agency, or any other subterfuge."

Was the contract between the parties void as to the amount loaned with legal interest thereon, because it provided for, or in its execution involved, the payment of usurious interest? The plaintiff insists that it was, and, consequently, that a cause of action accrued immediately upon the payment of the bonus of $6500 to the company's agent, or at least from the first payment of interest for a fixed period. This question must first receive attention.

Of course, effect must be given to the intention of the legislature as manifested by the words of the statute, interpreted according to their natural signification. And in ascertaining that intention all of its provisions must be considered together. As said in *Harris* v. *Runnels*, 53 U. S. 12 How. 79, 84 [13: 901, 903]: "Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice." So, in *Pratt* v. *Short*, 79 N. Y. 437, 445, 35 Am. Rep. 531: "A prohibitory statute may itself point out the consequences of its violation; and if on a consideration of the whole statute, it appears that the legislature intended to define such consequences and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained." See also *Pangborn* v. *Westlake*, 36 Iowa, 546, 549, and authorities there cited.

The statute of New Mexico does not declare a contract *providing for usurious interest[324 to be absolutely void in respect to the amount loaned and legal interest thereon, but only imposes a fine upon any person or corporation charging, collecting, *or* receiving a higher rate of interest than twelve per cent per annum, and forfeits to the person, from whom such interest is collected or received, or to his executors, administrators, or assigns, double the amount so collected or received—the action to recover such penalty to be brought within three years after the cause of action accrues. Construing sections 1736, 1737, and 1738 together, the statute does not prohibit the recovery of the amount loaned with legal interest. No such consequence, as the forfeiture of the principal and legal interest, is visited upon the lender. And that seems to be the view expressed by the supreme court of the territory of New Mexico when, construing the local statute, in *Milligan* v. *Cromwell*, 3 N. M. 330, it said: "If it should not be legal to recover more than 12 per cent interest per annum upon written contracts, the converse of that proposition would seem to follow as a necessary

consequence that it shall be lawful to recover on such contract 12 per cent interest per annum." It is true that, by necessary implication, the contract is void as to any of interest stipulated to be paid, in excess of the highest rate allowed by the statute. But as the statute only imposes a fine for charging, collecting, or receiving usurious interest, and gives to the borrower a right to recover double the amount of such interest collected or received from him, the courts ought not to declare the contract void as to principal and legal interest. That would add a penalty not prescribed by the statute.

This question, substantially as now presented, has often arisen in cases under the section of the National Banking Act, providing that the knowingly taking, receiving, reserving, or charging a rate of interest, in excess of that allowed by the Act, shall be adjudged a forfeiture of the entire interest, and, in case a greater rate is paid, gives the person paying it, and his legal representatives, a right, by suit brought within a specified time, to recover back twice the amount so paid. In reference to that Act this court has said that "where a statute 325 | *prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might lawfully be taken. . . . When a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *Farmers & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 35 [23: 196, 199]. So in *Oates* v. *First Nat. Bank of Montgomery*, 100 U. S. 239, 249 [25, 580, 584], where one of the questions was whether a bank could be deemed a bona fide holder of a negotiable note, having received it under a contract which, in its execution, involved a violation of the usury laws of the state, this court said: "The statute under which the bank was organized, known as the National Banking Act, does not declare the contract under which the usurious interest is paid to be *void*. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself."

These decisions are in harmony with prior and subsequent decisions of this court. In *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 338, 353, 355 [5: 631, 634, 635], where one of the questions was whether a certain discount was usurious, the court said: "The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the Act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." Again, in the same case: "The Act has not pronounced that such a violation [the dealing in notes] *makes the transaction or contract; 326 *ipso facto* void, but has punished it by a specific penalty of treble the value." So in *De Wolf* v. *Johnson*, 23 U. S. 10 Wheat. 367, 392 [6: 343, 349], in which was said: "The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent, and so far no court would lend its aid to recover such interest. But the law goes no farther. It does not forbid the contract of loan, nor preclude the recovery of the principal under any circumstances. The sanctions of that law are the loss of the interest and a penalty to the amount of the whole interest and one third of the principal if sued for within a year. On what principle could this court add another to the penalties declared by the law itself?"

In line with the above cases are those in which national banks have been held entitled to recover upon securities taken in the course of business, but in violation of the Act of Congress. In *Union Nat. Bank* v. *Matthews*, 98 U.S. 621, 627 [25: 188, 189], the court said: "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined." *National Bank of Geneva* v. *Whitney*, 103 U. S. 99, 103 [26: 443, 444]; *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 358, 361 [20: 430, 431].

To this general class of cases belongs *Fritts* v. *Palmer*, 132 U. S. 282, 291 [33: 317, 320] where the question was whether a deed for real estate in Colorado, made to a Missouri corporation organized to do business in Colorado, but which had not filed in the office of the secretary of state of the latter state a copy of its charter of incorporation, etc., was absolutely void, passing no title to the grantee. The statutes of Colorado provided that no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members should purchase or hold real estate in that state, except as provided for in the act; that every company incorporated under the laws of any foreign state or kingdom, or of *any state or territory of the United 327 States, beyond the limits of Colorado, and then or thereafter doing business within that state, should file in the office of the secretary of state a copy of their charter or incorporation; and that failure to comply with these provisions should render each and every officer, agent, and stockholder so failing therein, jointly and severally liable on any and all contracts of such company made within that state during the time that such corporation is so in default. This court said: "The constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a con-

veyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the state. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the state before acquiring the right to do so, is found in section 262 of the same chapter. . . The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that state. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed, for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others." 132 U. S. 282, 291 [33: 317, 320].

To the cases may be added the following: *Lazuer* v. *Maryland Nat. Union Bank*, 52 Md. 78, 121, in which the court, referring to statutes regulating usury, held that a contract, under which a greater interest is taken than the law allows, is not, for that reason, void, unless the law itself provides that the taking of illegal interest shall be attended by that result; and *Farmers & T. Bank* v. *Harrison*, 57 Mo. 503, 328] 509, *in which the court, referring to the prohibitions of usury by statute, said that the measure of illegality or immorality is the extent of the prohibition, and that applies not to the *loan* in which there is no moral vice, but only to the forbidden excess of interest.

Our conclusion upon this branch of the case is that, upon principle and authority, the contract of loan in question providing for usurious interest cannot be held void, except as to interest in excess of what the statute allowed to be charged, collected, or received.

The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While, under the statute, the mere *charging* of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may be lawfully collected and received, until the lender has, in fact—after giving credit for all payments—collected or received more than the sum loaned, with legal interest. Such, in our judgment, is the true construction of the statute of New Mexico. In this view, the limitation of three years, within which the borrower may sue for double the amount of usurious interest collected and received from him, does not commence to run, and, therefore, the cause of action does not accrue, until the lender has actually collected or received more than the original debt with legal interest. These conclusions are supported by adjudged cases.

In *Duncan* v. *First Nat. Bank of Mt. Pleasant*, in the District Court of the United States for the Western District of Pennsylvania, it was said: "From the origin of the loan, from the retaining of the first discount through all the *renewals up to the time of final pay- [329 ment of the principal, or up to the time of entering judgments, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it and lessen the principal. . . Up to that time he may make this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete." Nat. Bank Cases, 360, 362.

In *Stevens* v. *Lincoln*, 7 Met. 525, 528, which was an action, under a statute of Massachusetts, authorizing suit to recover threefold the amount of interest paid; it being alleged that interest had been paid at a greater rate than the law allowed, the court said: "In regard to the payment of $1458.91, whether this was a payment of the usurious interest or a part of it, we are of opinion, that while the usurious interest is unpaid, there remains the *locus penitentiæ;* that the party may relinquish it, and recover interest for the balance of his debt—the contract not being rendered void by the statute. And in the absence of proof as to any appropriation of a partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation, on his part, that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due." The same rule was affirmed in *Saunders* v. *Lambert*, 7 Gray, 484, 486.

So in *Harvey* v. *National L. Ins. Co.* 60 Vt. 209: "As the result of that transaction the plaintiff went away with $900 in money, all he had ever *received, as his own money, [330 and the defendant with the plaintiff's note for $1000. . . . Hence the $100 usury entered into and became a part of the mortgage note. The payments made by the plaintiff and by Mrs. Hardaker prior to the time of taking up the note, would in law be applied towards the payment of the legal portion of the note. . . All the payments made by her, as well as those made by the plaintiff, up to the final payment, were in law to be applied towards the liquidation of the legal portion of the note. Hence the plaintiff is entitled to recover what was

paid as the final payment of the note, above what was then legally due upon the note after applying the payments made thereon in liquidation of the legal portion of the note with interest." To the same effect are the following authorities: *Kendall* v. *Crouch*, 88 Ky. 199, 202; *Smith* v. *Robinson*, 10 Allen, 132; *Hawkins* v. *Welch*, 8 Mo. 490, 492; *Hall* v. *First Nat. Bank of Fairfield*, 8 Neb. 99, 102; *Jackson* v. *Garner*, 79 Ga. 415.

In *Wright* v. *Laing*, 3 Barn. & C. 165, 168, which was an action to recover the penalties of the statute of usury, Abbott, *Ch. J.*, said: "None of the payments were appropriated by either party at the time of payment. If the law ought now to make such an appropriation as the pleader has supposed in this court the count will be sustained by the proof, otherwise not. We think the law ought not to make such an appropriation. . . . And such an appropriation works no prejudice to the party; it leaves him only where by his own conduct he placed himself; and in the case I have put of the payment of one bill and non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant by applying the payment of the first bill to the legal demand, and not permitting the then plaintiff to apply it to the illegal demand, that is, to the loan and interest, although it be precisely of the same amount; because peradventure, the lender might repent the illegal bargain and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be 331] deemed a receiver of usurious* interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest. And if the law will make this appropriation of the payment in the two cases that I have put, in one instance, against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal bargain only, it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court. And this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits."

For the reasons stated, we are, of opinion that this action cannot now be maintained under the statute, and, consequently, the court below properly reversed the judgment of the court of original jurisdiction and entered judgment in favor of the defendant.

It is proper to say that the questions determined in *Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555 [25: 180]; *Driesbach* v. *Second Nat. Bank of Wilkesbarre*, 104 U. S. 52 [26: 658]; *Stephens* v. *Monongahela Nat. Bank*, 111 U. S. 197 [28: 399]; and *Carter* v. *Carusi*, 112 U. S. 478 [28: 820], do not arise here. No question is presented in the case before us as to whether the borrower, when sued for the principal debt and legal interest, may, of right, set off the amount of any penalty prescribed by the statute of New Mexico.

The judgment of the supreme court of the territory is, therefore, affirmed.

THE GATES IRON WORKS, *Appt.*, [332
v.
DAVID R. FRASER ET AL.

(See S. C. Reporter's ed. 332-352.)

Patents for improvements in stone crushing machines, Nos. 201,646, 237,320, 56,793, 110,397, 243,343, 243,545, 246,608, 250,656, when valid, and when not infringed.

1. The patent to Charles M. Brown, No. 201,646, of March 26, 1878, for a stone crushing machine, is a reproduction of the earlier machine patented to Rutter and is not infringed by defendant's machine.
2. The patent to George and Albert Raymond, No. 237,320, of Feb. 1, 1881, is for a combination which includes several features not found in the machine made by defendants.
3. The leading features of the stone crushing machine patented to Henry Pearce July 31, 1866, by patent No. 56,793, and which are found in the machine of defendants, are anticipated by the Wood machine, a prior patented invention, and by the Ostrander machine, a still older patent.
4. The use of safety break pins for saving machinery from the strain of a sudden jar is old, and their use for such a purpose, in connection with the driving gear of a stone crushing machine, is not patentable.
5. Defendant's use of a hard cast iron safety pin does not infringe the patent No. 110,397, to John H. Rusk, of Dec. 20, 1870, for a soft metal pin in a grinding mill, the use of safety pins being old.
6. The two patents to P. W. Gates No. 243,343, issued June 21, 1881, and No. 243,545, issued June 28, 1881, for improvements in stone crushing machines, were anticipated in the Brown machines.

NOTE.—*As to assignments of patents, their construction and effect*, see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

For what patents are granted; when declared void, see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boiselier, 29: 76, and to Corning v. Burden, 14: 683.

As to distinction between inventions of mechanism, articles or products and processes; when latter patented, see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor, see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement, when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages, see note to Hogg v. Emerson, 13: 824.

As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects, see note to Grant v. Walter, 37: 553.

in public use more than two years before Gates applied for such patents.

7. The first claim of the patent to P. W. Gates No. 246,608, of Sept. 5, 1881, for an improvement in stone crushing machines, is not an invention, and is not infringed by defendants.

8. The alleged invention in the patent to P. W. Gates, No. 250,656, of Dec. 13, 1881, for improvement in stone crushing machines, is for a combination of old features present in the Brown machine made and sold more than two years before Gates applied for this patent, except the hard metal plate, which is old.

[No. 253.]

Argued March 8, 1894. Decided May 14, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a suit in equity brought by the Gates Iron Works against David R. Fraser *et al.*, for a violation of certain patents for improvements in stone crushing machines, which had been assigned to, and become vested in the plaintiff, and for the usual relief. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

At the March term, 1890, of the Circuit Court of the United States for the Northern District of Illinois the Gates Iron Works, a corporation organized under the laws of the state of Illinois, filed its bill of complaint against David R. Fraser, Thomas Chalmers, and Hiram H. Scoville, alleging that the said complainant was the sole owner of several letters patent of the United States, namely, No. 56,793, issued to Henry Pearce, July 31, 1866; No. 201,646, issued to Charles M. Brown, March 26, 1878; No. 237,320, issued to George and Albert Raymond, February 1, 1881; No. 110,397, issued to John H. Rusk, December 20, 1870; No. 243,343, issued to P. W. Gates, June 21, 1881; No. 243,545, issued to P. W. Gates, June 28, 1881; No. 246,608, issued to P. W. Gates, September 5, 1881; and No. 250,656, issued to P. W. Gates, December 13, 1881; and which said letters patent, and the inventions and improvements therein described, had, by assignments in writing, prior to the commencement of the suit, become vested in the complaint. The bill further alleged that the defendants were making, using, and vending machines embodying the said inventions, in disregard of the rights of complainant, and prayed for the usual relief.

The defendants filed a joint and several answer, admitting that the letters patent mentioned in the bill have been issued, but 334]*denying that the persons to whom they had been granted were the original and first inventors of the several inventions described and claimed therein, or that the defendants had infringed, or were infringing, the rights of the complainant in the said inventions.

The answer further averred that the defendant Hiram H. Scoville had, prior to the filing of the application by Charles N. Brown for a patent for the improvements described and claimed in said patent No. 201,646, dated March 26, 1878, by and with the consent of the said Brown, made and put into use two machines containing the inventions secured by said patent No. 201,646, and that the defendants had a right to make and sell machines containing said inventions by virtue of an oral license given by Brown to Scoville before the application for said patent was filed.

The answer further alleged that P. W. Gates was not the original and first inventor of the improvements described in the several patents Nos. 243,343, 243,545, 246,608, 250,656; but that substantially those improvements were invented by said Charles N. Brown before the supposed invention thereof by Gates, and were embodied and exemplified in certain full-sized working machines built by the said Hiram H. Scoville, which were publicly used more than two years before Gates made application for any one of the said four patents.

The answer further stated that Henry Pearce was not the original and first inventor of the improvement patented by said patent No. 56,793, dated July 31, 1866, and that substantially the same thing was shown and described in letters patent No. 28,031, issued to one G. H. Wood, dated April 24, 1860.

Subsequently the defendants, with leave of court, filed the following amendment to the answer, to wit:

"Letters patent to J. F. Ostrander, granted and dated April 25, 1846, No. 4478, 'grain mill.'

"And as to the patent mentioned in said bill of complaint as having been granted and issued to J. H. Rusk, Charles M. Brown, G. and A. Raymond, and the four patents to P. W. Gates, numbered respectively 243,343, 243,545, 246,608, and 250,656, they further aver, upon information and belief, that the *said Brown, Raymond, Rusk, and Gates[335 were not the original and first inventors of the things patented by or to them respectively, and that substantially the same things were patented by or shown and described in the following letters patent, to wit:

"As to patent to H. Pearce, No. 56,793.

"Letters patent to J. F. Ostrander, granted and dated April 25, 1846, No. 4478, for improvement in grain mill.

"Letters patent to G. H. Wood, granted and dated April 24, 1860, No. 28,031.

"As to patent to J. H. Rusk, No. 110,397.

"Letters patent to A. C. Ellithorpe and I. Scoville, granted and dated November 23, 1858, for improvements in machine for breaking stones, etc., No. 22,113.

"Letters patent to Hiram H. Scoville, granted and dated May 26, 1868, No. 78,332, for improvement in stone breaker.

"As to patent to C. M. Brown, No. 201,646.

"Letters patent to Charles Tripp, granted and dated November 10, 1857, No. 18,610, for improvement in grinding mill.

"Letters patent to Conrad P. Wagner, granted and dated January 30, 1866, No. 52,347, for improvement in quartz mill.

"Reissue letters patent to James W. Rutter, granted and dated September 7, 1869, No. 3633 for improvement in ore crusher.

"As to chilled iron, V. I. Knight's American Mechanical Dictionary, published in New York, 1874, p. 537, title 'Chill.'

"As to patent to P. W. Gates, No. 243,343.

"Letters patent to L. Fagin, granted and

dated October 30, 1866, No. 59,201, for improvement in hanging millstones.

"Letters patent to S. N. Taylor, granted and dated February 27, 1866, No. 52,908, for improvements in knuckle joint.

"As to patent to P. W. Gates, No. 243,545.

"Letters patent to Charles Tripp, granted and dated November 10, 1857, No. 18,610, for improvement in grinding mill.

"Letters patent to Conrad P. Wagner, 336] granted and *dated January 30, 1866, for improvement in quartz mill, No. 52,347.

"Letters patent to Thomas Varney, granted and dated April 9, 1867, No. 63,675, for improvement in quartz mill.

"As to patent to P. W. Gates, No. 246,608.

"Letters patent to H. Pearce, granted and dated July 31, 1866, No. 56,795, for improvement in quartz mill.

"As to patent to P. W. Gates, No. 250,656.

"Letters patent to P. W. Gates, granted and dated June 28, 1881, No. 243.545, for improvement in rock or stone breaker.

"Letters patent to Daniel Hughes, granted and dated February 20, 1866, No. 52,716, for improvement in quartz crusher, etc.

"Letters patent to L. Fagin, granted and dated October 30, 1866, No. 59,201, for improvement in hanging millstones.

"English letters patent to Claude Marie Savoye, No. 6195 of 1831, for improvement in machinery for grinding grain and other substances.

"The defendants, further answering, say upon information and belief that some of the older ones of complainant's said patents show and describe improvements which are claimed in other and later of the complainant's said patents, and they further say that as to the said several patents by them herein and hereintofore mentioned are shown and described devices, parts, or combination of parts that are substantially the same as the devices and combinations set forth in other patents than those to which they are specifically named as relating, and that any and all of said patents will be referred to as containing the substance of any or either of the complainant's said patents as may be deemed appropriate."

The cause was put at issue, a large amount of evidence taken, and after argument on March 31, 1890, the court below dismissed the bill at complainant's costs. From this decree an appeal was taken to this court.

Mr. **Lewis L. Coburn** for appellant.

Messrs. **L. L. Bond** and *C. E. Pickard* for appellees.

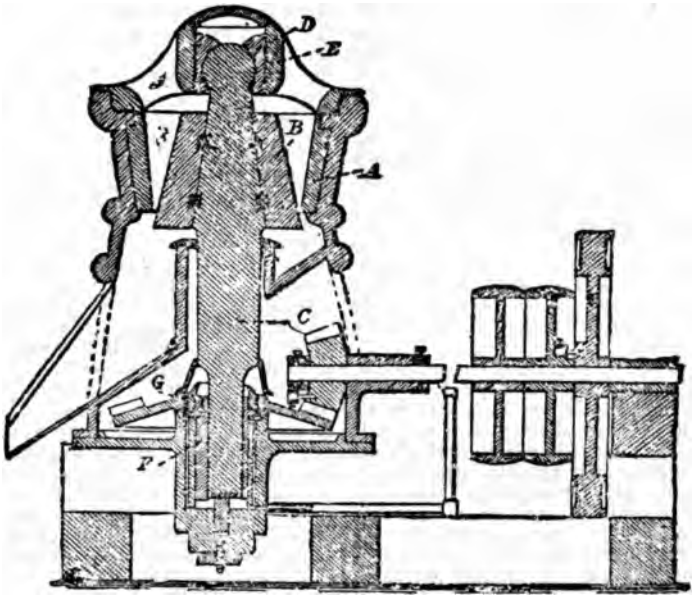
337] *Mr. Justice* **Shiras** delivered the opinion of the court:

The patents that are before us for consideration are for improvements in stone crushing machines. We shall preface our discussion of the questions that arise by adopting from the brief of the plaintiff in error the following description of the final and perfected form of the machine, and which is claimed to embody the various inventions and improvements covered by the several patents:

"The inventions of these various patents can be more readily understood by first understanding the construction of this type of stone crushing machines which has become to be known as the gyratory type of stone crushers. This name comes from the fact that the crushing cone is carried on a vertical shaft which has its bearing at one end in the axis of the conical enclosing case which surrounds the crushing cone, while the bearing of the other end of the cone shaft is eccentric to the axis of the enclosing or surrounding conical cylinder which surrounds the crushing cone. This vertical shaft which carries the crushing cone of the machine is loose in its bearings, but the end of this shaft which is eccentric to the axis of the enclosing conical case or cylinder of the machine is carried around in a circle by being placed in an eccentric box in a gear wheel that is revolved on its center, which center is in the axis of the enclosing case or cylinder of the machine. The shaft which carries the crushing cone describes in its movement, when the machine is in operation, a conical orbit around the vertical axis of the enclosing conical cylinder of the machine. The stone to be crushed is dumped into the top of the machine between the crushing cone and the cylindrical conical case or shell which surrounds it, the cone shaft is carried around in its conical orbit, the crushing cone and impinges the ore or rock between it and the surrounding case or cylinder, and crushes it. The shaft or arbor of this crushing cone being loose in its bearings, it does not rub or grind the stone, but simply cracks it into finer pieces, and then impinges the next pieces of ore or rock, and so on around the entire conical *orbit, the space between the [338 crushing cone and the enclosing conical case or cylinder opposite of where the ore or rock is being cracked or broken becomes greater by reason of the crushing cone being carried to the opposite side of the enclosing case or cylinder, and the broken rock falls down into a narrower space, and when the crushing cone comes around again, it is again broken, until it is sufficiently fine to pass out at the bottom of the space between the crushing cone and its enclosing case or cylinder.

"This construction of ore crushers, or stone breakers, as they are frequently called, is a continuous feed machine, the stone being constantly fed in at the top of the machine in a coarse state, and continuously passes out at the bottom of the crushing space, broken to a certain definite size, which is fixed by an adjustment of the crushing cone in the enclosing case or cylinder."

This form of machine is illustrated in the following drawing:



Vertical Sectional View of Machine.

339] *In this cut, A represents the conical enclosing case or cylinder which surrounds the crushing cone B, which is rigidly attached to and is carried on the vertical shaft or arbor C. The top or upper end of the arbor C has a bearing in the chilled section box D that is held in an open spider-frame E, this bearing being exactly in line of the axis of the enclosing conical case or cylinder A. The bottom or lower end of the shaft C has its bearing in what is termed an eccentric box, F, which is placed in the gearwheel G. This eccentric box is placed at one side of or eccentric to the vertical axis of the enclosing case or cylinder A. The gear wheel G is supported on the base of the machine, so that the center of its hub is exactly in line with the vertical axis of the enclosing conical case or cylinder A, and when it is revolved it carries the lower end of the shaft or arbor C, around in a circle, and consequently continually brings the conical crushing cone B in closer proximity to one side of the enclosing case or cylinder to impinge the stone contained in the enclosing case or cylinder, and that impingement is continually changing from one place to another throughout the entire circle, and the space opposite of the place of impingement between the crushing cone and its enclosing case or cylinder is wider than where the impingement of the ore or stone is taking place. This particular motion of the crushing cone and its shaft or arbor has been termed a gyratory motion. The shaft or arbor is never vertical, and one of its bearings is in an eccentric box placed eccentric to the bearing of the other end of the shaft or arbor, and eccentric to the axis of the enclosing case or cylinder. The crushing cone and its shaft or arbor describes at each revolution of the geared wheel in which the eccentric box of the shaft or arbor is placed, a conical orbit.

It is claimed by the plaintiff in error that this form of machine is the composite result of the application of the improvements described in the patents set up in the bill. To test the soundness of this claim it will be necessary for us to look into the condition of the art prior to the issue of the earliest patent owned by the complainant, that is prior to July 31, 1866, the date of letters patent No. 56,793, granted to Henry Pearce.

*The first patent to which our atten- [340 tion has been particularly directed is that issued April 25, 1846, to Jonathan F. Ostrander, and numbered 4478. It is a claim for an improvement in grinding mills, and the nature of the invention is said to consist in "making the surfaces of the stones, or metallic plates, between which the material is ground, the one convex, the concave, . . . and also in giving the movable plate or stone a compound motion, consisting of, firstly, an oblique gyrating motion of its axis around the axis of the fixed plate; and, secondly, a rotating motion around its own axis." The material to be ground is fed to the mill by being placed in a cup-shaped opening in the top of the shell that encloses the machine, and the ground material is received in a gutter surrounding the base. We here perceive the double motion, that is, "the revolving and rolling motion," which is a feature of the Pearce patent, and the operation of the two machines is similar in that, in both, the pestle alternately closes upon and recedes from the sides of the outer shell, so that any substance or material to be ground is thereby crushed, and passes downward to the lower part of the machine, where the space gradually lessens, and is crushed finer.

The patent No. 28,031, granted April 24, 1860, to George H. Wood, was for a machine for crushing stone, quartz, ores, or any other substance capable of being reduced or pulverized by pressure. The specification describes a machine having an outer shell or case and an interior cone or pestle, which has an eccentric motion. We shall hereafter show that the machine made by the defendants does not contain the distinguishing features of the Pearce patent. But we have briefly described the inventions of Ostrander and of Wood to make it to appear that machines composed of an outer shell or case enclosing an outer cone or pestle, and operating on the material to be crushed by an eccentric motion, were known to the art.

Letters patent No. 88,216, dated March 23, 1869, reissue No. 3633, dated September 7, 1869, were granted to James W. Rutter for an improvement in ore crushers, and in which it is stated that the invention related to that class **341**] of crushing and* grinding machines in which a conical grinder or crusher, with concentric and eccentric bearings, is operated within a stationary upright cylinder or chamber, or in which the crushing chamber is made conical and the crusher straight. There are other special features contained in this patent not relevant to our present inquiry, but this patent does provide for grinding ore or other material introduced at the upper or top end of the machine, and subjecting it to a continuous crushing and grinding force till it reaches the bottom, where it is discharged into a gutter or annular space.

With this brief view of the state of the art we shall now examime the letters patent upon which the complainant directly relies. The first is that which was granted to Charles M. Brown, No. 201,646, dated March 26, 1878.

The object of this invention is described as being "to furnish a strong, compact machine, in which large pieces of ore may be broken into smaller fragments by the regular continuous movements of the mechanism, and also in which the power used for crushing the ore shall be applied in a more advantageous manner than has been done heretofore in machines designed for this purpose."

The specification describes a machine composed of an outer shell or case, with an opening on one side for the egress of the crushed ore. Within this outer shell is an upright shaft or spindle, whose upper end is pivoted within a circular cap or cover, which is accurately fitted within the top of the outer shell. The lower end of the shaft is pivoted in a bearing in the hub of a bevel gear, and this bearing is placed in an eccentric position with reference to the center of the hub. The end of the shaft rests on a loose plate or button, which is raised or lowered by an adjusting screw, which passes through the lower part of the hub in a line with the axis of the shaft. The upper part of the shaft, below the place where it is pivoted in the cap, is contracted into a neck, and below this neck it is enlarged in the form of a pyramidal section, so as to receive a conical breaking head, which is accurately fitted on the shaft. The outer shell or case is lined with a hard or durable material, made in sections so that they may be readily *replaced by similar pieces when they [**342** are worn out by use, and their wearing surfaces may be either smooth or corrugated. The ore is fed into the machine through openings in the head, and falls into the space between the outer shell, lined as before mentioned, and the breaking head. When the driving mechanism, which is not claimed as a part of the invention, is set in operation the breaking head receives an eccentric gyratory motion from the eccentrically placed bearing in the hub of the gear below, and advances successively towards every portion of the outer shell, crushing the ore that is contained between two surfaces. As the breaking head advances on one side it recedes on the opposite, thus allowing the partially broken ore to fall still lower in the space between the shell and the breaking head, to be again and again acted upon until it is reduced to fragments sufficiently small to pass through an opening at the bottom of the chamber. Here it falls upon an inclined plate and passes out of the machine through the opening in the side of the shell. The claims of the inventor were substantially for the combination of the gyrating spindle; the conical breaking head with the breaking interior surface of the shell; the sliding socket bearing in which the upper end of the shaft operates; the eccentric bearing at the lower end of the shaft, and the adjusting screw which raises or lowers the shaft. His fourth claim was as follows: "In our ore breaking machine, a shell or case frame, enclosing at its upper part a conclave breaker, and provided with an oblique trough, integral with the frame, the inner edge of which extends upwards and within the conclave base of the breaker all around, and having a low-down discharge at one side."

It will be seen that, in its general features, this machine is a reproduction of that of Rutter. In both we find the outer shell; the shaft to which a gyrating motion is given by the eccentric bearing at the lower end, and which shaft works at the upper end in a ball and socket joint, and the crusher or breaking head of a conical form. The operation of the machines is similar in that the material to be crushed is fed into the machine at the top, and passes down between the inner surface of the shell and the breaker, and the gyrating motion* of the shaft causes the breaking [**343** head to so operate that as it approaches the shell on the one side it departs from the other side, thus permitting the partially broken ore to fall further down in the chamber, and thus to be exposed over and again to the crushing operation of the breaking head. It is true, however, that the Rutter machine operates differently from that of Brown's, because its crusher or breaking head does not revolve on its own axis. There are also some minor features in which the machines differ, but such minor features of the Brown machine are not found in the defendant's machine.

The next patent in chronological order, set up in the bill, is that numbered 237,820, granted February 1, 1881, to George Raymond and Albert Raymond. It claims to cover certain improvements in that class of mills

in which vertical metallic grinding discs are employed, and the invention is said to consist in "the combination of the driving shaft, grinding or reducing devices having an exposed hub or bearing, and a safety pin connecting said parts, and in minor details."

As the claims in this patent are for a combination which includes several features not found in the machine as made by the defendants, we need not dwell upon it further than to observe that among the devices described is that of a "safety pin," made of wood, which connects the rotary disk with the shaft, and the object of which is to relieve the strain or wrench which is sometimes given to the machine by some stone or metal of a hardness too great to yield to the crushing operation. The pin, which is strong enough to hold the rotary disk in its connection with its shaft when the material is capable of being crushed, breaks when a refractory substance is suddenly encountered, and thus permits the disk to stop, while the shaft is permitted to continue its motion. The offending substance is then removed, and the broken pin is removed and replaced by a new one. We shall have occasion to revert to this safety pin when we reach the question of infringement. But in this connection we may briefly refer to the patent No. 110,397, issued to John H. Rusk, December 20, 1870, and which is also set up in the bill. The feature of this patent which concerns our inquiry is the use of safety pins, [344] whose function is the same with that of the Raymond patent, with the difference that the Rusk pins are made of soft metal, strong enough to hold the driving shaft and the spindle together in all ordinary grinding operations, but weak enough to yield when any extraordinary strain is put on the machine by the accidental introduction of a substance too hard to be crushed. Another difference is that, in the Rusk machine the pins are placed between the two driving gear wheels, and which it is necessary to remove to get at the safety pins to remove them or replace them, while, in the Raymond machine, the safety pins are placed in an accessible position, so that they can be removed without disturbing other parts of the machine.

Continuing our history of the complainant's machines, we come now to No. 243,843, issued to P. W. Gates, June 21, 1881. It is for an alleged improvement for ball joints of stone breakers and other machines, and consists mainly in constructing bearings in which the ball works so hardened or chilled on the internal surface of the bearing as to offer but slight friction to the ball which fits and works within it. Further reference will be had to this patent when we treat the question of infringement.

We next come to No. 243,545, issued to P. W. Gates, June 2, 1881. The specification, in terms, refers to letters patent No. 201,646, issued March 26, 1878, to Charles M. Brown, and claims for certain improvements to the Brown machine. The machine as a whole is a reproduction of the main features contained in the Brown and Rutter machines, but exhibits some changes and improvements in details, to which we shall hereafter refer.

On September 6, 1881, letters patent No. 246,608 were granted to P. W. Gates, and are now the property of the complainant company. This is a claim for an improvement in eccentric revolving bearing boxes for ore crushers and stone breakers. The inventor, in his specification, says: "My invention relates especially to the revolving eccentric bearing box employed at the lower end of the gyrating shaft of stone breakers and ore crushers, and the nature of my *inven- [345] tion consists in providing the thicker or eccentric portion of said bearing box with a depression or grove in its outer bearing surface, and applying within this depression a removable portion of carbon bronze metal or other suitable durable wearing metal, said removable portion of metal being of a segmental form and extending partly around the circumference of the eccentric bearing box proper, and also extending vertically from or nearly from the upper to the lower ends of said box proper, and being adapted for being secured in position by bevel flanges at the edges of the depression or groove, or by other suitable means provided on the bearing box proper, and on the removable portion of metal or by said flanges together, with screws or dowels. It also consists in the combination of the box proper, having a peculiarly formed depression or groove in its periphery, and a peculiarly formed removable carbon bronze metal or other suitable bearing metal portion, whereby greater strength in the parts is secured." The practical necessity of this improvement is said to arise out of the fact that there is a destructive wear on the periphery of the bearing box, especially at the place where the box is made with an increased thickness opposite one side its eccentric bore. In practice, it is said, that this wear operates to change the throw or motion of the eccentric, thus impairing the effective capacity of the machine, and it is claimed that this defect is remedied by the use of the removable bronze metal. When the wear becomes so great as to injure the operation of the machine the bronze can be removed and another portion of bronze metal put in its place, and thus dispense with procuring a new eccentric box.

Still another improvement was patented by P. W. Gates by letters issued December 13, 1881, and numbered 250,656. This invention relates to alleged improvements in the shaft of ore crushing machines, and in the method of applying oil to the machinery while in place and in motion, and calls for no special attention at this stage of our inquiry.

The defendants' machine, as described by W. S. Bates, an expert called on behalf of the defendants, has an outer shell or case; a crushing cone within the shell, mounted on a shaft, *a fixed bearing for the upper part of [346] the shaft; an eccentric bearing for the lower part of the shaft by which it is made to travel in a circular path; a step bearing for the lower end of the shaft to take the thrust due to the weight and the crushing effort, and suitable gearing operating on the eccentric bearing to revolve the same.

The stress of the case is in the effort of the complainant's witnesses to establish an in-

fringement in the defendants' machine of the Pearce patent and of the Rusk patent.

Undoubtedly, the leading features of the Pearce machine are found in that of the defendants. There are the conical shell or case; a conical crusher within the shell; a shaft on which the crusher is secured; a pivotal point at the lower end of the shaft, and an eccentric bearing at the upper end of the shaft, whereby the shaft and the crushing cone are caused to revolve in a conical orbit. But, as we have heretofore seen, these are present in the Wood machine, a prior invention. The Wood patent shows a stone crushing mill consisting of a conical shell, a conical crusher within the shell, a shaft on which the crusher is mounted, a fixed pivotal point at the lower end of the shaft, and the crusher revolves in a conical orbit. The mode of operation is the same in the two patents—that is, the material to be crushed is fed into the top of the machine, the sides of the crushing cone are caused to approach and recede from the sides of the shell, so as to crush the material, the motion being greatest at the top, where the large lumps are, and least at the bottom, so that the material is finely reduced, and passes out at the bottom. The modes of supporting and adjusting the crushing head and shaft are mechanically different. Some of these principal features are likewise to be seen in the Ostrander machine under a still older patent.

The infringement of the Rusk patent is said to be in the use in the defendants' machine of the safety break pins; and it must be conceded that the defendants do use such a device. Rusk does not claim the invention of the pin. What he does claim is "the combination of soft-metal pins or plugs with the driving gear of a grinding mill."

347] *Hiram H. Scoville, one of defendants' witnesses, testified that the use of breaking pins was common in large machines; in a brick machine as far back as 1860; in the Blake ore crusher in the form of a breaking link; and in machines used in the shop of the witness in 1875.

Bates, defendants' expert, testified that "there is nothing new in the use of such safety devices for such a purpose. Their use is common in all classes of machines which are liable to sudden or unexpected strains. I have here two examples of safety pins applied to cultivators, to wit: patent No. 11,379 to G. Lichtenthaler, July 25, 1854, and patent No. 75,669 to J. D. De Turk, March 17, 1868. Both of these patents show cultivator teeth, arranged with wooden pins, for the purpose of having the pins break should the teeth strike a root or stone, the object being to prevent the breaking of the machine."

We do not perceive that this testimony was controverted by the complainant's witnesses. The complainant's expert does indeed claim that the patents referred to as showing the prior use of safety pins do not show such use in combination with driving gear. But, assuming that the use of safety pins for saving machinery from the strain of a sudden jar was old, we cannot regard their use, for such a purpose, in connection with the driving gear of a stone crushing machine, as patentable. It is also to be observed that Rusk expressly limited himself to soft metal pin, and thus limited, the use of wooden pins being old, no infringement would be shown by defendants' use of a hard cast iron pin.

Coming now to the Brown patent, and not regarding, at this stage of the discussion, the defendants' claim of a license, we have to consider the claim of infringement. The claims asserted are the 2d, 3d, and 4th. There is no pretence of infringement of the 1st claim, for the reason that the defendants' machine does not have the adjusting screw, the main feature of that claim.

A comparison of the Brown patent, in the particulars relied on, with the prior Rutter and Tripp patents satisfies us that, even if some of his additional devices were deemed novel, it is *plain, from the history of [**348** such machines that his claims, to be saved, must receive a very narrow construction. Thus limited, they are not infringed in defendants' machines. We dismiss this part of the case by adopting the views of the court below: "Claims 2, 3, and 4 of the Brown patent are involved in this suit. The fourth claim is limited to a shell enclosing at its upper end a concave breaker, and provided with an oblique trough 'integral with the frame, the inner edge of which extends upwards and within the concave base of the breaker 6 all around.' This claim was allowed on the ground that this feature of the combination was an improvement on anything contained in the prior art. One element in the combination covered by the second claim is the 'breaking head 6, constructed with a concave base as shown.' Both the drawing and the specification show a concave breaking head, into which the shell or trough extends. The trough or shell is cast integral with the case shell. These claims cannot be broadened by eliminating or disregarding any of their language. The breaking head of the defendants' machine is not concave, and it follows that their machine has no trough extending upward and within the concave breaking head. The defendants' machine, therefore, infringes neither the second nor the fourth claim of the Brown patent. The defendants' machine does not contain the spindles with the sliding bearing mentioned in Brown's third claim, or any other sliding bearings, and the adjusting screw or step embraced in the third claim is not found in the defendants' machine."

The defendants, in the fifth paragraph of their answer, aver that, prior to Brown's application for patent No. 201,646, H. H. Scoville, one of the defendants by and with Brown's consent, made and put into use two machines containing the invention described in that patent, and that by virtue of an oral license thus given by Brown to Scoville the defendants have a right to make and sell machines containing inventions covered by said patent. Scoville testifies that, in consideration of assistance given by him to Brown in bringing out his invention the latter had verbally agreed that he, Scoville, was to *have a half interest in the exclusive [**349**

manufacture of the ore breakers, but that Brown had never made an assignment of such interest in a legal form. Brown himself testifies to the same effect. But, as it appears that subsequently Brown assigned these letters patent to the complainant company, and as there is nothing to show that the latter had any notice or knowledge of Scoville's interest, we think that no effect can be given to this alleged verbal license or interest.

In the sixth paragraph of their answer the defendants allege that, before P. W. Gates made application for either one of the four patents issued to him, the same improvements that were described in the Gates patent were known to and used by Brown and Scoville; that said improvements were invented by Brown, and were embodied by Scoville in full-sized working machines, and which machines were publicly used more than two years before Gates' application for his patents.

The history of these two machines is given by Scoville and Brown. The former testifies that in the early part of 1878 he made two machines under the Brown patents. He says that he and Brown loaned them to other parties to test their value as stone breakers. The first was loaned to the Kirby & Howe Stone Company of Iowa, who operated the machine for nine months, when they broke the cast iron shaft, and then returned the machine. This machine was repaired in the works of the Gates & Scoville Iron Works Company, of which Scoville was then vice president and superintendent. This machine was then sold to the Chicago City Railway Company, and has since been used by them. He further testifies that the second machine was loaned to General McDowell, in charge of the custom house, then in course of erection at Chicago, and several thousand tons of concrete and slag for the foundation were broken by this machine. It was then returned to Scoville, who says he made some repairs on it, and also some changes which have since been adopted and claimed by the complainant company. This machine was afterwards sold to Smith Bros., of Marion, Ohio. Brown testifies that one of these two machines was made in 1877, **350**]*and sold on trial to Mr. Kirby, of Iowa, during the fall of that year; that the second one was in the shop of Scoville during the summer of 1878, and loaned the following winter to be used in breaking stone for the construction of the United States custom house.

Scoville further testified that these two machines were at first made in the manner described in the Brown patent, but that on their return by the parties to whom they had been loaned they were somewhat changed. Those changes he thus describes: "They were changed by my own order, and under my superintendence, with Mr. Brown's advice, the old breaking heads being worn, and requiring new ones. We made a change in the new heads from the old by cutting off the lips that form the concave for the head, making the head level on the bottom, and also cutting off the top of the annular ring that projects up from the trough, so as to make room for a washer or riding ring, which ring we put on to keep the dust out from the gear. We also took out at that time the wedges in the top of the machine for adjusting a section of bearings around the ball, and put in sections that just fitted. That was all the change that was made. My recollection is that it was in November, 1878, in respect to the breaker sold the Chicago City Railway Company. The second was somewhat later." He further testified as to a provision that was made by groove to receive zinc or other metal that might be filled in to form a collar for the purpose of keeping the head from working off.

Brown's testimony is to the same effect, but he goes more into detail. Among other important changes that he alleges were made was that made at the top of the machine by leaving out the adjustable wedges around the socket bearing, and making this bearing to fill the space around the shaft inside of the head at the top of the machine, and that the segments that supported the ball at the upper end of the shaft were introduced in place of the wedges and were made or cast on a round chill, with pieces of sheet iron placed in the mold where the junction of the segments was designed to be, so that after the casting was made it could readily be spread *apart [**351** into four pieces. He also states that he put a breaking pin between the driving shaft and the gear, but this was modified by placing the breaking pin between the driving pulley and a hub which was fastened on the countershaft. All these changes were made in 1878, and none of them, according to Brown, were made by the design or suggestion of P. W. Gates.

P. W. Gates, on behalf of the complainant company, testified that two machines were made by Brown, one of which was used by the Kirby-Howe Company of Iowa, and which was returned about September 1, 1878. The other, built by Brown or Scoville, was loaned to the United States government to use at the custom house, and was returned.

He admits that, in repairing these two machines, considerable changes were made, exhibiting features not shown in the original Brown patent, but he claims that these changes were devised by himself.

But whether these improvements were attributable to Brown, as testified by Scoville and Brown, or to Gates, as he testifies, is not specially important. What is important is the fact, that it thus appears that several of the features claimed in the Gates patents were illustrated in these two reformed Brown machines, actually in public use more than two years before Gates applied for his patents.

The claim of Gates No. 1, for the segmental cast bearing for the ball of the socket joint, having a form which gives it a bearing contact upon the ball, is found in the Brown reformed machine. The claim in Gates No. 2 of a novel application of a loose collar around the eccentrically gyrating shaft, to prevent dirt getting into the bearing, was anticipated in the Brown machine as changed in 1878, by a circular washer or collar upon the top of the sleeve that surrounded the breaking head, which fitted around the shaft, the object being to keep the dust from the machinery below.

We agree with the court below in thinking that the first claim in Gates' patent No. 3, for the device of a depression or groove in the outer bearing surface of the bearing box, and applying within this depression a removable portion of carbon bronze metal, so as to correct the wear of the machine at that 352]*place, can scarcely be deemed an invention, as the use of soft metals for that function is shown to be old. At all events, the defendants' machine uses Babbitt metal over the entire surface; that is, going entirely around, instead of only a portion of the distance. In this respect defendants' machine follows the Brown amended machine. Nor can any force be given to Gates' claim that the use of the Babbitt or carbon bronze metal in the depression or groove is a new article of manufacture. Whether or not such a device, as a merely incidental feature of a compound machine, can be deemed a new article of manufacture, there is no proof of infringement, as it is not pretended that the defendants have ever made any such new article of manufacture. The alleged invention in Gates' patent No. 4 is for a combination of old features, to wit, a shaft, a bearing for the shaft, a hard metal plate in the lower end of the shaft, an adjustable sliding step block, and an oil step box.

All of the elements of this combination were shown to be present in the Brown machine as made and sold more than two years before Gates applied for this patent, except the hard metal plate at the end of the shaft. But the use of hard or steel wearing plates was shown to be old, and several letters patent, viz, C. M. Savoye, an English patent, 1831; T. Varney, No. 63,675, issued April 9, 1867; Palen & Avery, No. 111,239, issued January 24, 1871, and several others were put in evidence by the defendants, and exhibited the feature of a hard metal wearing place at the end of the working shaft.

Our conclusion is that reached by the court below, and its decree dismissing the bill is affirmed.

353] *UNITED STATES *ex rel.* the STATE OF SOUTH CAROLINA, *Plff. in Err.*,

v.

JOHN S. SEYMOUR, Commissioner of Patents.

(See S. C. Reporter's ed. "*South Carolina* v. *Seymour*," 353-360).

Review of judgment of Court of Appeals of District of Columbia—requisites of review—jurisdictional amount—mandamus to register a trademark.

1. This court has no jurisdiction to review a judgment of the court of appeals of the District of Columbia, denying a writ of mandamus to the Commissioner of Patents to register a trademark.

2. A case cannot be brought to this court by appeal from the supreme court of the District of Columbia, unless either the matter in dispute, exclusive of costs, exceeds the sum of $5000, or there is involved the validity of a patent or copyright, or there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States.

3. In order to give this court jurisdiction to review a judgment of the supreme court of the District of Columbia on the ground that the matter in dispute exceeds $5000, it must appear by the record that the matter in dispute exceeds that value.

4. A petition for a mandamus to the Commissioner of Patents to register a trade-mark does not involve the validity of any patent or copyright nor of a treaty or statute or authority exercised under the United States.

[No. 1140.]

Submitted April 9, 1894. Decided May 14, 1894.

IN ERROR to the Court of Appeals of the District of Columbia, to review a judgment of that court, denying a writ of mandamus to the commissioner of patents to register a trade-mark. On motion to dismiss. *Dismissed.*

Statement by *Mr. Justice* **Gray:**

This was a motion to dismiss for want of jurisdiction a writ of error to review a judgment of the Court of Appeals of the District of Columbia, denying a writ of mandamus to the Commissioner of Patents to register a trade-mark under the Act of March 3, 1881, chap. 138 (21 Stat. at L. 502). The case is stated in the opinion.

Messrs. **Levin H. Campbell** and *John I. Hall*, for defendant in error, in favor of motion:

There is no sum of money involved in the decision of the court of appeals in this case. Nor was there any right of property in issue.

Cameron v. *United States*, 146 U. S. 533 (36: 1077); *Kurtz* v. *Moffitt*, 115 U. S. 487 (29: 458); *Smith* v. *Adams*, 130 U. S. 167 (32: 895).

Nothing appears of record to show the money value of the matter in dispute.

Street v. *Ferry*, 119 U. S. 386 (30: 439); *Cross* v. *Burke*, 146 U. S. 82 (36: 896).

This action does not involve the validity of a patent, nor copyright, nor treaty, nor statute, nor authority of the United States.

Baltimore & P. R. Co. v. *Hopkins*, 130 U. S. 211 (32: 908); *District of Columbia* v. *Gannon*, 130 U. S. 227 (32: 922); *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227 (36: 951); *United States* v. *Lynch*, 137 U. S. 280 (34: 700); *Cook County* v. *Calumet & C. Canal & D. Co.* 138 U. S. 653 (34: 1116); *Clough* v. *Curtis*, 134 U. S. 361 (33: 945).

Mr. **John Altheus Johnson**, for plaintiff in error, in opposition:

Courts check the exercise of discretion of an officer when assumed in regard to matters not properly within it, or when mistake is made in law not germane to the discretion.

Nelson v. *Edwards*, 55 Tex. 389; *Beck* v. *Jackson*, 43 Mo. 117; *Gulick* v. *New*, 14 Ind.

NOTE.—*As to when mandamus will issue*, see note to M'Cluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion, see note to Ex parte Morgan, 29: 135.

As to when an injunction will be granted restraining the unauthorized use of trademarks, see note to McLean v. Fleming, 24: 828.

As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute, see note to Schunk v. Moline, M. & S. Co. 37: 256.

98, 77 Am. Dec. 49; *Mobile Mut. Ins. Co.* v. *Cleveland*, 76 Ala. 321; *People* v. *Perry*, 13 Barb. 206; *Thomas* v. *Armstrong*, 7 Cal. 287.

A trade-mark is a species of property recognized by the courts as of pecuniary value, and a right of action exists for every infringement or invasion thereof, either at law for the damage, or in equity for an injunction and accounting.

And this court will not assume the value to be less than $5000 when the article of commerce to which applied is of as wide and extensive use as the one involved in this case.

McLean v. *Fleming*, 96 U. S. 245 (24: 828); *Julian* v. *Hoosier Drill Co.* 78 Ind. 408; *Graham* v. *Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Avery* v. *Meikle*, 85 Ky. 435; *Stonebraker* v. *Stonebraker*, 33 Md. 252; *Hostetter* v. *Vowinkle*, 1 Dill. 329.

Mr. Justice **Gray** delivered the opinion of the court:

The earliest legislation of Congress for the registration and protection of trade-marks was contained in the Patent Act of 1870, and substantially re enacted in the Revised Statutes. Act of July 8, 1870, chap. 230, §§ 77-84 (16 Stat. at L. 210-212); Rev. Stat. §§ 4937-4947. That legislation, as well as the Act of August 14, 1876, chap. 274 (19 Stat. at L. 141) for punishing the counterfeiting of trade-marks, was held by this court at October term, 1879, to be **354**] unconstitutional and void, because* not limited to trade-marks used in commerce with foreign nations, or among the several states, or with the Indian tribes. *Trade-mark Cases*, 100 U. S. 82 [25: 550].

Congress afterwards passed an Act limited to the registration and protection of trade-marks "used in commerce with foreign nations or with the Indian tribes," and whose owners were "domiciled in the United States, or located in any foreign country or tribes which by treaty, convention or law, affords similar privileges to citizens of the United States." Act of March 3, 1881, chap. 138 (21 Stat. at L. 502).

Sections 1 and 2 of that Act provide that such owners may obtain registration of such trade-marks by "causing to be recorded in the Patent Office a statement specifying name, domicil, location and citizenship of the party applying; the class of merchandise and the particular description of goods comprised in such class to which the particular trade-mark has been appropriated; a description of the trade-mark itself, with facsimiles thereof, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used;" "paying into the Treasury of the United States the sum of twenty-five dollars, and complying with such regulations as may be prescribed by the Commissioner of Patents;" and "accompanied by a written declaration verified by the person, or by a member of a firm, or by an officer of a corporation applying, to the effect that such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive: that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; and that the description and facsimiles presented for registry truly represent the trade-mark sought to be registered."

By section 3, "no alleged trade-mark shall be registered, unless the same appear to be lawfully used as such by the applicant in foreign commerce or commerce with Indian tribes, as above mentioned, or is within the provision of a treaty, *convention or de- [**355** claration with a foreign power; nor which is merely the name of the applicant; nor which is identical with a registered or known trade-mark of another and appropriate to the same class of merchandise, or which so nearly resembles some other person's lawful trade mark as to be likely to cause confusion or mistake in the public or to deceive purchasers."

This section further provides that "in an application for registration the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases."

The Act provides for no direct judicial review, by appeal or otherwise, of the decision of the Commissioner of Patents upon the question of registration. But section 7 provides that "registration of a trade-mark shall be prima facie evidence of ownership;" that any person reproducing, counterfeiting, copying or colorably imitating and affixing to similar goods, a registered trade-mark shall be liable to an action at law for damages, or a suit in equity for an injunction; and that the courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy.

On December 24, 1892, the general assembly of South Carolina passed an act, prohibiting the manufacture or sale of intoxicating liquors within the state, except as therein provided, directing the appointment of a commissioner who should, under the rules and regulations of a state board of control, consisting of the governor, the comptroller general and the attorney general, "purchase all intoxicating liquors for lawful sale in this state," and sell to county dispensers no liquors unless "tested by the chemist of the South Carolina college and declared to be pure and unadulterated;" that county dispensers should "alone be authorized to sell and dispense intoxicating liquors;" that manufacturers of intoxicating liquors doing business in the state should "be *allowed [**356** to sell to no person in this state, except to the state commissioners and to parties outside of the state;" and that every package of intoxicating liquors, sold in the state, or shipped beyond the limits of the state, should have thereon a certificate of the commissioner. South Carolina Acts of 1892, chap. 28, pp. 62, 63, 65.

On July 15, 1893, the state of South Carolina, by its governor, paid into the Treasury of the United States the sum of twenty-five dollars, and filed with the Commissioner of Patents, in conformity with the provisions of the Act of Congress of 1881, and with the regulations prescribed by the Commissioner of Patents, a statement and declaration, which

began by stating that "the state of South Carolina, one of the commonwealths composing the United States of America, possessed in this regard of the full rights of a corporation, and doing business at its capital city of Columbia, in the county of Richmond, state aforesaid, has adopted for its use a trade-mark for chemically pure distilled liquors," consisting of the word "Palmetto," and particularly described; was accompanied by facsimiles of the trade-mark; and was supported by a declaration on oath of the governor that he verily believed "that the foregoing statement is true; that the said state at this time has a right to the use of the trade-mark therein described; that no other person or firm or corporation has the right to such use, either in the identical form, or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by the said state in commerce with foreign nations or Indian tribes, and particularly with Canada; and that the description and facsimiles presented for record truly represent the trade-mark sought to be registered."

At the hearing before the Commissioner of Patents, it appeared that the trade-mark had been adopted by the state board of control, and that the state had sold in Canada a case of liquors with this trade-mark.

The Commissioner of Patents refused registration of the trade-mark, upon the ground that the state of South Carolina, by its own laws, had no authorized trade in distilled liquors 357] *outside of its own limits, was not the owner of any trade-mark, and had not the right to the use of the trade-mark sought to be registered.

The state of South Carolina, by its attorney general, thereupon presented to the supreme court of the District of Columbia a petition for a writ of mandamus to the Commissioner of Patents to register the trade-mark. That court held that upon the facts proved the duties of the Commissioner of Patents in regard to registration of trade-marks were merely ministerial, and that the writ of mandamus should issue. The Commissioner of Patents appealed to the court of appeals of the District of Columbia, which held that those duties were not ministerial, but required the exercise of judgment and discretion by the Commissioner, and therefore reversed the judgment and dismissed the petition.

The petitioner sued out this writ of error, and the defendant in error now moves to dismiss it for want of jurisdiction.

By section 8 of the Act of February 9, 1893, chap. 74, establishing a Court of Appeals for the District of Columbia, as in the previous Act of March 3, 1885, chap. 355, regulating appeals from the supreme court of the district and the supreme courts of the territories, no case can be brought to this court by appeal or writ of error, unless either "the matter in dispute, exclusive of costs, shall exceed the sum of $5000," or else, without regard to the sum or value in dispute, it is a case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." 27 Stat. at L. 434; 23 Stat. at L. 443.

In order to bring a case within the first alternative, the matter in dispute, according to the settled construction, must be money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value. *Columbian Ins. Co.* v. *Wheelwright*, 20 U. S. 7 Wheat. 534 [5: 516]; *Kurtz* v. *Moffitt*, 115 U. S. 487 [29: 458]; *Street* v. *Ferry*, 119 U. S. 385 [30: 439]; *Smith* v. *Adams*, 130 U. S. 167, 176 [32: 895, 898]; *Cross* v. *Burke*, 146 U. S. 82, 88 [36: 896, 898]; *Washington & G. R. Co.* v. *District of Columbia*, 146 U. S. 227 [36: 951]; *Cameron v. United States, 146 U. S. [358 533, 535 [36:1077, 1078], and 148 U. S. 301, 303 [37: 459, 460]. In *Sparrow* v. *Strong*, 70 U. S. 3 Wall. 97 [18: 49], cited by the plaintiff in error, there was an affidavit, uncontradicted by anything in the record, that the mining claim in dispute was of the requisite pecuniary value. In *Columbian Ins. Co.* v. *Wheelwright*, above cited, this court quashed a writ of error to review a judgment upon a writ of mandamus to admit to an office, the salary of which was not shown to be of the pecuniary value required to support the jurisdiction of this court. See also *United States* v. *Addison*, 63 U. S. 22 How. 174 [16: 304]; *Smith* v. *Whitney*, 116 U. S. 167, 173 [29: 601, 602]; *United States* v. *Wanamaker*, 147 U. S. 149 [37: 118].

The matter in dispute in this case is not the right to the trade-mark, but the right to have it registered; the registration is only prima facie evidence of ownership; and if the value of the registration is susceptible of an estimate in money, there is no evidence whatever in the record tending to show this value.

It is not, and could not be, pretended that in this case there was "involved the validity of any patent or copyright;" and, in the light of previous decisions of this court, it is quite clear that there was not "drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question.

In *Snow* v. *United States*, 118 U. S. 346, 363 [30:207, 209], in which it was contended that a court established by Act of Congress, and admitted to have a lawful existence, and jurisdiction of the case, misconstrued the Act and went beyond the authority which it conferred, it was held that all that was drawn in question was whether there was or was not error in the administration of the statute, and not "the validity of an authority exercised under the United States," within the meaning of the Act of March 3, 1885, chap. 355.

In *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210 [32:908], which also arose under that act, the question in controversy *was whether 359 a railroad corporation authorized by acts of Congress to establish freight stations, and to lay as many tracks "as its president and board of directors might deem necessary," in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority, exercised under the United States,

to so occupy the public streets was drawn in question. But this court held that only the construction of the acts of Congress, and the extent of the authority claimed under them, and not the validity, either of the statutes, or of the authority, was drawn in question; or, in other words, it was "a case which depends only on a judicial construction of an Act of Congress, there being no denial of the power of Congress to pass the Act, or of the right to enjoy whatever privileges are granted by it." *Clough* v. *Curtis*, 134 U. S. 361, 370 [33:945, 949].

In *District of Columbia* v. *Gannon*, 130 U. S. 227 [32:922], it was held that the validity of the authority of the commissioners of the district was not drawn in question by contesting the liability of the district in damages for the negligence of the Commissioners in failing to keep the streets in repair.

In *United States* v. *Lynch*, 137 U. S. 280 [34:700], in which the court below had denied a writ of mandamus to compel accounting officers of the Treasury to allow a claim for mileage, it was contended that under the acts of Congress, and the construction given them by a previous decision of this court, the duty of the accounting officers "was merely ministerial, and that by the disallowance of the relator's claim for mileage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question." To which this court, speaking by the *Chief Justice*, answered: "In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted; nor is the validity of an authority, every time an act done by such au-[360] thority *is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry." The court accordingly held that the authority of the accounting officers of the Treasury was not thus denied, nor the validity of that authority questioned; but that it was only contended that in the exercise of a valid authority those officers erred in respect to the allowance, in view of the decision of this court in another case; that if the judgment should be reversed upon the ground urged, it would not be for want of power in these officers to audit and pass upon the account, but because they had disallowed what they ought to have allowed, and erroneously construed what needed no construction; and that this would not in any degree involve the validity of their authority. 137 U. S. 285, 286 [34:702, 703].

In the present case, no objection to the validity of the Act of Congress under which the Commissioner of Patents acted was made, either at the hearings in the Patent Office and in the courts of the District of Columbia, or in the briefs filed by counsel in this court. Nor was the existence or the lawfulness of the authority conferred by that Act upon the Commissioner of Patents drawn in question. But from the beginning to the end of the proceedings the only controversy was as to the construction of the Act of Congress, and consequently as to the nature and extent of the Commissioner's authority. Neither the question whether the Commissioner rightly decided upon the presumptive lawfulness of the right of the state of South Carolina to the trademark sought to be registered, nor the question whether the Commissioner's duty was of such a character that a writ of mandamus would lie to compel its performance, involved a question of the validity of the authority exercised by him under the United States.

Writ of error dismissed for want of jurisdiction.

THOMAS H. MASON, ET AL. *Appts.*,
v.
THE PEWABIC MINING COMPANY ET AL. [361

(See S. C. Reporter's ed. 361-366.)

Appeal, when dismissed—extra allowance of costs.

1. Where there is no appeal to this court under section 5 of the Judiciary Act of 1891, nor under the Joint Resolution of March 3, 1891, the appeal will be dismissed.
2. Where this court in its mandate to the circuit court ordered that a party should recover costs, that court can entertain an application for an extra allowance of costs out of the funds to the counsel of such party, and if denied, its decision may be reviewed in the circuit court of appeals.

[No. 1041.]

Argued April 26, 27, 1894. Decided May 14, 1894.

APPEAL from an order of the Circuit Court of the United States for the Western District of Michigan, denying a petition by complainant's counsel, for an allowance out of the amount realized on the sale of property of a mining company, in addition to the usual taxable costs for professional services and expenses. *Dismissed.*

See same case, 133 U. S. 50 [33: 524]; 145 U. S. 349 [36: 732.]

The cause was argued both on the merits, and on a motion to dismiss made by the appellees.

Statement by *Mr. Chief Justice* **Fuller:**

On March 31, 1884, some of the stockholders of the Pewabic Mining Company, on behalf of themselves and all others who might desire to join therein, filed their bill in the Circuit

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NOTE—*As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute*, see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statute, treaty or Constitution, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state laws, void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

Court of the United States for the Western District of Michigan against that company, its directors, and a new corporation called the Pewabic Copper Company, formed for the purpose of acquiring the property of the Mining Company, seeking to have the property disposed of at public sale, and an accounting by the directors. The circuit court decreed a sale but denied the accounting. The case was brought to this court on cross-appeals and the decree affirmed except in respect of the accounting, as to which the decree was reversed and a reference directed. *Mason* v. *Pewabic Min. Co.* 133 U. S. 50 [33:524]. The case was decided in this court January 13, 1890, and the mandate having gone down, the circuit court rendered a decree May 6, 1890, ordering a reference, report, and sale by auction. February 3, 1891, the special master filed his report of sale, which was confirmed. On March 3, one Marcus filed an intervening petition to set aside the confirmation and open the sale, which was denied April 27, 1891, and the pe-[362] tition *dismissed, whereupon Marcus appealed to this court, which affirmed the order. *Marcus* v. *Mason*, 145 U. S. 349 [36:732].

February 28, 1893, counsel filed a petition for an allowance out of the amount realized on the sale, to which an answer was filed and the petition denied, whereupon an appeal was prosecuted to this court. In the opinion of the circuit court, appearing in the record, it is said:

"The other matter which remains to be disposed of is the petition for an allowance out of the fund in favor of the solicitors for the complainants upon the footing of what are known as costs between solicitors and clients.

"A preliminary question arises in regard to the power of the court proceeding as it is under the mandate of the supreme court, which contains the order of that court in regard to costs. This was to the effect that the complainants should recover their costs in the circuit as well as in the supreme court. These, of course, must be understood to be the usual taxable costs.

"It would seem clear that this court has no authority to supplement that order by awarding a sum, to be determined by its discretion, as costs to be taxed as between party and party, but which are really an indemnity for the expense of carrying on the suit against a perverse and unreasonable defense, as was done in *Perrin* v. *Lepper*, 72 Mich. 454, and *Mackintosh* v. *Flint & P. M. R. Co.* a case reported in 34 Fed. Rep. 582 (though not on this point, which latter appears from the record) cited in support of this petition.

This court is not now proceeding upon its original authority in regard to any matters which were or might have been dealt with by the supreme court on the appeal from the original decree. The subject of costs was included in the mandate which we are now executing. *Perkins* v. *Forniquet*, 55 U. S. 14 How. 328 [14:441]; *Re Washington & G. R. Co.* 140 U. S. 91 [35:339]; *Gaines* v. *Caldwell* ("*Gaines* v. *Rugg*") 148 U. S. 228, 239 [37:432, 435].

"There is some analogy, though it is not complete, between the equity for such costs and costs between solicitor and client, which are paid out of a fund in court. I have some doubt whether this court retains the power to award the latter *species of costs; but I [363] express no opinion upon this question, as it seems to me clear that this is not a case in which they could properly be allowed."

The cause was argued both on the merits and on a motion to dismiss made by the appellees.

Messrs. **Don M. Dickinson** and *Alfred Russell* for appellants.

Mr. **Thomas H. Talbot** for appellees.

Messrs. Cahill & Ostrander for intervening stockholders.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By section four of the Judiciary Act of March 3, 1891, it was provided that "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts, shall be had only in the Supreme Court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this Act regulating the same." Section five enumerated the classes of cases in which appeals or writs of error might be taken from the circuit courts direct to this court; and section six provided that the circuit courts of appeals should exercise appellate jurisdiction to review by appeal or by writ of error final decisions of the circuit courts "in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law." By section fourteen "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this Act" were repealed.

In *Lau Ow Bew* v. *United States*, 144 U. S. 47, 56 [36:340, 343], it was held that "the words 'unless otherwise provided by law' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were thereby intended to be guarded against. To hold that the words referred to prior laws would defeat the purpose of the Act and be inconsistent with its context and its repealing clause."

By joint resolution of March 3, 1891, it was provided "that nothing in said Act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any Circuit Court of the United States in any case now pending before it," and it was added, "or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken *to any of said courts before the [366] first day of July, *anno Domini*, eighteen hundred and ninety-one."

The Act of March 3, 1891, went into immediate operation. *Re Claasen*, 140 U. S. 200 [35:409]. But the jurisdiction of this court having been preserved in respect of writs of error or appeals sued out or taken before July 1, 1891, by the joint resolution, we had jurisdiction of the appeal of Marcus which was taken June 12 of that year. This case does not come within either of the classes of cases specified in section five, and the appeal was not prayed until August 20, 1893. It must

therefore be dismissed. *National Exch. Bank* v. *Peters*, 144 U. S. 570 [36:545]; *Wauton* v. *De Wolf*, 142 U. S. 138 [35:965]; *Ogden* v. *United States*, 148 U. S. 390 [37:493]; *Aspen Min. & S. Co.* v. *Billings*, 150 U. S. 31 [37:986]; *Voorhees* v. *J. T. Noye Mfg. Co. ante, p.* 101; *Nashua & L. R. Corp.* v. *Boston & L R. Corp.* 51 Fed. Rep. 929. It is said, however, that the disposition of the case involved the construction and application of the mandate of this court as to costs. If it could be contended that our mandate had been misconstrued or disregarded, this would not give complainants the right of appeal after July 1, 1891, but the remedy would be by mandamus. *City Nat. Bank of Ft. Worth* v. *Hunter, ante, p.* 534. Lest, however, appellants might unnecessarily seek a review of the matter in that form of procedure, we deem it proper to say that the circuit court was right in the view taken of the mandate. The remedy of appellants lay in an appeal to the Circuit Court of Appeals for the Sixth Circuit.

In *Texas & P. R Co.* v. *Anderson*, 149 U. S. 237 [37:717], the action of the circuit court conformed to the mandate, and there were no proceedings subsequent thereto, not settled by the terms of the mandate itself, and we therefore held, upon the authorities cited and for the reasons given, that, on the facts appearing in that record, the circuit court of appeals could not review by writ of error the judgment of the circuit court. But in this case the circuit court was at liberty to consider, as it did, the application for an allowance out of the fund on the footing of costs between solicitors and clients, and its action in that regard was open to review in the circuit court of appeals.

Appeal dismissed.

367] ARTEMAS ROBERTS, *Plff. in Errr.*, *v.* WALTER F. LEWIS.

(See S. C. Reporter's ed. 367-379.)

State decision, when followed—will of Jacob Dawson—construction of.

1. In construing the will of Jacob Dawson, the circuit court of appeals should be governed by the decision of the supreme court of Nebraska, and not by the former decision of this court, which is overruled.
2. The will of Jacob Dawson as follows: "To my wife Editha, I give and bequeath all my estate real and personal, of which I may die seised, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike," vested his widow with such an estate in the lands whereof the testator died seised that during her widowhood she could convey to third parties an estate in fee simple therein.
3. The construction of the will of Jacob Dawson, heretofore adopted by this court, should not be adhered to by the circuit court of appeals in determining the right of Lewis, the defendant, in and to the property referred to herein, although he purchased said property after the promulgation of such decision, and prior to the decision of the supreme court of the state.

[No. 1044.]

Submitted April 23, 1894. Decided May 14, 1894.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, certifying questions of law for the decision of this court, relating to the construction of the will of Jacob Dawson, in an action of ejectment brought by Walter F. Lewis, plaintiff, against Artemas Roberts, defendant, to recover possession of land in the county of Lancaster, Nebraska. *Answers certified to the circuit court of appeals.*

Statement by *Mr. Justice* **Gray:**

This was an action of ejectment, brought June 11, 1887, by Walter F. Lewis against Artemas Roberts, in the Circuit Court of the United States for the District of Nebraska, to recover possession of six lots in the town of South Lincoln, in the county of Lancaster and state of Nebraska. The circuit court gave judgment for the plaintiff, and the case was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, which certified to this court the following facts:

On May 10, 1869, Jacob Dawson duly made his last will, which was duly admitted to probate in 1869 after his death, and which, omitting the formal parts, was as follows:

"After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath and dispose of as follows, to wit: To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seised, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, "that if she should [368 marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike, and in case any of my children should have deceased leaving issue, then the issue so left to receive the share to which said child would be entitled. I likewise make, constitute and appoint my said wife, Editha J., to be executrix of this my last will and testament, hereby revoking all former wills made by me."

At the time of his death, he had a perfect title to the lots in controversy in this suit. On March 15, 1870, Editha J. Dawson conveyed

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NOTE.—*That the title of lands by devise is governed by laws of the state*, see note to Clark v. Graham, 8: 334.

That domicil of testator governs validity of will and distribution; foreign will; necessary to be proved where assets are, see note to Smith v. Union Bank of Georgetown, 8: 212.

As to interpretation of wills; intention of testator to govern, see note to Pray v. Belt, 7: 309.

That foreign wills must be proved here, to have effect here; when, and how evidence; ancillary, probate of, see note to Darby v. Mayer, 6: 367, and to Armstrong v. Lear, 6: 589.

these lots by warranty deed to Paran England, who, on December 15, 1871, conveyed them by warranty deed to Roberts, the plaintiff in error. On December 14, 1879, Editha J. Dawson married Henry M. Pickering. On September 15, 1879, the children of Jacob Dawson made a warranty deed of these lots to Hiland H. Wheeler and Lionel C. Burr; and Wheeler and Burr afterwards made a warranty deed thereof to Ezekiel Giles, who, in May, 1887, conveyed them by warranty deed to Lewis, the defendant in error.

While the title in these lots was vested in Giles as aforesaid, he brought an action claiming under that title to recover another lot in the same county, which had belonged to Jacob Dawson at the time of his death, against one Little, who claimed under a deed executed by Editha J. Dawson during her widowhood. That case was brought by writ of error to this court, which held at October term, 1881, that under the will of Jacob Dawson his widow only took "an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only," and that "her estate in the land and that of her grantees determined on her marriage with Pickering." *Giles* v. *Little*, 104 U. S. 291 [26: 745].

After that decision, but whether before or after the aforesaid deed from Giles to Lewis did not appear, a suit was brought in the district court of Lancaster county by various grantees of the widow against Giles to quiet their title against the title claimed by Giles under **369**] the aforesaid deed from the *children of Jacob Dawson; and was taken by appeal to the supreme court of Nebraska, which held that the will of Jacob Dawson, under the statutes of the state of Nebraska, enabled his widow, prior to her remarriage, to convey an estate in fee simple in any of the lands whereof her deceased husband had died seised. *Little* v. *Giles*, 25 Neb. 313.

Upon these facts, the circuit court of appeals duly certified to this court the following questions or propositions of law:

"First. In determining the nature of the estate that became vested in said Editha J. Dawson under said will of her deceased husband, Jacob Dawson, in and to lands situated in the state of Nebraska, whereof said Jacob Dawson died seised and possessed, should the circuit court of appeals be governed by the decision of the Supreme Court of the United States in *Giles* v. *Little*, 104 U. S. 291, 300 [26: 745, 748], or by the subsequent decision of the supreme court of the state of Nebraska in *Little* v. *Giles*, 25 Neb. 313, 334?

"Second. Did the aforesaid will of Jacob Dawson vest his widow with such an estate in lands whereof the testator died seised, situated in the state of Nebraska, that during her widowhood she could convey to third parties an estate in fee simple therein?

"Third. Should the construction of the will of Jacob Dawson, deceased, which was adopted by the Supreme Court of the United States in *Giles* v. *Little*, 104 U. S. 291 [26: 745], be adhered to by the United States Circuit Court of Appeals for the Eighth Circuit in determining the right of Walter F. Lewis in and to the property heretofore described, in view of the fact that said Walter F. Lewis purchased said property subsequently to the promulgation of said decision in *Giles* v. *Little* and prior to the decision of the supreme court of the state of Nebraska in the case of *Little* v. *Giles*, 25 Neb. 313.

Messrs. **N. S. Harwood** and **John H. Ames**, for plaintiff in error:

The section of the Nebraska statute in question was copied from the statute of Michigan, and its proper construction was before that court in *Weir* v. *Michigan Stove Co.* 44 Mich. 506; *Chambers* v. *Shaw*, 52 Mich. 18.

The statute changed the rule as to the presumption of the estate devised.

Dew v. *Kuehn*, 64 Wis. 300; *Robbins* v. *Robbins* (Ky.) June 7, 1888.

This court should adopt the interpretation of the will in *Little* v. *Giles*, 25 Neb. 313.

Where any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court.

Suydam v. *Williamson*, 65 U. S. 24 How. 427 (16: 742); *Henderson* v. *Griffin*, 30 U. S. 5 Pet. 151 (8: 79); *Bucher* v. *Cheshire R. Co.* 125 U. S. 555 (31: 795).

In the construction of a will the application of natural reason should be made to the language of the instrument, under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and the instrument itself.

The use of the words "estate" and "seized," coupled with the power of disposition, as in this will, convey the fee, or the power to dispose of it, to the first taker, the widow, determinable at death or marriage.

Roseboom v. *Roseboom*, 81 N. Y. 356; *Sears* v. *Cunningham*, 122 Mass. 538; *Campbell* v. *Beaumont*, 91 N. Y. 464; *Bacon* v. *Woodward*, 12 Gray, 379; *Godfrey* v. *Humphrey*, 18 Pick. 537, 29 Am. Dec. 621; *Ide* v. *Ide*, 5 Mass. 500; *Alden* v. *Johnson*, 63 Iowa, 124; 4 Kent, Com. 435 *note;* 6 Cruise's Dig. title 38, chap. 11, § 25.

If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee.

Ruby v. *Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Cook* v. *Walker*, 15 Ga. 462; *Helmer* v. *Shoemaker*, 22 Wend. 139; *Jackson* v. *Bull*, 10 Johns. 19; *Rona* v. *Meier*, 47 Iowa, 607, 29 Am. Rep. 493; *Flinn* v. *Davis*, 18 Ala. 132; *Benesch* v. *Clark*, 49 Md. 498; *Van Horne* v. *Campbell*, 100 N. Y. 287, 53 Am. Rep. 166; *Canedy* v. *Jones*, 19 S. C. 297, 45 Am. Rep. 777; *South* v. *South*, 91 Ind. 221, 46 Am. Rep. 591; *Jones* v. *Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Bond's App.* 31 Conn. 183; *Stowell* v. *Hastings*, 59 Vt. 496, 59 Am. Rep. 748.

The terms used apply alike to real and personal estate.

Henderson v. *Blackburn*, 104 Ill. 227, 44 Am. Rep. 780; *Morrison* v. *Semple*, 6 Binn. 98; *Johnson* v. *Morton*, 10 Pa. 249; *Johnson* v. *Johnson*, 1 Munf. 549; *Steele* v. *Thompson*, 14 Serg. & R. 101; *Second Reformed Presb. Church* v. *Disbrow*, 52 Pa. 219.

The terms "whatever may remain" imply an absolute power of disposition.

McKenzie's App. 41 Conn. 607, 19 Am. Rep. 525; *Ramsdell* v. *Ramsdell*, 21 Me. 288; *Harris* v. *Knapp*, 21 Pick. 416; *Homer* v. *Shelton*, 2 Met. 202; *Lynde* v. *Estabrook*, 7 Allen, 68; *State* v. *Smith*, 52 Conn. 562; *Riddick* v. *Cohoon*, 4 Rand. (Va.) 547; *Ide* v. *Ide*, 5 Mass. 500; *Clark* v. *Middlesworth*, 82 Ind. 240; *Paine* v. *Barnes*, 100 Mass. 470; *Andrews* v. *Cape Ann Bank*, 3 Allen, 313; *South* v. *South*, 91 Ind. 222, 46 Am. Rep. 591; *Markillie* v. *Rugland*, 77 Ill. 98; *Kaufman* v. *Breckinridge*, 117 Ill. 315.

The case of *Smith* v. *Bell*, 31 U. S. 6 Pet. 68 (8: 322), has been practically overruled.

Overruled cases by Bigelow: *Flinn* v. *Davis*, 18 Ala. 132; *Stuart* v. *Walker*, 72 Me. 146, 39 Am. Rep. 311; *Gifford* v. *Choate*, 100 Mass. 346; *Lewis* v. *Palmer*, 46 Conn. 454; *Campbell* v. *Beaumont*, 91 N. Y. 468; *Canedy* v. *Jones*, 19 S. C. 297, 45 Am. Rep. 777; *Henderson* v. *Blackburn*, 104 Ill. 282, 44 Am. Rep. 780.

In support of our construction of this statute we cite the following decisions from a state from which the statute was borrowed, and where it is still in force.

Jones v. *Jones*, 25 Mich. 401; *Weir* v. *Michigan Stove Co.* 44 Mich. 506; *Chambers* v. *Shaw*, 52 Mich. 18.

Messrs. **J. M. Woolworth and L. C. Burr,** for defendant in error:

This court is, by the exigencies of an orderly litigation, first called on to determine the local law and it does so, it does not yield its judgment to that of a local court afterwards pronounced, save only when, as in all other cases, it becomes satisfied upon its own independent examination that it has fallen into an error.

Grores v. *Slaughter*, 40 U. S. 15 Pet. 449 (10: 800); *Rowan* v. *Runnels*, 46 U. S. 5 How. 134 (12: 85); *Pease* v. *Peck*, 59 U. S. 18 How. 595 (15: 518); *Martin* v. *Curtenius*, 61 U. S. 20 How. 1 (15:823); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359); *Sinclair* v. *Jackson*, 8 Cow. 543; *Clarke* v. *Van Surlay*, 15 Wend. 439; *Fairfield* v. *Gallatin County*, 105 U. S. 47 (25: 544.)

If the state courts have held a certain view of the law upon which contracts have been made and rights have been acquired, and afterwards they have changed their decisions, they will not be followed in the Federal courts, in cases to enforce those contracts, but the law of the state at the time those rights were acquired will be rigidly applied.

Mercer County v. *Hackett*, 68 U. S. 1 Wall. 83 (17: 548); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175 (17: 520); *Havemeyer* v. *Iowa County Supra.* 70 U. S. 3 Wall. 294 (18: 38); *Thomson* v. *Lee County*, 70 U. S. 3 Wall. 327 (18: 177); *Mitchell* v. *Burlington*, 71 U. S. 4 Wall. 270 (18: 350); *Lee County* v. *Rogers*, 74 U. S. 7 Wall. 181 (19: 160); *Kenosha* v. *Lamson*, 76 U. S. 9 Wall. 477 (19: 725); *Olcott* v. *Fond du Lac County Supra.* 83 U. S. 16 Wall. 678 (21: 382); *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968); *Thompson* v. *Perrine*, 103 U. S. 806 (26: 612), 106 U. S. 589 (27: 298); *Pleasant Twp.* v. *Aetna L. Ins. Co.* 138 U. S. 67 (34: 864); *Clark* v. *Bever*, 139 U. S. 96 (35: 88).

There are laws in force in the states, upon which this court has not only an independent but entirely free judgment, such as questions of commercial law, as in the case of promissory notes (*Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 [10:865]) and policies of insurance (*Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495 [10:1044]) and of the construction of deeds (*Foxcraft* v. *Mallett*, 45 U. S. 4 How. 353 [11:1108]), and of private rights which are to be determined on common law principles (*Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 [17: 298]) and rights of common carriers (*Michigan Cent. R. Co.* v. *Myrick*, 107 U. S. 102 [27:325]) and many other cases.

To this class belong also cases of the construction of wills.

Lane v. *Vick*, 44 U. S. 3 How. 464 (11: 681); *Brimmer* v. *Sohier*, 1 Cush. 132.

Where the statute is simply an enactment of the general rule, the decisions of the state courts are not to be regarded as resting upon a local statute, but only as expressing the views of that tribunal in respect to the same principles of general law.

Clark v. *Bever*, 139 U. S. 96 (35: 88); *Carroll County Supra.* v. *Smith*, 111 U. S. 556 (28: 517).

The decision of the supreme court of the state cannot have conclusive force in the courts of the United States unless it has become a rule of property.

Gibson v. *Lyon*, 115 U. S. 439 (29: 440).

While the courts of the United States accept and apply the construction of a state constitution or local statute upon which the rights of the parties depend, which has been fixed by a course of decisions in the state court, it is the settled doctrine of this court that rights accruing under one construction will not be lost merely by a change of opinion in the state court, and where such rights have accured before the state court has announced its construction, the Federal courts, although leaning to an agreement with the state court, must determine the question upon their own independent judgment.

Anderson v. *Santa Anna Twp.* 116 U. S. 356 (29: 633); *Pease* v. *Peck*, 59 U. S. 18 How. 595 (15: 518); *Morgan* v. *Curtenius*, 61 U. S. 20 How. 1 (15: 823); *Butz* v. *Muscatine*, 75 U. S. 8 Wall. 575 (19: 490); *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368 (37: 772).

The words "clearly appear" in the state statute mean "according to the ordinary rules of construction" and nothing more.

Brimmer v. *Sohier*, 1 Cush. 118, 132.

The intent of the statute is that words of inheritance are no longer necessary.

Areson v. *Areson*, 3 Denio, 458; *Wilkins* v. *Allen*, 59 U. S. 18 How. 391 (15: 398); *Dew* v. *Kuehn*, 64 Wis. 300; *Winchester* v. *Forster*, 3 Cush. 366, 370; *Briggs* v. *Briggs*, 69 Iowa, 617.

The language of the will does not give Mrs. Dawson an absolute power of disposition during widowhood.

Weir v. *Michigan Stove Co.* 44 Mich. 506.

In *Helmer* v. *Shoemaker*, 22 Wend. 137, there was no express limitation for life in the devise; the estate was devised absolutely. So in *Van Horne* v. *Campbell*, 100 N. Y. 287, 53 Am. Rep. 166.

In *State* v. *Smith*, 52 Conn. 562, there was an express power "to sell and convey and use without any restriction whatever."

Mr. Justice **Gray** delivered the opinion of the court:

The certificate distinctly presents for decision the question argued, but not decided, when this case was before this court at a former term, reported in 144 U. S. 653 [36: 579], of the construction of the will of Jacob Dawson, the material part of which was as follows:

"To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and per-[376] sonal, of which I may die *seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike."

By the statutes of Nebraska, "every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise, unless it shall clearly appear by the will that the devisor intended to convey a less estate;" and "the term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Neb. Comp. Stat. chap. 23, § 124, chap. 73, § 49.

In the opinion delivered by this court in a former case between different parties, and concerning other land, the second of those sections was not referred to, and the first was imperfectly quoted (omitting the word "clearly" before "appear") and was treated as of no weight; and it was held, reversing the decision of *Judge* McCrary in 2 McCrary, 370, that by the true construction of the will the widow "took under it an estate for life in the testator's lands, subject to be devested on her ceasing to be his widow, with power to convey her qualified life estate only;" and that "her estate in the land and that of her grantees determined on her marriage with Pickering." *Giles* v. *Little*, 104 U. S. 299, 300 [26: 748].

The supreme court of Nebraska, in a subsequent case, considered those sections of the statute as controlling the construction of the will, and making it clear that the widow took an estate in fee. *Little* v. *Giles*, 25 Neb. 321, 322. That court was also of opinion that the gift over to the children passed only that portion of the estate, real or personal, not disposed of by the widow during her widowhood; and upon the whole case concluded, "that the intention of the testator was to empower his widow to convey all of his real and personal estate, if she saw fit to do so, and, as she had exercised this right and power before her re-[377] marriage, the *grantee under her deeds acquired all the title of the testator to such lands." 25 Neb. 327, 328, 334.

The opinion of the supreme court of the state appears to have been formed upon full consideration of the difficulties of the case; and is entitled to great weight, especially upon the construction of the statute of the state. *Suydam* v. *Williamson*, 65 U. S. 24 How. 427 [16:742]. And this court, on reconsideration of the whole matter, with the aid of the various judicial opinions upon the subject, and of the learned briefs of counsel, is of opinion that the sound construction of this will, as to the extent of the power conferred on the widow, is in accordance with the conclusion of the state court, and not with the former decision of this court, which must, therefore, be considered as overruled.

The testator's primary object manifestly was to provide for his widow. He begins by giving her "all my estate, real and personal," which of itself would carry a fee, unless restricted by other words. *Lambert* v. *Paine*, 7 U. S. 3 Cranch, 97 [2: 377]. He then says "to be and remain hers," which, upon any possible construction, secures to her the full use and enjoyment of the estate, while she holds it. She is also vested, in the most comprehensive terms, "with full power, right and authority to dispose of the same" (which, as no less title has yet been mentioned, naturally means the whole estate) "as to her shall seem most meet and proper, so long as she shall remain my widow." This last clause, so far as it controls the previous words, has full effect if construed as limiting the time during which the widow may have the use and enjoyment of the estate, and the power to dispose of it, and not restricting the subject to be disposed of. The power thus conferred, therefore in its own terms as well as by the general intent of the testator, gives her during widowhood the right to sell and convey an absolute title in any part of the estate; for it would be difficult, if not impossible, to obtain an adequate price for a title liable to be defeated in the hands of the purchaser by the widow's marrying again.

That the power was intended to be unlimited in this respect appears, even more distinctly, by the terms of the next clause, *by which, if [378] she should marry again, the testator declares it to be his will that "all of the estate herein bequeathed, or whatever may remain, should go" to his surviving children. By not using the technical word "remainder," or making the devise over include the entire estate at all events, but carefully adding, after the words "all the estate herein bequeathed," the alternative "or whatever may remain" (which would otherwise have no meaning) he clearly manifests his intention to restrict the estate given to the children to whatever has not been disposed of by the widow; and there is nothing upon the face of the will, nor are there any extrinsic facts in this record, having any tendency to show that the power of the widow is less absolute over the real estate than over the personal property.

The cases of *Smith* v. *Bell*, 31 U. S. 6 Pet. 68 [8:322], and *Brant* v. *Virginia Coal & I. Co.* 93 U. S. 326 [23: 927], relied on in support of the opposite conclusion, involved the construction of wills expressed in different language from that now before the court.

In *Smith* v. *Bell*, the testator bequeathed "all his personal estate," consisting principally of slaves, to his wife, "to and for her own use and benefit and disposal absolutely, the remainder of said estate, after her decease, to be for the use of" his son; and the decision was that the wife took a life estate only, and the son a vested remained. The wife had made no conveyance of the property; the words of the gift over were the technical ones "the remainder of my estate," appropriately designating the whole

estate after the wife's death; and the court distinctly intimated that if the will were construed as giving the wife "the power to sell or consume the whole personal estate during her life," a gift over of "what remains at her death" would be "totally incompatible" and "void for uncertainty," 31 U. S. 6 Pet. 78, [8: 326]. But in the case at bar, the gift over is in express terms of "whatever may remain." If the intent expressed by these words can be carried out, the children take only what has not been disposed of. If the clause containing them is repugnant and void, the view of the supreme court of Nebraska that the widow took an estate in fee is fortified. See *Howard* v. *Carusi*, 109 U. S. 725 [27: 1089]; *Potter* v. *Couch*, 141 U. S. 296, 315, 316 [35: 721, 732].

[379] *In *Brant* v. *Virginia Coal & I. Co.* the bequest which was held to give a life estate, and no power to convey a fee, was only of the testator's estate, real and personal, to his wife, "to have and to hold during her life, and to do with as she sees proper before her death." 93 U. S. 326 [23: 927].

The numerous cases cited in the briefs have been examined, and show that the general current of authority in other courts is in favor of our present conclusion; but, as they largely depend upon the phraseology of particular wills, it would serve no useful purpose to discuss them in detail.

It is unnecessary to express a positive opinion upon the question whether, under this will, the widow took an estate in fee; for if she took a less estate with power to convey in fee, the result of the case, and the answers to the questions certified, must be the same as if she took an estate in fee herself.

For the reasons above stated, this court is of opinion that the will of Jacob Dawson did give his widow such an estate in lands in Nebraska of which he died seised that she could during her widowhood convey to third persons an estate in fee simple therein; and that the circuit court of appeals, in determining the nature of the estate vested in her by the will in such lands, should be governed, not by the former decision of this court in *Giles* v. *Little*, 104 U. S. 291 [26: 745], but by the decision of the supreme court of Nebraska in *Little* v. *Giles*, 25 Neb. 313.

The result is, that the first question certified must be answered according: that the second question must be answered in the affirmative; and that the third question must be answered in the negative; and that these answers be certified to the circuit court of appeals.

*ADELINE B. MARCHANT, Admin- [380
istratrix of Edward D. Marchant, deceased, *Plff. in Err.*,

v.

PENNSYLVANIA RAILROAD COMPANY.

(See S. C. Reporter's ed. 380, 390.)

State decisions—due process of law—equal protection of the law.

1. This court is not authorized to inquire into the grounds and reasons upon which the supreme court of a state proceeded in its construction of the statutes and constitution of that state.
2. A party has not, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding in such a case.
3. A judgment of a state court construing a provision of the constitution of the state which gives a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad does not deprive the plaintiff of property without due process of law, or deny him the equal protection of the law.

[No. 221.]

Argued Jan. 18, 19, 1894. Decided May 14, 1894.

IN ERROR to the Court of Common Pleas, No. 3, for the County of Philadelphia, State of Pennsylvania, to review the judgment of the Supreme Court of Pennsylvania, reversing the judgment of the said Court of Common Pleas, for the recovery of damages by Edward D. Marchant, plaintiff, against the Pennsylvania Railroad Company, defendant, occasioned to plaintiff by the erection by defendant of its elevated road on property belonging to the railroad company and abutting on the south side of Filbert street, in the city of Philadelphia, in front of plaintiff's property, which was situated on the north side of Filbert street. The plaintiff having died pending the litigation his administratrix was substituted in his place. *Affirmed.*

Statement by *Mr. Justice* **Shiras:**

Edward D. Marchant brought an action in the Court of Common Pleas, No. 3, for the county of Philadelphia, state of Pennsylvania, at September term, 1884, against the Pennsylvania Railroad Company, a corporation of Pennsylvania, for the recovery of the damages occasioned to him in the erection by the defendant company of its elevated road on property belonging to the railroad company and abutting on the south side of Filbert street, in the city of Philadelphia, in front of plaintiff's property, which was

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

As to retrospective statutes, when valid, see note to Otoe County v. Baldwin, 28: 331.

Vested rights defined; how affected by subsequent repeal of statute, see note to Fletcher v. Peck, 3: 162.

As to constitutionality of ex post facto laws, see note to Calder v. Bull, 1: 648, and to Sturges v. Crowninshield, 4: 529.

situated on the north side of Filbert street, a public highway fifty-one feet in width. No portion of the plaintiff's property was actually taken or occupied by the railroad com-
381] pany, nor was Filbert* street where it extends in front of the plaintiff's lot, occupied by the structure of the railroad company. But at another portion of Filbert street, not far from plaintiff's lot, the bed of the street was and is occupied by the railroad. The plaintiff alleged in his declaration that by the erection and maintenance of the elevated railroad, and the continuous passage of passenger and freight cars thereon, driven by steam locomotives, he was injured in the possession, use, and enjoyment of his property, and that his dwelling and business house on said lot was rendered unfit for habitation, and was greatly depreciated in value. The trial resulted in a verdict and judgment for the plaintiff in the sum of $4980. The cause was taken on error to the supreme court of Pennsylvania, where the judgment was reversed, the majority of the court holding that the plaintiff had no legal cause of action. The plaintiff having died, pending the litigation, his administratrix was substituted, and thereupon sued out a writ of error to this court.

Mr. **M. Hampton Todd,** for plaintiff in error:

Under the Pennsylvania constitution of 1838, the supreme court of Pennsylvania held that the word "taken" was to be interpreted literally, that is, that it only extended to an actual seizure of property, and that when the injury extended only to "a depreciation of property by decreasing the enjoyment of it," the Constitution afforded no protection.

Philadelphia & T. R. Co's Case, 6 Whart. 25; *Struthers* v. *Dunkirk, W. & P. R. Co.* 87 Pa. 282; *O'Connor* v. *Pittsburg*, 18 Pa. 189; *Monongahela Nav. Co.* v. *Coons*, 6 Watts & S. 114; *Pittsburg, B. & B. R. Co.* v. *McCloskey*, 110 Pa. 436.

To remedy this evil, to suppress this mischief, the clause of the constitution of 1874 was adopted, the words "injured or destroyed" being added to cover the cases of consequential damage not included and relieved against by the word "taken" as construed by the court.

Schuylkill Nav. Co. v. *Thoburn*, 7 Serg. & R. 411.

The supreme court of Pennsylvania, in a number of cases arising since the adoption of the present constitution, have uniformly held that the words "injured or destroyed" included damages consequential, that prior to the adopting of that instrument could not have been recovered.

Pusey v. *Allegheny*, 98 Pa. 522; *Reading* v. *Althouse*, 93 Pa. 400; *New Brighton* v. *United Presbyterian Church*, 96 Pa. 331; *Pennsylvania R. Co.* v. *Duncan*, 111 Pa. 352; *Pennsylvania S. V. R. Co.* v. *Walsh*, 124 Pa. 544.

There should be no distinction between the class of cases where the property injured abuts on a highway appropriated by a railroad company for railway purposes, and where the railroad is not on the bed of the street on which the property fronts, but runs along the street on property abutting on the opposite side of the street.

Pennsylvania R. Co. v. *Lippincott*, 116 Pa. 472.

According to one of the last cases on the subject, the property entitled to damages by reason of the exercise of the right of eminent domain must be either that which is actually invaded or that which abuts upon a highway that is invaded.

Pennsylvania Co. v. *Pennsylvania S. V. R. Co.* 151 Pa. 334; *Jones* v *Erie & W. V. R. Co.* 151 Pa. 30.

The defendant cannot be restrained from exercising the privilege of maintaining and operating a railroad in accordance with the provisions of its charter even though it maintained a nuisance and negligently operated the same.

Pottstown Gas Co. v. *Murphy*, 39 Pa. 257; *Pittsburg, Ft. W. & C. R. Co.* v. *Gilliland*, 56 Pa. 445; *Western Pennsylvania R. Co.* v. *Hill*, 56 Pa. 460; *Columbia Delaware Bridge Co.* v. *Geisse*, 35 N. J. L. 562; *Brand* v. *Hammersmith & C. R. Co.* L. R. 2 Q. B. 223.

A person or company building a railway and employing engines and carriages upon it are by the common law not entitled to greater immunity when causing damage to others than the practicers of other useful and longer established trades.

Hammersmith & C. R. Co. v. *Brand*, L. R. 4 Eng. & Ir. App. Cas. 171; *Richardson* v. *Vermont Cent. R. Co.* 25 Vt. 465; Wood, Nuisances, §§ 495, 611; *Crump* v. *Lambert*, L. R. 3 Eq. 409; Pollock, Torts, 350; Hare, Am. Const. Law, 413.

The question is whether the railroad company defendant, in conducting a business within the scope of its powers by the best known and approved methods, takes, injures, or destroys the property of another.

Radcliff v. *Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; Hare, Am. Const. Law, 398.

Under the authorities heretofore cited and the general principles governing the law of nuisances, the maintaining and operating of the defendant's railroad as shown in this case would be a nuisance if maintained by a private citizen.

The evidence in this case showed the existence of a nuisance which caused special damage, and a damage that was directly incident to the use and operation of the railroad, and which would continue, in contemplation of law, for all time.

The object in view is not to prevent the recurrences of the nuisance, but to give compensation for the right to inflict it continuously.

The object of the Constitution was to give a right to just compensation once for all not only to such owners as should have their property condemned for the purposes of the railroad, but also to every other person whose property was "injured or destroyed," that is, depreciated in value by the location, construction, and operation of the railroad. It was to extend the rule of damages in reference to property "taken" to property "injured or destroyed" that this further limitation was added in the Constitution.

Pumpelly v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557); *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317

(27: 739); *Pennsylvania R. Co.* v. *Duncan*, 111 Pa. 352, 132 U. S. 75 (33: 267).

The plaintiff had a good cause of action, under the common law and under the provisions of the constitution of Pennsylvania, which requires just compensation to be made for private property "taken, injured, or destroyed" for public use.

This court has jurisdiction.

Bank of Columbia v. *Okely*, 17 U. S. 4 Wheat. 235 (4: 559); *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 9 (28: 889); Hare, Am. Const. Law, 755.

This court is not bound by the rulings of a state court when the question is one of general law or jurisprudence.

Pine Grove Twp. v. *Talcott*, 86 U. S. 19 Wall. 666 (22: 227); *Venice* v. *Murdock*, 92 U. S 494 (23: 583); *Murray* v. *Gibson*, 56 U. S. 15 How. 421 (14: 755); *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Yesler* v. *Harbor Line Comrs.* 146 U. S. 646 (36: 1119); *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254 (35: 1004).

The reversal of the judgment in favor of the plaintiff by the supreme court of Pennsylvania denied to her the equal protection of the laws.

Caldwell v. *Texas*, 137 U. S. 692 (34: 816).

Messrs. **Wayne MacVeagh** and *A. H. Wintersteen*, for defendant in error:

There was no legal injury to property as contemplated in the state constitution sustained by the respective claimants, and the defendant was not liable in damages.

Pennsylvania R. Co. v. *Lippincott*, 116 Pa. 472; *Dooner* v. *Pennsylvania R. Co.* 142 Pa. 36; *Pennsylvania S. V. R. Co.* v. *Walsh*, 124 Pa. 544; *Ryan* v. *Pennsylvania R. Co.* 132 Pa. 804; *Jones* v. *Erie & W. V. R. Co.* 151 Pa. 30; *Pennsylvania Co.* v. *Pennsylvania S. V. R. Co.* 151 Pa. 334; *Hauck* v. *Tidewater Pipe Line Co.* 20 L. R. A. 642, 153 Pa. 366.

No possible ground exists for asserting that the state, by this enactment of its people in the form of a constitution, in any way affected individual rights injuriously.

De Saussure v. *Gaillard*, 127 U. S. 216 (32: 125).

There was no discussion before the supreme court of Pennsylvania of any Federal question, and the opinion of the court shows that no such question was considered by it.

Delaware City, S. & P. S. B. Nav. Co. v. *Reybold*, 142 U. S. 636 (35: 1141); *Yesler* v. *Harbor Line Comrs.* 146 U. S. 646 (36: 1119).

The proposition that the property of the plaintiff in error has been taken for public use without just compensation, if regarded as an independent one, does not raise a Federal question. The 5th Amendment contains the only prohibition in the constitution against the taking of property for public use without compensation, and this amendment, operates exclusively in restriction of Federal power, and has no application to the states.

Thorington v. *Montgomery*, 147 U. S. 490 (37: 252); *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Barron* v. *Baltimore*, 32 U. S. 7 Pet. 243 (8: 672).

The 14th Amendment prevents the arbitrary deprivation of individual property by the states, and a state law authorizing the taking of property for public use without compensation would be inimical to the 14th Amendment as not due process of law.

Davidson v. *New Orleans*, 96 U. S. 97, 107 (24: 616, 620); *Kaukauna* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 269 (35: 1004, 1009); *Yesler* v. *Harbor Line Comrs.* 146 U. S. 646, 655 (36: 1119, 1122).

There has been no taking of property without due process of law.

This court is obliged to follow the settled construction by the Pennsylvania court of its constitution of 1874.

Mercer County v. *Hackett*, 68 U. S. 1 Wall. 83, 96 (17: 548, 550); *Christy* v. *Pridgeon*, 71 U. S. 4 Wall. 196–203 (18: 322–324); *Elmwood* v. *Marcy*, 92 U. S. 289 (23: 710); *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 575 (23: 663); *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 365 (29: 633, 636).

There was, in 1871, no liability under Pennsylvania law for such injuries to property as are here alleged.

Philadelphia & T. R. Co's Case, 6 Whart. 25; *Monongahela Nav. Co.* v. *Coons*, 6 Watts. & S. 101; *Henry* v. *Pittsburg & A. Bridge Co.* 8 Watts. & S. 85; *O'Connor* v. *Pittsburg*, 18 Pa. 187; *Sharpless* v. *Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *New York & E. R. Co.* v. *Young*, 33 Pa. 175; *Watson* v. *Pittsburg & C. R. Co.* 37 Pa. 469; *Buckwalter* v. *Black Rock Bridge Co.* 38 Pa. 281; *Cleveland & P. R. Co.* v. *Speer*, 56 Pa. 325; *Spangler's App.* 64 Pa. 387; *West Branch & S. Canal Co.* v. *Mulliner*, 68 Pa. 357; *Pennsylvania R. Co.* v. *Duncan*, 111 Pa. 352; *Pennsylvania R. Co.* v. *Miller*, 132 U. S. 75 (33: 267); *Struthers* v. *Dunkirk, W. & P. R. Co.* 87 Pa. 282; *Lycoming Gas & W. Co.* v. *Moyer*, 99 Pa. 615; *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616).

This court is required by its own decisions to recognize and enforce the above law of Pennsylvania as it existed in that state in 1871.

South Ottawa v. *Perkins*, 94 U. S. 260 (24: 154); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359); *Pana* v. *Bowler*, 107 U. S. 529 (27: 424); *Carroll County Suprs.* v. *Smith*, 111 U. S. 556 (28: 517); *Bucher* v. *Cheshire R. Co.* 125 U. S. 555 (31: 795); *Wheaton* v. *Peters*, 33 U. S. 8 Pet 591 (8: 1055); *Pennsylvania* v. *Wheeling & B. Bridge Co.* 54 U. S. 13 How. 519 (14: 249).

Where a local law or custom has been established by repeated decisions of the highest courts of a state it becomes also the law governing the courts of the United States sitting in that state.

Bacon v. *Northwestern Mut. L. Ins. Co.* 131 U. S. 258 (33: 128); *Gormley* v. *Clark*, 134 U. S. 338 (33: 909); *Jenks* v. *Quidnick Co.* 135 U. S. 457 (34: 200); *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622 (35: 1156); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 (17: 173).

There was no taking of plaintiff's property within the meaning of the 14th Amendment.

Butz v. *Muscatine*, 75 U. S. 8 Wall. 575, 582 (19: 490, 493); *Smith* v. *Washington Corp.* 61 U. S. 20 How. 135 (15:858); *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635 (25: 336); *Chicago* v. *Taylor*, 125 U. S. 161 (31: 658); *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U.S. 317 (27: 739); *Cumberland Teleph. & Teleg. Co.* v. *United Electric R. Co.* 42 Fed. Rep. 273; *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463).

But even were we to assume that there was a taking of property, under no possible authoritative construction of the words can it be maintained that the taking was without due process of law.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569); *Caldwell* v. *Texas*, 137 U. S. 692 (34: 816); *Leeper* v. *Texas*, 139 U. S. 462 (35: 225); *Giozza* v. *Tiernan*, 148 U. S. 657 (37: 599).

There has been no denial of the equal protection of the laws.

Pennsylvania R. Co. v. *Lippincott*, 116 Pa. 472; *Hayes* v. *Missouri*, 120 U. S. 68 (30: 578); *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 (35: 1035), 3 Inters. Com. Rep. 810.

Mr. Justice **Shiras** delivered the opinion of the court:

The Pennsylvania Railroad Company, a corporation under the laws of the state of Pennsylvania, and invested with the privilege of taking private property for its corporate use, erected in May, 1881, and has since maintained a viaduct or elevated roadway and railroad thereon, along the south side of Filbert street in the city of Philadelphia. On the opposite or north side of Filbert street the plaintiff below was the owner of a lot or parcel of land, whereon was erected a large four story building, at that time occupied as a dwelling and business house. The elevated railroad did not occupy any portion of the plaintiff's land, nor did it trench upon Filbert street where it extends in front of the plaintiff's property, which is situated on Filbert between Seventeenth and Eighteenth streets, but where the elevated road, in its course westward, reaches Twentieth street it trends to the north and is supported over the cartway of Filbert street by iron pillars having their foundations in that street inside the curb line, and thus extends westwardly to the Schuylkill river. Opposite the plaintiff's lot the railroad structure occupies land owned by the company.

The plaintiff, by his action in the court of common pleas, sought to recover for injuries caused to his property by the smoke, dust, noise, and vibration arising from the **384** use of the *engines and cars, the necessary consequence and incidents of the operations of a steam railway.

The trial court refused the defendant's prayer that "the jury should be instructed that the defendant, under its charter and supplements in evidence, had full lawful authority to create and operate the Filbert street extension or branch described in the declaration without incurring any liability by reason thereof for consequential damages to the property of the plaintiff, the uncontradicted evidence being that none of the said property was taken by the defendant, but that the entire width of Filbert street intervenes between the railroad of the defendant and the nearest point thereto of the property of the plaintiff," and instructed the jury that the only question for them to determine was the amount of depreciation in value of the plaintiff's property caused by the operation of the railroad, that in estimating the damages they should consider the value of the property before and its value after the injury was inflicted, and allow the difference. The plaintiff recovered a verdict and judgment. The judgment was reversed by the supreme court of Pennsylvania, because of the action of the trial court in refusing to grant the defendant's prayer for instruction, and, in effect, because the plaintiff had no cause of action. By the specifications of error contained in this record we are asked to reverse the judgment of the supreme court of Pennsylvania because the plaintiff in error was thereby deprived of her property without compensation; because she was thereby deprived of the equal protection of the laws; and because she was thereby deprived of her property without due process of law.

In reaching the conclusion that the plaintiff, under the admitted facts in the case, had no legal cause of action, the supreme court of Pennsylvania was called upon to construe the laws and constitution of the state. The plaintiff pointed to the 10th section of article 1 of the constitution, which provided that "private property shall not be taken or applied to public use, without authority of law, and without just compensation being first made or secured;" and to the 8th section of article 16, which contains the following terms. "Municipal *and other corporations [**385** and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction."

The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the supreme court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of that state, constitute a taking, an injury, or a destruction of the plaintiff's property.

We are not authorized to inquire into the grounds and reasons upon which the supreme court of Pennsylvania proceeded in its construction of the statutes and constitution of that state, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason.

But we are urged to sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken "without due process of law," and because the plaintiff was denied "the equal protection of the laws," and these propositions are said to present Federal questions arising under the 14th Amendment of the Constitution of the United States, to which our jurisdiction extends.

It is sufficient for us in the present case to say that, even if the plaintiff could be re-
386] garded as having been deprived of *her property, the proceedings that so resulted were in "due process of law."

The plaintiff below had the benefit of a full and fair trial in the several courts of her own state, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition.

To justify this position it is not necessary to enter into an examination of the origin, meaning, and scope of the phase "due process of law," as found in the 5th and 14th Amendments. That has been done so often and so thoroughly in previous cases that all we need do is to cite a few of them.

Davidson v. *New Orleans*, 96 U. S. 97 [24: 616] came to this court on a writ of error to the supreme court of the state of Louisiana. There was state legislation, under which an assessment had been laid on real estate belonging to Davidson, for draining swamp lands in the parish of Orleans. Objections were raised in the state courts, including alleged departures from the requirements of the statute under which the proceedings were had, and objections based on the claim that Davidson was, by the proceedings, deprived of his property without due process of law. This court briefly disposed of the objections based on questions of method and detail and disregard of statutory directions by saying that such questions were not regulated or controlled by the Constitution of the United States. In respect to the contention that the assessment in question deprived the plaintiff in error of his property without due process of law, the court said, after deprecating any attempt to define what it is for a state to deprive a person of life, liberty, or property without process of law, in terms which would cover every exercise of power thus forbidden to the state, "whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding
387] in *regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. . . . It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding in such a case. . . . The party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterwards in the supreme court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

In *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 708 [28: 569, 572], is found the following definition of the phrase: "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question, therefore, means that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Missouri Pac. R. Co. v. *Humes*, 115 U. S. 520 [29: 465], was a case where it was contended that, by an act of the state of Missouri requiring railroad companies to erect and maintain fences and affixing penalties for disobedience, a railroad company previously chartered was deprived of property without due process of law, and it was said: "If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws *will [388
not invalidate them as affecting life, liberty, or property without due process of law." Without encumbering this opinion with citations of the language used we refer to the following cases: *Ex parte Kemmler*, 136 U. S. 436 [34: 519]; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254 [35: 1004]; *Hallinger* v. *Davis*, 146 U. S. 314 [36: 986]; *Yesler* v. *Harbor Line Comrs.* 146 U. S. 646 [36: 1119].

The plaintiff in error further contends that, by the proceedings in the courts of Pennsylvania, she was denied the equal protection of the laws. We understand this proposition to be based on the allegation that those suitors whose property abutted on Filbert street between the Schuylkill river and Twentieth street, where the elevated road actually occupies the territory of Filbert street, were allowed by the Pennsylvania courts to recover damages for the injury thus occasioned to their property, while the plaintiff, and those in like case, whose property abutted on Filbert street where it was not occupied by the railroad structure, which was erected on the opposite side of the street on land belonging to the railroad company, were not permitted to recover. The diversity

of result in the two classes of cases is supposed to show that equal protection of the laws was not afforded to the unsuccessful litigants. It is not clear that the facts are so presented as to authorize us to consider this question. Neither in the plaintiff's declaration, in the instructions prayed for, nor in the charge of the trial court, do we perceive any finding or admission that there were suitors, holding property abutting on Filbert street, who were held entitled to recover for damages occasioned by the elevated railroad. However, the third assignment of error is as follows: "The supreme court of Pennsylvania erred in deciding that the present cause was different in principle from the case of *Pennsylvania R. Co.* v. *Duncan*, 111 Pa. 352, and 132 U. S. 75 [33: 267]. The effect of said decision is that, under the same constitutional guarantees, it gives to one person a right to compensation for property damaged by the defendant in the exercise of its power of eminent domain, and denies it to another; and as in this instance the decision 389] is* against the plaintiff's right to compensation for the injury to her property by the defendant, she is thereby deprived of the equal protection of the laws." The counsel of defendant in error, in their printed brief, make no point that the facts are not shown by this record, but discuss the question on its merits. We are referred in the printed briefs to our own case of *Pennsylvania R. Co.* v. *Miller*, 132 U. S. 76 [33: 268], in the report of which it appears that one Duncan, whose property abutted on Filbert street, where that street was occupied by the elevated railroad in question, was permitted by the state courts to recover for damages suffered by having been deprived of access to and the free use of Filbert street.

Conceding, for the sake of the argument, that the facts are as alleged by the plaintiff in error, we are unable to see any merit in the contention that the supreme court of Pennsylvania, in distinguishing between the case of those who, like Duncan, were shut off from access to and use of the street by the construction thereon of the elevated railroad, and the case of those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad, as situated on defendant's own property, thereby deprived the plaintiff of the equal protection of the laws. The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude them from the use of their accustomed highway, and the other class suffered damages which were consequential on the use by the defendant company of their franchise on their own property. The question thus raised is within the case of *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 [25: 989], where it was said that "the clause in question means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances." So in *Hayes* v. *Missouri*, 120 U. S. 68 [30: 578], where by a statute of the state of Missouri it was provided that, in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges, while elsewhere* in the state it is allowed [390 only eight peremptory challenges, it was held that such a distinction did not deny to a person accused and tried for murder in a city containing over 100,000 inhabitants the equal protection of the laws enjoined by the 14th Amendment, and in the course of the discussion it was said: "The 14th Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923], speaking of the 14th Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.'"

It should also be observed that the plaintiff does not complain that, by any legislative enactment, she has been denied rights granted to others, but she attributes error to the judgment of the supreme court of Pennsylvania in construing that provision of the constitution of the state which gives a remedy for property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad. It is not pretended that, by such a construction of the law, the plaintiff has been deprived of any right previously enjoyed. The scope of the remedy added by the constitution of 1874 to those previously possessed by persons whose property is affected by the erection of a public work is declared by the court not to embrace the case of damages purely consequential.

In so holding, it does not appear to us that the supreme court of Pennsylvania has either deprived the plaintiff of property without due process of law, or denied her the equal protection of the law, and its judgment is accordingly affirmed.

391] NORMAN BRASS, *Plff. in Err.*,
v.
THE STATE OF NORTH DAKOTA *ex rel.* LOUIS W. STOESER.

(See S. C. Reporter's ed. 391-410.)

North Dakota law regulating grain warehouses, constitutional—business of elevating grain—equal protection of the laws.

1. The law of North Dakota, of March 7, 1891, regulating grain warehouses and the weighing and handling of grain, etc., is constitutional. Munn v. Illinois, 94 U. S. 113 (24: 77) and Budd v. New York, 143 U. S. 517 (36: 247) followed.
2. The North Dakota law of March 7, 1891, is not unconstitutional, because it is applicable to the entire state, which is agricultural and is not restricted to large cities.
3. One who enters upon the business of elevating and storing the grain of other persons for profit in North Dakota, becomes subject to the statutory regulations, although he also elevates and stores his own grain in the same warehouse.
4. The legislature of North Dakota, in regulating by a general law the business and charges of public warehousemen engaged in elevating and storing grain for profit, does not deny to the plaintiff in error the equal protection of the laws nor deprive him of his property without due process of law, and such statutory regulations do not amount to a regulation of commerce between the states.

[No. 768.]

Argued April 26, 1894. Decided May 14, 1894.

IN ERROR to the Second Judicial District Court of Ramsey County, State of North Dakota, to review a judgment of that court entered in pursuance of a judgment of the supreme court of North Dakota, affirming the judgment of the former court, granting a writ of mandamus to Norman Brass, upon the petition of Louis W. Stoeser, requiring said Brass to receive from said Stoeser, at the elevator of the former, grain tendered by the latter for storage, at the statutory rate of that state for storage in handling such grain. *Affirmed.*

See same case below, 2 N. D. 482.

Statement by *Mr. Justice* **Shiras:**

Norman Brass, the plaintiff in error, owns and operates a grain elevator in the village of Grand Harbor, in the state of North Dakota. The defendant in error, Louis W. Stoeser, owns a farm adjoining the village, on which in the year 1891 he raised about four thousand bushels of wheat. On September 30, 1891, Stoeser applied to store a part of his wheat crop for the compensation fixed by section eleven of chapter 126 of the laws of North Dakota for the year 1891, which Brass refused to do unless paid therefor at a rate in excess of that fixed by the statute. On this refusal, Stoeser filed in the *District Court of [392 Ramsey County, North Dakota, a petition for an alternative writ of mandamus. The district court granted an alternative writ of mandamus as follows:

"The state of North Dakota to Norman Brass, respondent: Whereas the following facts have been made to appear to this court by the verified petition of the above named relator, to wit: 1. That he is the relator in the above entitled matter; that he owns and operates a farm containing 540 acres in the vicinity of the railroad station of Grand Harbor, in the county and state aforesaid, and during the year 1891 has raised on said farm about 4000 bushels of grain, principally wheat. 2. That the relator has not sufficient storage capacity on his farm or elsewhere for said grain so raised as aforesaid, but is dependent almost wholly upon the grain elevators and warehouses in the vicinity of said farm for storage capacity. 3. That fully fifty per cent of the grain raised in said Ramsey county, North Dakota, is dependent for storage capacity upon the grain elevators and warehouses at the various towns, villages, and railroad stations in said Ramsey county. 4. That the respondent, Norman Brass, is now and at all the time herein stated has owned and operated a grain elevator at the railroad station of Grand Harbor aforesaid for the purpose of buying, selling, storing, and shipping grain for profit. 5. That the relator on the 30th day of September, 1891, hauled fifty-eight bushels of wheat to the grain elevator of respondent, Norman Brass, at Grand Harbor aforesaid, and tendered the same at said elevator of said Norman Brass for storage, and requested said Norman Brass to receive, elevate, insure, and store said grain for twenty days, and at the time tendered to said Brass two cents per bushel for compensation for receiving, elevating, insuring and storing said grain for twenty days; that said grain when so tendered as aforesaid was dry and in a suitable condition for storage, and there was in said grain elevator of said Brass at Grand Harbor aforesaid at said time storage capacity for over twenty-five thousand bushels of grain not in use and wholly unoccupied. 6. That said Brass then and there refused to receive said grain for the purpose aforesaid and wholly refused to store said grain at said price. *7. [393 That the relator endeavored to secure storage for said grain at the only other elevator in operation at said railroad station of Grand Harbor aforesaid, but said elevator refused to receive relator's grain upon the same ground as respondent. 8. That the relator is informed and believes that the owners of grain elevators and warehouses within a radius of fifty miles of Grand Harbor aforesaid refused to receive grain for storage at said price: Now, therefore, this court, in order that justice may be done in this behalf to him, Louis W. Stoeser, relator, does hereby command and enjoin you that immediately upon receipt of this writ you do receive from relator, while your storage capacity at your elevator herein mentioned is sufficient for that purpose, all grain that may be tendered you by the relator in a dry

NOTE.—*As to what is "due process of law,"* see note to Pearson v. Yewdall, 24:436.

As to retrospective statutes, when valid, see note to Otoe County v. Baldwin, 28: 331.

As to 15th Amendment to United States Constitution, its construction and effect, see note to United States v. Reese, 23: 563.

As to power of Congress to regulate commerce, see note to Gibbons v. Ogden, 6: 23, and to Brown v. Maryland, 6: 678.

As to interstate commerce; regulations of; power of Congress; how far exclusive, see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

and suitable condition for storage at a rate of compensation not exceeding the following schedule, viz, for receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel; storage rates after the first twenty days, one half cent per bushel for each fifteen days or fraction thereof, and shall not exceed five cents for six months, or that you show cause to the contrary before this court at the court house, in the city of Devil's Lake, Ramsey county, North Dakota, on the 5th day of October, 1891, at ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard; and how you have executed this writ make known to this court at the time and place aforesaid, and have you then and there this writ.

"Dated Sept. 30, 1891."

To which writ appellant made return by answer as follows:

"The return of the respondent to the alternate writ of mandamus issued in the above entitled proceeding shows to the court—

"1. That the respondent admits the truth of the facts pleaded in said alternative writ.

"2. For a further return to the said alternative writ the respondent alleges that he owns and operates only one grain elevator in North Dakota or elsewhere; that the said elevator is the elevator mentioned in said alternative writ, and is situated at Grand Harbor, a small way station on the line of the Great [394]*Northern Railroad, containing a population of less than one hundred people; that there are two other elevators owned and operated by different owners independently of and in competition with each other; that there are about six hundred grain elevators, flat houses, and warehouses in said state of North Dakota at which grain is bought and shipped for profit, which said elevators, warehouses, and flat houses are owned and operated by over one hundred and twenty-five different owners independent of and in competition with each other; that the owners of said elevators, warehouses, and flat houses are individuals engaged in buying and shipping grain, millers who use their elevators to supply their mills with grain, farmers' shipping associations, elevator corporations, and individual farmers; that said elevators, flat houses, and warehouses vary in cost of construction from five hundred dollars to five thousand dollars, and vary in capacity from five thousand to fifty thousand bushels; that there are from two to ten elevators, warehouses, and flat houses operated and owned each by different owners and operators at every station in North Dakota at which grain is marketed; that land upon which it is practicable to erect other elevators at every station in North Dakota at which grain is marketed is unlimited in area and can be readily purchased at prices varying from one dollar and twenty-five cents per acre to forty dollars per acre; that respondent's said elevator cost, when constructed and fully equipped, about three thousand dollars; that the capacity of the same is about 80,000 bushels.

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the same to and selling it at Minneapolis and Duluth, Minnesota, to which business that of storing grain for third persons has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said *Minneapolis and [395] Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contract.

"That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times, when the yield is enormous, as in the present year, respondent's contracts are large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That there are located in Minneapolis and Duluth, Minnesota, a great many corporations, persons, and copartnerships engaged in a business known as the 'grain commission' business.

"That those grain commission houses have swarms of agents traveling throughout the state of North Dakota, going from town to town and farm to farm, purchasing grain from farmers in some instances and in others soliciting farmers to ship their grain to said houses at Minneapolis or Duluth, Minnesota, to be by the latter sold on commission.

"That none of said grain commission houses have or own any storage capacity in North Dakota.

"That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others, without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of the respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct *of his said business, and respondent [396] subjected to suits for damages for non-fulfillment of his said contracts.

"That the relator only offered to pay respondent for the service which he requested him to perform, the rate fixed by chapter 126 of the Laws of 1891—that is, two cents per bushel; that respondent refused to perform the service for less than two and one half cents per bushel.

"That respondent refuses to comply with the provisions of said chapter 126 on the

ground that it abridges his privileges and immunities as a citizen of the United States; that it deprives him of his liberty and property without due process of law, and denies to him the equal protection of the laws, and amounts to a regulation of commerce among the states.

"That for thirteen years last past the rate charged for the storage of grain has been uniform at all elevators, flat houses, and warehouses in North Dakota, and during that time did not exceed the following schedule: For receiving, elevating, insuring, delivering, and fifteen days' storage, two and one half cents per bushel; after the first fifteen days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents per bushel for six months.

"That the average farm in North Dakota does not exceed in area 160 acres; that the average yield in grain of a quarter section of land in North Dakota does not exceed twenty-five hundred bushels; that a granary sufficient in size to safely and securely store twenty-five hundred bushels of grain can be erected on any farm in North Dakota at a cost not exceeding one hundred and fifty dollars.

"That the business of respondent and all other persons, firms, and corporations engaged in the business of operating grain elevators, warehouses, and flat houses in North Dakota and the manner in which said business is conducted is not in any manner unwholesome or deleterious to the health, morals, welfare, or safety of the community or society.

"That the railroad and warehouse commissioners of North Dakota, on page 33 of their annual report to the governor for 1890, said: 'In view of the fact that after thorough investigation the board deem the charges allowed [397] *by section 22, chapter 187 (Laws of 1890) and also section 10 of said chapter, as unreasonable, the following rules of storage are recommended: 1, for receiving, elevating, insuring, delivering, and fifteen days' storage, two and one half cents per bushel; 2, after fifteen days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months.'

"That the rates referred to by said commissioners as unreasonable were less than the rate recommended by said board.

"That the respondent denies that the legislature has any power whatever to say whether he shall rent the bins in his elevator or not, and wholly denies the power of the legislature to say what he shall charge for the use of his said elevator or the bins therein.

"That since the enactment of section nine of chapter 126 of the Laws of 1885 the amount of grain shipped directly by farmers without the intervention of elevators, warehouses, or flat houses has been increasing, and in 1890, as respondent is informed and believes, nearly fifty per cent of the entire grain product of North Dakota was shipped to Minneapolis and Duluth, Minnesota, by farmers; that the amount of grain shipped in that manner is steadily increasing from year to year.

"That pursuant to section 7 of chapter 122, Laws of 1890, the railroad commissioners adopted and published the following rules to govern the distribution of cars and other freight, which rules are now in operation in said state of North Dakota, to wit:

"'State of North Dakota,

"'Office of Commissioners of Railroads.

"'Rules for the distribution of cars between stations and shippers.

"'1. In distributing cars to stations for grain loading they shall be distributed according to the daily average shipments from such stations.

"'2. In distributing cars to shippers for grain loading at stations, agents shall first fill each shipper's order for one car to each. After this is done, the balance of the cars shall be distributed among shippers according to the amount of grain in sight offered for shipment by each shipper.

*"'3 Parties desiring to load grain on [398 track shall be furnished cars and shall be allowed for loading time twenty-four hours from the time the car is set on the side track to complete loading and furnish shipping directions. In case shipper fails to complete loading or furnish shipping directions within twenty-four hours, then, in such case, the railway company may collect upon such cars $3.00 rental for each and every day or part of a day which such cars are delayed after twenty-four hours.

"'The above rule as to time and rental charges shall also apply to grain delayed in unloading on track.'

"In connection with said rules in said report said commissioners said: 'We believe that the railroads have labored faithfully to supply cars to shippers, in accordance with these rules, and, so far as their ability to supply the demand permitted, cars have been distributed in conformity therewith. From September 15 to December 15 the demand for cars is double the ability of the roads to supply, and as a necessary consequence delay in supplying cars must ensue. In all cases of complaint as to failure to get cars investigated this year, this has been the case, and cars have been supplied as soon as possible by the railroad companies.

"'The liberal policy of the railroads in the distribution of cars adopted this year has been of great benefit to the farmers of North Dakota.'

"Wherefore respondent demands judgment quashing the alternative writ of mandamus dismissing this proceeding, and for his costs and disbursements laid out and expended in this action."

To this return Stoeser interposed a general demurrer, which was sustained, and Brass electing in open court to stand on his return, a peremptory writ of mandamus was allowed. From this judgment an appeal was taken to the supreme court of Dakota, which court affirmed the order and judgment of the district court, and remitted the record to that court. On May 28, 1892, final judgment was entered in the district court, making the judgment of the supreme court the judgment of the district court, and awarding a peremptory writ *of mandamus to [399 execute that judgment. Whereupon Brass sued out a writ of error to this court.

Messrs. **A. B. Browne,** *A. T. Britton* and *J. F. McGee* for plaintiff in error.

Messrs. **Halbert E. Paine** and *C. D. O'Brien* for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

In the 13th article of the constitution of the state of Illinois, adopted in 1870, all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, were declared to be public warehouses, and it was made the duty of the general assembly to pass all necessary laws to give full effect to that article of the constitution. By an act approved April 25, 1871, and entitled "An act to regulate public warehouses and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of the state," the legislature of Illinois provided that those who conducted such public warehouses located in cities containing not less than one hundred thousand inhabitants should procure licenses and should give bond conditioned for compliance with the law; prescribed maximum rates for storage and handling grain; and declared certain penalties for the failure to procure licenses.

The validity of this law was upheld by the supreme court of Illinois (*Munn* v. *People*, 69 Ill. 80) and that judgment was affirmed by this court. *Munn* v. *Illinois*, 94 U. S. 113 [24: 77].

In June, 1888, the legislature of the state of New York passed an act entitled "An act to regulate the fees and charges for elevating, trimming, receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state," whereby maximum charges were fixed for elevating, re-[400] ceiving, *weighing, and discharging grain, when the business was carried on in a city containing 130,000 inhabitants or upwards, and penalties imposed for disregard of the provisions of the statute. The owner of an elevator in the city of Buffalo was indicted, found guilty, and sentenced, in the superior court of Buffalo, for exacting charges for elevating grain in excess of the statutory rates. An appeal was taken to the court of appeals of the state of New York, which affirmed the judgment of the superior court of Buffalo. *People* v. *Budd*, 5 L. R. A. 559, 117 N. Y. 1. A writ of error brought the case to this court, where the judgment of the court of appeals was affirmed. *Budd* v. *New York*, 143 U. S. 517 [36:247], 4 Inters. Com. Rep. 45.

The legislature of the state of North Dakota, by an act approved March 7, 1891, and entitled "An act to regulate grain warehouses and the weighing and handling of grain, and defining the duties of the railroad commissioners in relation thereto," enacted, in the 4th section thereof, that "all buildings, elevators, or warehouses in this state, erected and operated, or which may hereafter be erected and operated by any person or persons, association, copartnership, corporation, or trust for the purpose of buying, selling, storing, shipping, or handling grain for profit, are hereby declared public warehouses, and the person or persons, association, copartnership, or trust owning or operating said building or buildings, elevator or elevators, warehouse or warehouses, which are now or may hereafter be located or doing business within this state, as above described, whether said owners or operators reside within this state or not, are public warehousemen within the meaning of this act, and none of the provisions of this act shall be construed so as to permit discrimination with reference to the buying, receiving, and handling of grain of standard grades, or in regard to parties offering such grain for sale, storage, or handling at such public warehouses, while the same are in operation;" and in the 5th section, "that the proprietor, lessee, or manager of any public warehouse or elevator in this state shall file with the railroad commissioners of the state a bond to the state of North Dakota, with good and sufficient sureties,* to be approved by [401] said commissioners of railroads, in the penal sum of not less than $5000 nor more than $75,000, in the discretion of said commissioners, conditioned for the faithful performance of duty as public warehousemen, and a compliance with all the laws of the state in relation thereto," and in the 11th section thereof, "the charges for storing and handling of grain shall not be greater than the following schedule: For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel. Storage rates, after the first twenty days, one half cent for each fifteen days and fraction thereof, and shall not exceed five cents for six months. The grain shall be kept insured at the expense of the warehouseman for the benefit of the owner;" and by the 12th section it is provided that "any person, firm or association, or any representative thereof, who shall fail to do and keep the requirements as herein provided, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than two hundred dollars nor more than one thousand dollars, and be liable in addition thereto to imprisonment for not more than one year in the state penitentiary, at the discretion of the court."

In October, 1891, in the district court of the Second Judicial District of the state of North Dakota, in proceedings the nature of which sufficiently appears in the previous statement of facts, the validity of this statute was sustained, and the judgment of that court was, on error, duly affirmed by the supreme court of the state. *State* v. *Brass*, 2 N. D. 482.

In the cases thus brought to this court from the states of Illinois and New York, we were asked to declare void statutes regulating the affairs of grain warehouses and elevators within those states, but held valid by their highest courts, because it was claimed that such legislation was repugnant to that clause of the 8th section of article 1 of the Constitution of the United States, which confers upon Congress power to regulate commerce with foreign nations and among the several states, and to the 14th Amendment, which ordains that no state shall deprive any person of life, liberty, or property *without due process of law, [402] nor deny to any person within its jurisdiction the equal protection of the laws.

In the case now before us the same contentions are made, but we are not asked to review our decisions made in the previous cases. Indeed, their soundness is tacitly admitted in the briefs and argument of the counsel of the plaintiff in error. But it is said that those cases arose out of facts so peculiar and exceptional, and so different from those of the pres-

ent case, as to render the reasoning there used, and the conclusions reached, now inapplicable.

The concession, then, is that, upon the facts found to exist by the legislatures of Illinois and New York, their enactments were by the courts properly declared valid, and the contention is that the facts upon which the legislature of North Dakota proceeded, and of which we can take notice in the present case, are so different as to call for the application of other principles, and to render an opposite conclusion necessary.

The differences in the facts of the respective cases, to which we are pointed, are mainly as follows: In the first place, what may be called a geographical difference is suggested, in that the operation of the Illinois and New York statutes is said to be restricted to the city of Chicago in the one case, and to the cities of Buffalo, New York, and Brooklyn in the other, while the North Dakota statute is applicable to the territory of the entire state.

It is, indeed, true that while the terms of the Illinois and New York statutes embrace in both cases the entire state, yet their behests are restricted to cities having not less than a prescribed number of inhabitants, and that there is no such restriction in the North Dakota law.

Upon this it is argued that the statutes of Illinois and New York are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the state of North Dakota and the small population of its country towns and villages are said to present no such opportunities.

403] *The considerations mentioned are obviously addressed to the legislative discretion. It can scarcely be meant to contend that the statutes of Illinois and New York, valid in their present form, would become illegal if the law makers thought fit to repeal the clauses limiting their operation to cities of a certain size, or that the statute of North Dakota would at once be validated if one or more of her towns were to reach a population of one hundred thousand, and her legislature were to restrict the operation of the statute to such cities.

Again, it is said that the modes of carrying on the business of elevating and storing grain in North Dakota are not similar to those pursued in the eastern cities; that the great elevators used in transshipping grain from the Lakes to the railroads are essential; and that those who own them, if uncontrolled by law, could extort such charges as they pleased; and great stress is laid upon expressions used in our previous opinions, in which this business, as carried on at Chicago and Buffalo, is spoken of as a practical monopoly, to which shippers and owners of grain are compelled to resort. The surroundings in an agricultural state, where land is cheap in price and limitless in quantity, are thought to be widely different, and to demand different regulations.

These arguments are disposed of, as we think, by the simple observation, already made, that the facts rehearsed are matters for those who make, not for those who interpret the laws. When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided the same regulations in every case, and overlooked differences in the facts that called for regulations. But as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota. It may be true that, in the *cases cited, [404 the judges who expressed the conclusions of the court entered, at some length, into a defense of the propriety of the laws which they were considering, and that some of the reasons given for sustaining them went rather to their expediency than to their validity. Such efforts, on the part of judges, to vindicate to citizens the ways of legislatures are not without value, though they are liable to be met by the assertion of opposite views as to the practical wisdom of the law, and thus the real question at issue, namely, the power of the legislature to act at all, is obscured. Still, in the present instance, the obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law, and did not interfere with Federal jurisdiction over interstate commerce.

Another argument advanced is based on the admitted allegation that the principal business of the plaintiff in error, in connection with his warehouse, is in storing his own grain, and that the storage of the grain of other persons is and always has been a mere incident, and it is said that the effect of this law will be to compel him to renounce his principal business and become a mere warehouseman for others. We do not understand this law to require the owner of a warehouse, built and used by him only to store his own grain, to receive and store the grain of others. Such a duty only arises when he chooses to enter upon the business of elevating and storing the grain of other persons for profit. Then he becomes subject to the statutory regulations, and he cannot escape them by assert- that he also elevates and stores his own grain in the same warehouse. As well might a person accused of selling liquor without a license urge that the larger part of his liquors were designed for his own consumption, and that he only sold the surplus as a mere incident.

Another objection to the law is found in its provision that the warehouseman shall insure the grain of others at his own expense. This may be burdensome, but it affects alike all *engaged in the business, and, if it [405 be regarded as contrary to sound public policy,

those affected must instruct their representatives in general assembly met to provide a remedy.

The plaintiff in error, in his answer to the writ of mandamus, based his defense wholly upon grounds arising under the constitution of the state and of the United States. We are limited by this record to the questions whether the legislature of North Dakota, in regulating by a general law the business and charges of public warehouses engaged in elevating and storing grain for profit, denies to the plaintiff in error the equal protection of the laws or deprives him of his property without due process of law, and whether such statutory regulations amount to a regulation of commerce between the states. The allegations and arguments of the plaintiff in error have failed to satisfy us that any solid distinction can be found between the cases in which those questions have been heretofore determined by this court and the present one. *The judgment of the court below is accordingly affirmed.*

Mr. Justice **Brewer** dissenting:

I dissent from the opinion and judgment of the court in this case. Reliance is placed in that opinion on *Munn* v. *Illinois*, 94 U. S. 113 [24:77] and *Budd* v. *New York*, 143 U. S. 517 [36:247], 4 Inters. Com. Rep. 45. In the dissenting opinion I filed in the latter case, I expressed, so far as was necessary, my views in reference to the general propositions laid down in the two cases, and I do not desire to repeat what I there said. It is a significant fact that in *Union Pac. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700, 747 [25:496, 511], and in *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 569 [30:244, 248], 1 Inters. Com. Rep. 31, *Mr. Justice* Bradley and *Mr. Justice* Miller, who concurred in the judgment in *Munn* v. *Illinois*, each sought to limit and qualify the scope of the language used by the *Chief Justice* in that case. These are the words of *Mr. Justice* Bradley:

"The inquiry there was as to the extent of **406**] the police power *in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

And this is the language of *Mr. Justice* Miller, delivering the opinion of the court:

"And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

I desire, however, specially to notice the facts disclosed by this record, and to point out to what extent the decision of this court now goes. The case, coming from the supreme court of the state of North Dakota, must be determined upon the record as it is presented. Nothing can be added to or taken from the facts as established by that record. The case was heard and determined upon a demurrer to the return made by the defendant to the petition and writ of mandamus, and of course upon such demurrer the facts stated in the return are to be taken as true. From that return it appears that along the line of the Great Northern Railroad in the state of North Dakota there are about six hundred grain elevators; that at Grand Harbor, a small way station on the line of that road, there are three elevators, one of them being that owned by the defendant; that defendant's elevator is a small one, with a capacity of 30,000 bushels, and costing about $3000. For aught that appears, the elevator was on the private property of the defendant, though contiguous to the railroad, and at the railroad station. It is further admitted:

"That respondent's principal business is that of buying wheat at Grand Harbor, North Dakota, and shipping the *same to and [**407** selling it at Minneapolis and Duluth, Minnesota, to which the business of storing grain for third persons is and always has been a mere incident.

"That all grain purchased by respondent at his said elevator is purchased for the sole purpose of being shipped to and sold at and is shipped to and sold at Minneapolis and Duluth, Minnesota.

"That respondent in the conduct of his said business contracts with millers and other purchasers of grain at said Minneapolis and Duluth to sell and deliver to said persons at a future and fixed date certain quantities of wheat, and operates and maintains his said elevator for the exclusive purpose of purchasing grain to fill said contracts.

"That in seasons when the grain yield is light and railroad facilities are such as to enable grain to be moved rapidly there is space and storage capacity in respondent's elevator in excess of that used by respondent's grain, and particularly when respondent's contracts for the sale of grain are small, while at other times when the yield is enormous, as in the present year, respondent's contracts large, and the quantities of grain presented for shipment are beyond the capacity of the railroads to move, there is not sufficient storage capacity in respondent's elevator to hold and store the grain purchased by respondent in the conduct of his said business.

"That if chapter 126 of the Laws of 1891 is valid and its effect is to compel respondent to receive all grain that may be tendered to him for storage by grain commission men, farmers, grain speculators, and others without reference to the necessities or condition of respondent's business at any particular time, the entire storage capacity of respondent's elevator will be exhausted in storing grain for third persons, and the principal business of respondent, to conduct which his capital was invested in said elevator, will be utterly ruined and annihilated for want of storage capacity to contain wheat purchased by him to fill contracts made by him in the conduct of his said business and respondent subjected to suits for

damages for non-fulfilment of his said contracts."

The rates which were established by law were as follows:

408] *"1. For receiving, elevating, insuring, delivering, and twenty days' storage, two cents per bushel.

"2. After twenty days, one half cent per bushel for each fifteen days or part thereof, but not to exceed five cents for six months."

It appears from these admissions that the principal business of defendant was that of buying wheat and shipping it to Minneapolis and Duluth for sale, and that he operated and maintained his elevator for the exclusive purpose of purchasing grain to fill his contracts; and while at the time the elevator was not full and there was room for the storage of the grain tendered by the petitioner, and the defendant had at times used vacant space in his elevator for the storage of grain of others, yet such use was a mere incident to and subordinate to his principal business of buying and selling grain, for which principal business he exclusively maintained and operated his elevator.

Now, my first objection is that by this decision a party is compelled by the mandate of the court to engage in a business which he never intended to engage in, and which he does not desire to engage in, to wit, the business of maintaining a public elevator. His business is that of buying and selling grain, and he operates and maintains the elevator, which he owns, for the exclusive purpose of carrying on that business. That he may have sometimes accommodated his neighbors by the use of his elevator for the storage of their grain, and thus to a limited extent engaged in that business, does not change the fact, as admitted, that his principal business was that of buying and selling, and that he operated and maintained that elevator exclusively for the carrying on of that business, or the other admitted fact that, if he is compelled, as he is compelled by this mandate, to receive grain as tendered so long as he has storage capacity unoccupied in his elevator, his principal business and that for which he built the elevator will be utterly ruined and destroyed.

The question is not whether, if he should receive and store in his elevator grain for others, he might not so far bring himself within the scope of the law as to be deemed for that 409] *transaction engaged in the business of maintaining a public elevator, and thus bound by the charges fixed by statute; but whether, when he maintains an elevator exclusively for his own business, the fact that at times he has used vacant room in it for the storage of the grain of other persons, compels him to receive grain when tendered irrespective of the injury which it does to his own business. And it is admitted that at the time of this tender, there was not sufficient storage capacity in his elevator to hold and store the grain purchased by him in the conduct of his business. And this is a matter of no trifling moment to one engaged in the business of buying and selling grain. He cannot know in advance when grain will be tendered at a price which will justify his purchase with a view to profit. The fact that to-day there may be storage capacity does not prove that to-morrow he may not need the entire capacity of his elevator. And yet, if, because to-day there is room in his elevator, he is bound to receive any grain that shall be tendered, he may to morrow be unable to make purchase of the offered grain. It is a matter of common knowledge that grain is not put into and taken out of an elevator in an instant. And if once deposited the owner cannot be compelled to remove it, merely for the accomodation of the warehouseman, but may leave it there indefinitely, so long as he pays the legal charges. The petition was for a writ of mandamus commanding the defendant "so long as the capacity of his said elevator is sufficient for the purpose, to store such grain as may be tendered to him by the relator," and the decree of the court was that the "writ issued as prayed for," and that is the decision which is affirmed by this court.

I dissent in the second place because the facts show, in the words of *Mr. Justice* Bradley, no "practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community." Along the line of this single road within the limits of this state there are about six hundred of these elevators, owned and operated by over one hundred and twenty-five different persons, varying in cost of construction from $500 to $5000; at every station there is land purchasable by any one at prices varying *from $1.25 to $40 per acre, and a [410 granary sufficient to store the average product of an ordinary Dakota farm can be erected at a cost of not exceeding $150. So it is that when any farmer or other individual can at a cost of less than $200 provide himself with all the facilities for storing and shipping the entire product of an ordinary farm, when along the line of a single railroad there are six hundred elevators already constructed, owned, and operated by one hundred and twenty five different persons, when at every station at which grain is marketed there are from two to ten such elevators, it is held that there exists a monopoly such as justifies control by the public of the prices at which grain shall be stored in any one of these many elevators. If this be a monopoly, justifying public control of prices for service, I am at a loss to perceive at what point the fact of monopoly will cease and freedom of business commence. For obviously elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and therefore savoring no more of monopoly.

I dissent, in the third place, because by this law the elevator man is bound not merely to receive, store, and discharge the grain which is tendered to him, but also to insure and pay the cost of insurance, it matters not what that cost may be, whether more or less than he receives for the whole service. I do not care to enlarge upon this matter. If the legislature can compel a party, though confessedly to the disadvantage, injury, and even destruction of his own special business of buying and selling grain, to receive and store grain for whoever may demand it in an elevator which he is maintaining and operating for the exclusive

carrying on of his own business at any price which it sees fit to allow, and at the same time compel him to advance the money to insure the property thus forced upon him, I can only say that it seems to me that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost. For these reasons, thus briefly stated, I am constrained to dissent from this opinion and judgment.

I am authorized to say that *Mr. Justice* **Field**, *Mr. Justice* **Jackson**, and *Mr. Justice* **White** concur in this dissent.

411] *THE CITY OF NEW ORLEANS, *Appl.*, *v.* H. W. BENJAMIN ET AL.

(See S. C. Reporter's ed. 411-435.)

Suit arising under the Constitution—when not—jurisdiction of U. S. circuit court—impairment of contract—suit to recover choses in action—warrants and certificates.

1. The case made by the bill against a municipal corporation for the payment of the debts of its police board, alleging that the board of police has been abolished and left without successor or legal representative, and no provision has been made for the application of the assets of the board to the payment of its debts, and the answer denying that the statute abolishing the board without providing for such payment is unconstitutional, and alleging that taxes had been levied to pay such debts, etc., does not constitute a suit in equity arising under the U. S. Constitution and within the jurisdiction of the U. S. circuit court, without regard to the diverse citizenship of the parties.
2. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, then it is not a suit arising under the Constitution.
3. It is necessary to the exercise of original jurisdiction by the U. S. circuit court over cases arising under the Constitution, that the cause of action should depend upon the construction and application of the Constitution.
4. The U. S. circuit court cannot be given jurisdiction by the suggestion of the impairment of a contract in respect of which the complainant seeks no relief.
5. Where the pleadings show a suit to recover the contents of choses in action, and the bill contains no averment that it could have been maintained by the assignors, if no assignments had been made, and especially where it appears affirmatively that it could not, the jurisdiction of the circuit court cannot be sustained on the ground of diverse citizenship.
6. A suit to enforce against a city the payment of warrants and certificates for debts due the police force and claims against the board of police, is a suit to recover the contents of choses in action, so as to preclude the assignee from suing in the U. S. circuit court, unless his assignor could sue if no assignment had been made.

[No. 981.]

Submitted Jan. 12, 1894. Decided May 14, 1894.

ON A CERTIFICATE from the United States Circuit Court of Appeals from the Fifth Circuit, certifying questions and propositions of law to this court, in regard to the jurisdiction of the circuit court and asking the decision of this court thereupon, in a suit brought by H. W. Benjamin, plaintiff, against the city of New Orleans, and other municipal corporations, citizens of the state of Louisiana, for an account of the debts, liabilities, and unpaid dues of the Board of Metropolitan Police, including warrants and certificates, and that a like account be taken of the amount due by defendants to said board, and of all police taxes collected by defendants and withheld from said board, and the defendants be decreed to pay to a receiver their shares of the amount due to the creditors of said board, and that the fund thus realized be applied to the claimant of plaintiff's warrants, certificates, and claims, and of the other creditors of said board, etc. First question answered in the negative, and the third in the affirmative.

Statement by *Mr. Chief Justice* **Fuller**:

This is a certificate from the United States Circuit Court of Appeals for the Fifth Circuit, under section 6 of the Judiciary Act of March 3, 1891, the statement and questions of law so certified being as follows:

"The complainant, an alien, filed his bill of complaint in the circuit court against the city of New Orleans and other municipal corporations, citizens of the state of Louisiana, alleging, among other things, as follows, viz:

"That by an act of the legislature of Louisiana (No. 74) approved September 14, 1868, the parishes of Orleans (including the *city of New Orleans) Jefferson and St. [412 Bernard, were territorially united in one district for the purpose of police government therein, called the 'Metropolitan police district of New Orleans, state of Louisiana;' that the government of said district for police purposes was vested in a board of commissioners styled 'the board of Metropolitan police.'

"'That said board was required to appoint all the officers and employés of the police force required in said district, and their salaries, which were prescribed by the act, were required to be paid monthly; that by said act and acts of said legislature supplementary to and amendatory thereof said board was required to make annually an estimate of the expenses of maintaining a police force in said district and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay and provide the means for promptly paying the amounts thus apportioned to them,' and they were authorized and required to raise the amount by levying taxes for that purpose.

NOTE.—*As to jurisdiction of United States circuit court dependent on residence of parties: proper place of suit*, see note to Roberts v. Lewis, 36: 579.

As to amount necessary to give jurisdiction in circuit court cases prior to Act of 1875; amount necessary since Act of 1875; amount in dispute, see note to Schunk v. Moline, M. & S. Co. 37: 256.

As to colorable conveyances to enable suit to be brought; motive of transfer; when no objection; coupons; residence of assignor, see note to M'Donald v. Smalley, 7: 287.

"That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and appointed and employed the officers and members thereof, who entered upon their duties and rendered services under contracts therewith to be paid the salaries fixed by law for such employment, such contracts being made upon the faith of its revenues applicable to their payment being unimpaired.

"That said board annually made the estimates of the expenses of maintaining such police force and apportioned the same to the several cities and parishes in the district, and that large sums are due and unpaid on account thereof by the city of New Orleans and other corporations made defendants in the bill.

"That by the provisions of an act of said legislature approved February 27, 1869, and subsequent acts all warrants issued in payment of salaries of officers, employés, and members of the Metropolitan police and for the expenses of said board were made re-[413] ceivable for all parish and *municipal taxes and licenses within the limits of the Metropolitan police district and for all debts due or to become due to the parishes and cities within said district, not exceeding in any one year the amount of their respective apportionments for that year.

"'That by an act of said legislature (No. 35) approved March 31, 1877, said act No. 74, of September 14, 1868, establishing said Metropolitan police district; said act No. 44, of February 27, 1869, making all warrants issued in payment of Metropolitan police salaries and expenses receivable for all municipal and parish taxes within the district; said act No. 94, of March 30, 1870, requiring the several cities and parishes within the district to pay and to provide the means for the payment of their apportionments of the expenses of the board of Metropolitan police; said act No. 16, of March 24, 1875, entitled 'An act to enforce the payment by the city of New Orleans and the several cities and parishes of the Metropolitan police district of the apportionment made upon them by the board of Metropolitan police, and for other purposes,' as well as all other acts amendatory of said above enumerated acts or upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished and no provision was made for the liquidation of its affairs or the payment of its debts.

"'That said repealing act was in violation of section 10, article 1, of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police with its officers and employés and others to whom it was indebted, and who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid from the several cities and parishes within said district, out of which funds only they could be paid, and to that extent said act was and is null and void.'

"The bill further avers that complainant is the holder and owner of Metropolitan police warrants, certificates, and claims against said board of Metropolitan police, said warrants and certificates having been issued by said board for services* rendered and supplies [414] furnished, and said claims being for services rendered and supplies furnished thereto under contracts therewith, said warrants, certificates, and claims amounting to $5032.90, and that other due and unpaid warrants and certificates issued by said board are outstanding, and sums are due and owing by it for services rendered and supplies furnished to it exceeding $200,000.

"And it is also averred—

"'That the only assets of said board of Metropolitan police at the time it was abolished were the amounts due to it by said city of New Orleans, and by the other defendants as herein stated; that the aggregate amount of said indebtedness to said board largely exceeds the total amount of its debts and liabilities; that law and equity require that the amount of said assets should be ascertained, and the just proportion due by each of the defendants adjusted, and that the liabilities of said board of police be fixed and determined and paid out of said assets, and if the same exceed the liabilities of the board that said defendants be required to pay their *pro rata* shares thereof.'

"'That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said laws ceased to be, and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complainant herein, and he is remediless except in this honorable court, where matters of this nature are cognizable and relievable; wherefore he brings this his bill in behalf of himself and all other creditors of said board similarly situated who may come in and contribute to the expenses of this suit.'

"The prayer of the bill in substance is that an account be taken 'of all the debts, liabilities, and unpaid dues of every kind of said board of Metropolitan police, including all the warrants, certificates, and claims of your orator and of all others who may come in and avail themselves of the decree to be made herein and contribute to the expense of this suit; that a like account may be taken of the amount due by each of said defendants to said board of Metropolitan police for the balances of their unpaid apportionments of police expenses, as well as *of all police taxes [415] collected by them and withheld from said board, and that said defendants be decreed to pay into the hands of some discreet person, to be appointed receiver by this honorable court, their several *pro rata* shares of the amount so found to be due to creditors of said board of Metropolitan police, including all costs of the administration thereof, and that the funds thus realized be applied to the payment of your orator's said warrants, certificates, and claims and of such other persons as may be creditors of said board and who shall come in and establish their claims, and also to the payment of interest thereon and all expenses of administration and costs.'

"The defendant, the city of New Orleans, demurred to the bill, assigning, among other causes of demurrer, the following:

"'That the complainant's said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant.

'That the bill complains of the repeal by the legislature of Louisiana of the aforesaid acts organizing and relating to the Metropolitan police force and the Metropolitan police board, and by reason of said repeal the bill alleges the Metropolitan police board was abolished and no provision was made or now exists for the liquidation of the affairs or for the payment of the alleged debts of said board, and the bill calls upon this court to grant relief for the payment of said alleged debts of said Metropolitan police board; but this defendant shows that the only mode of payment of said alleged debts, if any, of the late Metropolitan police board, a political body for the administration of the police of the city, is by taxes to be levied for that purpose, and, if it be true, as asserted by said bill, that no provision now exists for the payment of said debts, this court has no power to direct the levy of taxes for said asserted debts or any power whatever to grant any relief in respect to the matters of which the bill complains.'

"The demurrer was overruled.

"Said defendant then filed an answer and, 416] among other *things, averred as follows: 'Further answering, defendant admits that by the act of the legislature of Louisiana No. 85, of 1877, the various acts organizing the Metropolitan police board were repealed; but all the provision for the payment of said Metropolitan police was the levy of the Metropolitan police taxes authorized by law, and said taxes had already been levied far in excess of taxes that should have been imposed, and the repealing legislation did not interfere in any manner with the levy and application of said taxes to the extent that they could be collected to the payment of the legal obligations of said Metropolitan police board, and with this statement and a reference to said repealing act this defendant denies the allegation in the bill that, by such repealing legislation, no provision was made for the liquidation of the affairs of said board or payment of its debts.'

"This defendant again affirms that said repealing act did not interfere in any manner with the means of payment of all lawful obligations of said board nor with the right of those who had made lawful contracts—that is, to the extent authorized by law with said board; and this defendant again refers to the illegal and void apportionments of said board, and to the alleged contracts made by it, far in excess of the means applicable to the support of the Metropolitan police, and far in excess of their power, and denies to be true that said repealing act was in violation of the Constitution of the United States or "impaired the obligation of the contracts of said board with its officers and employés who had contracted with and rendered services to said board upon the faith of said provisions of law for the enforced payment and collection of the sums due to it from the several cities and parishes within said district," and denies that said act was null and void in any respect or to any extent.'

"Said answer also averred that the city was liable to said board only for such police taxes as she collected, and that she had fully accounted for all such collections, and denies that she is now making any such collections and that any such taxes are collectible.

"Issue being joined, the case was referred to a master to *take an account of the [417 amounts due by the defendants to said board and of its outstanding liabilities. He reported as due by the city of New Orleans on account of its apportionments a balance of $241,106.54 and an indebtedness of the board incurred on account of said city and still unpaid amounting to $123,963.06, besides interest thereon. Small amounts were found due by the other defendants and also by the board on their account.

"Prior to the decree a number of creditors of the board, some of whom were citizens of Louisiana, with leave of court intervened in the suit, made proof of their claims before the master, claimed the benefit of the decree, and prayed to be permitted to share in the distribution.

"Of the amount of claims proved before the master and covered by the decree the complainant, an alien, holds $5777.78; an alien intervenor holds $815.78; intervenors who are citizens of Louisiana hold $81,100.51, and intervenors whose citizenship does not appear hold $30,302.16. Other claims, amounting to $13,363.21, were proved before the master by persons whose citizenship does not appear and who have not intervened.

"And it appearing that complainant and intervenors were assignees of the certificates, warrants and claims, of which they made proof before the master, and that their assignors were citizens of Louisiana, and there being no averment in the bill that the assignors might have sued thereon in the circuit court if no transfer thereof had been made, the city of New Orleans moved to dismiss the suit for want of jurisdiction in said court.

"The motion was denied and a final decree made requiring the defendants to pay their virile shares of the indebtedness of the board as reported by the master. From such decree an appeal was taken to this court, and the case came on to be heard upon the errors assigned; whereupon, the court desiring the instruction of the honorable and the Supreme Court of the United States for the proper decision of the questions arising herein touching the jurisdiction of the circuit court, it is hereby ordered that the following questions and propositions *of law be certified to said Supreme [418 Court in accordance with the provisions of section 6 of the act entitled 'An Act to establish circuit courts of appeals and define and regulate certain cases the jurisdiction of the circuit court of the United States and for other purposes,' approved March 3, 1891, to wit:

"First. Does the case made by the bill alleging that the board of police has been abolished and left without successor or legal representative and no provision has been made for the application of its assets to the payment of its debts and the answer herein constitute a suit in equity arising under the Constitution of the United States and within the jurisdiction of

the Circuit Court of the United States for the Eastern District of Louisiana without regard to the diverse citizenship of the parties?

"Second. The warrants and the certificates held by the complainant having been issued for services rendered and supplies furnished under contract with the board of Metropolitan police when the laws required said warrants and certificates to be received by the defendants in payment of all licenses, taxes, and other dues, and all such laws having been repealed by the legislature of Louisiana without making other provisions for the redemption of said warrants and certificates, was this an impairment of the obligation of the contract in relation to such warrants and certificates within the meaning of article 1, section 10, of the Constitution of the United States?

"Third. Do the pleadings show a suit to recover the contents of choses in action within the meaning of the Judiciary Act of 1887 and 1888, so as to preclude the complainant, as assignee, from suing in the circuit court of the United States to establish a fund out of which he, in common with other creditors of the late Metropolitan police board, may be paid *pro rata* upon their claims.

"Fourth. Considering all the allegations in the bill of complaint and the provisions in the constitution and laws of Louisiana respecting the Metropolitan police board and the Metropolitan police warrants and certificates and the **419**] redemption *and payment of said certificates, does the case show a liability on the part of the city of New Orleans to contribute to a fund for the payment of said warrants and certificates beyond its liability for taxes assessed and collected in pursuance of the apportionments made?"

The circuit court of appeals "further ordered that the bill of complaint and the demurrer and answer of the city of New Orleans thereto be made a part of the transcript certifying the aforesaid questions, together with the following sample copies of the warrants, certificates, pay rolls, and assignments forming the basis of complainant's demand, to wit:

"*Warrant Filed with and Part of Assignment.*

"(Copy.)

"Central department, Metropolitan police.

"(No. 10253.)

"New Orleans, May 18, 1874.

"Treasurer of the board Metropolitan police:

"Pay to the order of James Reilly, fifty $\frac{00}{100}$ dollars.

"By order of the board.

"$50.00. (Signed) E. Parker, Chief Clerk."

"*Certificate Filed with and Part of Assignment.*

"(Copy.)

"Central department, Metropolitan police.

"No. 4748. $73.97.

"New Orleans, Jan. 13, 1876.

"This is to certify that the board of Metropolitan police is indebted to P. Moran, No. 22, first precinct, in the sum of seventy-three $\frac{97}{100}$ dollars, for salary for account of the month of December, 1875.

"(Signed.) L. T. Murdock,

"Treasurer Board Metropolitan Police.

The amount due as per this "certificate will not be paid unless the certificate is delivered to the treasurer of the board."

Then followed form of pay rolls, the one given being approved *January 5, 1877, [**420** for forty nine hundred and seventy-six $\frac{1}{100}$ dollars, and the bill, demurrer and answer, which were set forth at length.

Messrs. **Wm. A. Maury, E. A. O'Sullivan** and **Henry C. Miller,** for appellant:

This is not a case arising under the Constitution. The bill and answer do not present on their face and without extraneous aid a case in equity arising under the Constitution of the United States aside from the diverse citizenship of the appellant and the appellee.

The impairment or disturbance of rights that have already vested under a repealed law is not within the purview of the repealing act unless its words compel such a sense.

Chew Heong v. *United States*, 112 U. S. 536, 559 (28: 770, 778); *Pacific Mail SS. Co.* v. *Joliffe*, 69 U. S. 2 Wall. 450 (17: 805); *Pacific Mail SS. Co.* v. *United States*. 103 U. S. 721 (26: 419).

The police board had no power under the law to become a debtor.

It had a fund provided by the authorities composing the police district, and that fund was the only debtor.

The remedy at law by mandamus for the enforcement of tax levies is fully adequate, and there is no jurisdiction in equity to afford relief of that kind. *Walkley* v. *Muscatine*, 73 U. S. 6 Wall. 481 (18: 930).

A party entitled to receive payment from a public fund has the right to compel such payment by mandamus.

Com. v. *Johnson*, 2 Binn. 279; *Apgar* v. *School Dist. No. 4*, 34 N. J. L. 308; *State* v. *Holiday*, 8 N. J. L. 205.

So that unless this case furnishes an occasion for the enforcement of the equitable doctrine of apportionment as between parties charged with a common burden the bill cannot be supported.

The repeal of the law authorizing the receivability of police warrants and certificates did not leave their redemption and payment unprovided for.

The bill in this case being for the purpose of enforcing payment of police warrants and certificates against so much of the police fund as is in the hands of the city of New Orleans is necessarily a direct suit to recover the contents thereof against the only debtor liable thereon.

Messrs. **J. D. Rouse** and **Wm. Grant,** for appellees:

A general demurrer admits the truth of all the facts alleged, and is a denial of plaintiff's right to have his case considered thereon in a court of equity.

Griffing v. *Gibb*, 67 U. S. 2 Black, 519 (17: 353).

Whether a suit in the circuit court is one arising under the Constitution or laws of the United States for the purpose of original jurisdiction, is determined by the questions involved. If from them it appears that some right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, or sustained by the opposite construction, then the case is one arising under

the Constitution or laws of the United States.

Cooke v. *Avery*, 147 U. S. 375 (37: 209).

Whether the repealing law and act 49 of 1880 did or did not impair complainant's contract, is the question presented for decision. It is a Federal question which gave jurisdiction to the circuit court, no matter how it might be determined.

Planters Bank of Mississippi v. *Sharp*, 47 U. S. 6 How. 301 (12: 447); *Edwards* v. *Kearsey*, 96 U. S. 595 (24: 793).

All laws which deprive a creditor of recourse against his debtor, or property he had at the time the debt was incurred, are obnoxious to the Federal Constitution and void.

Curran v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131 (29: 587).

Ordinarily, some adequate provision is made for the settlement of the affairs of dissolved corporations and the application of their assets. When this is done, creditors cannot, as we concede, complain that the mere dissolution of the corporation works any legal injury to them.

Mumma v. *Potomac Co.* 33 U. S. 8 Pet. 281 (8: 945).

But where no such provision is made, and it is contended, as it was in this case, by demurrer and argument, that the act of the legislature dissolving the debtor corporation took from creditors the right to have its assets applied to the payment of their claims and deprived the circuit court of the power to grant relief, such a law is clearly an impairment of the remedy, and violates the Constitution of the United States.

Even if defendants intended by answer to abandon the Federal questions raised by demurrer and place the defense on other grounds, it cannot be permitted to do so for the purpose of defeating the jurisdiction of the circuit court after it has once attached.

Cooke v. *Avery*, 147 U. S. 375 (37: 209).

The case is one of equitable cognizance. The dissolution of the Metropolitan board, by legislative act, without providing for the payment of its debts or appointing a representative, took from the creditors the action they had against their debtor for the satisfaction of their claims. The effect of such an act is to pronounce the legal death of the debtor without appointing an administrator who can be sued. It abates all pending actions and renders it impossible to bring a new suit against the debtor.

Mumma v. *Potomac Co.* 33 U. S. 8 Pet. 281 (8: 945).

The act therefore, of itself, was an impairment of their rights which gave the circuit court equitable jurisdiction. The only remedy left to the creditor is to establish a trust against such assets as the corporation may happen to own at the date of the dissolution, and seek payment out of them.

Broughton v. *Pensacola*, 93 U. S. 266 (23: 896).

The destruction of a corporation by the repeal of its charter does not destroy its rights of property or its choses in action. No suit can thereafter be maintained against it, but the rights of its creditors are not annihilated, and the courts may—if the legislature does not provide some special remedy, enforce such rights by means within their power.

Greenwood v. *Union Freight R. Co.* 105 U. S. 13 (26: 961); *Sturges* v. *Vanderbilt*, 73 N. Y. 384.

In the view of equity its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders, and if a municipal corporation, upon the surrender, or extinction in other ways of its charter is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation.

Meriwether v. *Garrett*, 102 U. S. 512 (26: 204).

If a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law.

Russell v. *Clark*, 11 U. S. 7 Cranch, 69 (3: 271); *Innes* v. *Lansing*, 7 Paige, 583; *Case* v. *New Orleans & C. R. Co.* ("*Case* v. *Beauregard*") 101 U. S. 688 (25: 1004); *New Orleans* v. *Christmas*, 131 U. S. 191–213 (33: 99–107); 3 Pom. Eq. 464 *note 4*.

The third question is founded upon the theory that the warrants and certificates held by complainant are choses in action, his title to which is derived through assignment by citizens of Louisiana; that he is suing to recover their contents, and that the exercise of jurisdiction is therefore prohibited by the Act of March 3, 1887.

Corbin v. *Black Hawk County*, 105 U. S. 665 (26: 1138).

Necessarily a suit to recover the contents must be brought against the party who made the stipulation, as in the case of a promissory note against the maker, or upon a bond against the obligor. But this exception has never been extended to a case not clearly within it.

Deshler v. *Dodge*, 57 U S. 16 How. 631 (14: 1088); *Ambler* v. *Eppinger*, 137 U. S. 480 (34: 765); *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 (19: 736).

The complainant's bill was brought not only in behalf of himself but of all other creditors similarly situated, not to recover contents, but to establish a fund out of which all should be be paid *pro rata*.

A suit to recover the contents of a chose in action is one to enforce the obligation thereof *in toto*.

Bean v. *Smith*, 2 Mason, 252.

The statute never contemplated an exclusion of jurisdiction in cases where a mere negotiable instrument, or chose in action was mixed up in the ingredients of the case; but only where that chose in action constituted the sole cause of action, and the assignment constituted the whole ground of plaintiff's right.

Ober v. *Gallagher*, 93 U. S. 206 (23: 881).

The intervenors come in merely for the purpose of participating in the distribution of the fund in which they are entitled to share. They present ancillary cases only, of which the circuit court always takes jurisdiction without regard to the citizenship of the parties.

Stewart v. *Dunham*, 115 U. S. 61 (29: 329); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145);

Pacific R. Co. of Missouri v. *Missouri Pac. R. Co.* 111 U. S. 521 (28: 504); *Phelps* v. *Oaks*, 117 U. S. 236 (29: 888); *Johnson* v. *Waters*, 111 U. S. 640 (28: 547).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The first and third questions propounded relate to the jurisdiction of the circuit court, which was invoked on two grounds: (1) that **424**] the case was one arising under the *Constitution of the United States; and (2) on diverse citizenship.

1. When a suit does not really and substantially involve a dispute or controversy as to the effect or construction, upon the determination of which the result depends, then it is not a suit arising under the Constitution. *Shreveport* v. *Cole*, 129 U. S. 36 [32: 589]; *Starin* v. *New York*, 115 U. S. 248, 257 [29: 388,390]; *Little York Gold Wash. & W. Co.* v. *Keyes*, 96 U. S. 199 [24:656].

The judicial power extends to all cases in law and equity arising under the Constitution, but these are cases actually and not potentially arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the Constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the Constitution and laws of the United States require (*Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 108 U. S. 18 [27: 636]) and if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the Constitution by the twenty-fifth section of the Judiciary Act of 1789, and has adhered to it in subsequent legislation.

But assuming that such repugnancy might be so set up as to form an independent ground of jurisdiction in the circuit court, it becomes necessary, in order to dispose of the inquiry whether such a dispute or controversy was really involved here, to refer to certain legislation of the state of Louisiana.

By act No. 74 of 1868 (La. Acts, 1868, 85) the parishes of Orleans, Jefferson, and St. Bernard were united into a district, called "the Metropolitan Police District of New Orleans, state of Louisiana," and a board created, styled the "Board of Metropolitan Police," upon **425**] which were conferred the *powers and duties pertaining to police government and discipline in that district, with power to issue warrants and certificates for the payment of the police and other expenses. These expenses were to be borne by the cities, towns, and parishes of the district, and apportionments or estimates thereof were to be made annually by the board against each of the cities and parishes, which were to be "binding upon the respective cities and towns interested therein," and the cities, towns, and parishes were empowered and directed to annually levy and collect taxes to raise the sums of money so estimated and apportioned, to be paid over to the state treasurer and constitute a fund to be paid out on warrants as provided.

By act No. 44 of 1869 (La. Acts, 1869, 42) and act No. 92 of 1869, amending and re-enacting the original act (La. Acts, 1869, 92) warrants issued in payment of the salaries of officers, employés, and members of the Metropolitan police in accordance with act No. 74 of 1868 were made receivable for all parish and municipal licenses and taxes within the limits of the Metropolitan police district, provided the aggregate so received in each current year should not exceed the amount of the apportionment for that year.

By act No. 41 of 1870 (La. Acts, 1870, 74) all warrants, checks, and orders issued in payment of the salaries of Metropolitan police, and all warrants, checks, and orders issued, or that might thereafter be issued, for the supplies and expenses of the board, were made receivable for all police and municipal taxes and debts to become due for the police of New Orleans, Jefferson, and Carrollton, provided that the aggregate of such warrants, checks, or orders so received in each current year should not exceed the apportionment.

By act No. 33 of 1874 (La. Laws, 1874, p. 70, § 4) it was enacted, among other things, that all Metropolitan police taxes should be collected in cash, and that it should be unlawful to receive in payment for said taxes any warrants of indebtedness of any kind whatever, provided that warrants and certificates issued prior to January 1, 1874, should still be received for taxes due for the years prior to that date.

In 1875 (La. Laws, 1875, 35, No. 16) an act was passed, to *the effect that the total [**426**] amount of apportionments should be divided into twelve equal parts, and that weekly settlements of taxes collected should be made, and that, whenever the city of New Orleans or any city or parish making part of the police district should fail to pay the full amount of its *pro rata* share for any month, the tax bills should be transferred to the Metropolitan police board for collection.

By Act No. 35, passed at an extra session of the legislature in 1877, and approved March 31 (La. Acts, Extra Sess. 1877, p. 57) the acts of 1868, 1869, 1870, and 1875, above referred to, and other acts upon the subject, were repealed, and the police system transferred to the city.

It was ordained by the constitutional convention of 1879 "that all taxes and licenses due any parish or municipal corporation prior to January 1, 1879, may be payable in any valid warrants, scrip or floating indebtedness of said parish or municipal corporation, except judgments." La. Acts, 1880, Constitution, etc. 68. And by act No. 49 of 1880 (La. Laws 1880, 48) it was enacted that all parish or municipal corporations should "receive for all taxes and licenses due said parish or municipal corporations prior to January 1, 1879, all valid warrants, scrip or evidence of indebtedness of said parish or municipal corporations, except judgments, without any discrimination as to what year said warrants, scrip or evidence of indebtedness shall have

been issued, *provided*, that all valid Metropolitan police warrants or scrip for the years 1874, 1875, and 1876 shall be receivable only for that portion of the tax levied for the Metropolitan police fund and no other, without any discrimination as to the year in which said warrants were issued or said taxes levied."

This bill was framed upon the theory that the city of New Orleans, the city of Kenner, and certain parishes were debtors for the amount of the apportionments as to each of them made by the police board during the eight years of its existence (from 1869 to 1876 inclusive) and that there was a large balance due on said apportionments which constituted a fund for distribution among the creditors of that board. The bill stated that the assets of the board at the time it was abolished "were 427] *the amounts due to it by said city of New Orleans and by the other defendants as herein stated," and that "the aggregate amount of such indebtedness to said board largely exceeds the total amount of its debts and liabilities." It was also, however, averred that the city of New Orleans, "annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority, levied taxes for the purpose of paying the same;" and "has from day to day and from year to year, ever since the passage of the repealing act of March 31, 1877, aforesaid, continued to collect the taxes levied as aforesaid, for the purpose of paying the apportionments of said city for police expenses, as aforesaid made, and notified thereto; and is now making such collections and enforcing the payment of taxes levied for that purpose, and now has a large sum of money thus realized, which is applicable to the payment of said city's indebtedness to said board of police, and ought to be distributed among the creditors of said board in reduction of their claims, including those of your orator."

The prayer of the bill was that an account be taken of the debts, liabilities, and unpaid dues of every kind of said board of Metropolitan police; that an account be taken of the amount due by each of the defendants to the board "for the balances of their unpaid apportionments of police expenses, as well as of all police taxes collected by them and withheld from said board;" that a receiver be appointed, to whom the defendants be decreed to pay their several *pro rata* shares of the amount found to be due to creditors of the board, including costs; and that the funds thus realized be applied to the payment of complainant's warrants, certificates, and claims, and of such other persons as may be creditors of the board, and who should come in and establish their claims; and also to the payment of interest, expenses and costs. The bill averred that, by act No. 35 of 1877, acts No. 74 of 1868; No. 44 of 1869; No. 94 of 1870; and No. 16 of 1875, and other acts not enumerated were repealed, and the eleventh paragraph of the bill contained the allegation upon which the contention rested that the suit was one arising under the Constitution of 428] the United States, *it being averred: "that said repealing act was in violation of section 10, article 1 of the Constitution of the United States, in that it impaired the obligation of the contracts made by said board of Metropolitan police, with its officers and employés and others, to whom it was indebted, and who had contracted with and rendered services to said board, upon the faith of said provisions of law for the enforced payment and collection of the sums due to it as aforesaid from the several cities and parishes within said district, out of which funds only they could be paid and to that extent said act was and is null and void."

The city of New Orleans demurred to the bill for want of equity; because the city had never been liable as a debtor directly upon the apportionments; and, because, so far as the payment of the warrants and certificates was enforceable through the levy of taxes, such levy, if needed, could not be directed in this proceeding. The demurrer was overruled and the city answered. The answer denied that the act of 1877 either changed or attempted to change or affect in any manner or degree the rights or remedies of the holders of the warrants and certificates; denied that the apportionments had ever been debts of the city, and averred that they were designed simply as the basis on which the city was to levy the Metropolitan police taxes; denied that tax levies already made or the means of collection were interfered with, and maintained that under the Metropolitan police acts its only liability was for taxes collected, of which it had then none in its hands.

The jurisdiction in equity in this case is found in the inadequacy of the remedy at law, either because the rights claimed could not be enforced at law or because they could not be administered in that forum. The bill was manifestly framed to bring the case within the class in which receivers are appointed to collect the assets and pay the creditors of a dissolved corporation. *Broughton* v. *Pensacola*, 93 U. S. 266, 268 [23:896, 897]; *Meriwether* v. *Garrett*, 102 U. S. 472, 527 [26:176, 209]. Indeed, it was expressly averred that the state courts had proceeded upon that principle in respect of similar warrants and certificates, and reference was made in terms to a decision of the supreme court of Louisiana in that behalf. *Harrison* v. *New Orleans*, [429 40 La. Ann. 509. The contention was that the holders of these warrants had a right to bring an action at law against the board of police to recover thereon, and that the dissolution of the board left the complainants without remedy except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. Therefore, the court in chancery was appealed to to lay hold of the assets of the board as in the nature of a trust fund and apply them to the payment of the claims. Those assets, as shown by the bill, were the apportionments, the tax levies, and the taxes collected. These were the means provided by law for the payment of debts created by the board, and if they were left unaffected by the repealing act the alleged impairment had no basis to rest on. That act was essentially a mere change of an instrumentality of municipal government. It abolished the police organization established in 1868, and vested

in the city the function of maintaining its own police. This legislation was not in contravention of the Constitution of the United States, and was enacted in the exercise of the undisputed power of the state in that regard. In making the change no obligation rested on the state to create an independent and corporate successor of the board or to provide for the application of its assets to the payment of its debts if existing laws were ample to effect that purpose. In that view the city of New Orleans remained for all purposes, so far as creditors were concerned, the representative of the board, and if the city were under a liability to pay the apportionments in cash it was not absolved from that liability by the dissolution of the board. Although the creditors could not avail themselves of the instrumentality of the board to sue for the apportionments (if that could ever have been done) still, as those apportionments had all been made and taxes had been levied and were in course of collection to pay them, or so much thereof as was needed to pay the warrants and certificates, the act of 1877 left the city of New Orleans to respond as before to the creditors in reference thereto, and the remedies to which they could resort were quite as efficient as they ever had been.

430] *In *New Orleans* v. *Christmas*, 131 U. S. 191 [33:99], it was held that under the jurisprudence prevailing in Louisiana a creditor might exercise the rights of action of his debtor, a right analogous to the garnishee or trustee process in some states, and that this right could be enforced in a Federal court by a suit in equity on the principle of subrogation. But if this bill could be maintained on the doctrine therein recognized, or if the equitable principle of apportionment as between parties charged with a common burden were applicable as justifying equity interposition, the result on the point under consideration would be the same. Jurisdiction could not be obtained upon the bare averment of an anticipation that the city might rely on the repealing act as wiping out apportionments, tax levies, and tax collections, and that the state courts would so decide. And the bill made no such specific averment, with which, indeed, many of its allegations were wholly inconsistent; while the defense of the city not only rested on no such ground, but the answer denied that the repealing act was susceptible of that construction or could be given that effect.

This would be equally true if, as suggested by counsel for the city, the board could never have been treated as a debtor (unless it had collected taxes under act No. 16 of 1875, and retained them) inasmuch as it had nothing to do with raising the sums apportioned to the local authorities, upon whom alone the duty was devolved to accomplish that through the exercise of the power of taxation, and the holders of warrants and certificates could from the first only have resorted to the police fund created through the medium of the annual apportionments.

In any aspect, the decision of the questions involved did not depend on the Federal Constitution. The construction or application of that instrument in one way would not defeat complainants, nor in another sustain them.

We are not dealing with a writ of error to review the final judgment of the highest court of a state in a suit wherein the validity of a statute of the state was drawn in question on the ground of repugnancy to the Constitution of the United States *and the decision [431 was in favor of its validity, but with the original jurisdiction of the circuit court, sought to be sustained on the ground that the cause of action arose under and was dependent upon the Constitution.

We are of opinion that the case made upon bill and answer did not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result of the suit depended. Reference is made in the argument to the fact that the city filed a demurrer which was overruled, but the first question is confined to the case on bill and answer, and, moreover, the filing of the demurrer could not, under the circumstances, give jurisdiction to the circuit court, if it did not otherwise exist.

This conclusion covers the second question, which specifically inquires whether there was an impairment of the obligations of the contract arising upon the warrants and certificates by reason of the repeal of laws making them receivable in payment of licenses, taxes, and other debts. Of course there was no such impairment by the act of 1877, if that left in force substantially the mode of payment of warrants provided by existing laws, and the bill did not attack act No. 33 of 1874, which suspended the tender of warrants and certificates for taxes except for the years prior to January 1, 1874, while under the ordinance of 1879, by act No. 49 of 1880, the police warrants or scrip for 1874, 1875, and 1876 were made receivable for police taxes without discrimination as to the year in which the warrants were issued or the taxes levied.

The bill did not claim the right assumed by the second question to have been taken away; but it was insisted that the warrants and certificates were payable "in cash," and it is argued that the act of 1880 was itself an impairment in making them receivable for taxes, which might restrict their payment in money. The difficulty with this second question is that the bill does not seek to compel the city to receive the warrants and certificates for taxes; but on the other hand, demands that they be paid in cash under the theory that the *city owes the amount of the apportion- [432 ments, or has taxes collected on hand, so that no dispute or controversy as to the receivability of the warrants and certificates, determinative of the case, was involved.

The circuit court cannot be given jurisdiction by the suggestion of the impairment of a contract in respect of which the complainant seeks no relief, and there is here no averment raising such an issue.

2. We have seen that the ground of equitable cognizance relied on is that the holders of these warrants and certificates had the right to bring an action at law against the board of police to recover thereon, and that the disso-

lution of the board left the complainants without remedy, except in a court of equity, judgment and execution at law not being required because impossible by reason of the dissolution of the board. It is insisted that the city stands in the position of a debtor for taxes collected on police board apportionments and for the amount of the apportionments themselves, so far as outstanding. If this were so, and the police board were still in existence and liable to suit, then complainants would be obliged to recover judgment against the board and proceed against the city by way of creditor's bill to enforce the collection. Granting that this could be done without judgment after and because the board had ceased to exist, nevertheless the claims of complainants must be established under the bill precisely as they would have to be in an action at law. Although it is ingeniously said that the suit is one to "establish a fund," this does not change the fact that it is a suit to recover on the warrants and certificates, and then enforce their payment by a decree over against the city. The establishment of a fund, is in this instance, only another name for the ascertainment of an indebtedness of the city to the board, available to the creditors of the board, after their claims as such are judicially determined.

By the first section of the Act of March 3, 1887, chap. 373 (24 Stat. at L. 552) amendatory of the Act determining the jurisdiction of circuit courts of the United States as corrected by the Act of August 13, 1888, chap. 866 (25 [433] Stat. at L. 433) no circuit or *district court has cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.

This provision was taken from the eleventh section of the Judiciary Act of 1789, and carried forward into section 629 of the Revised Statutes, and was designed to prevent the evasion of the discrimination in respect of suits between citizens of the same state and suits between citizens of different states, established by the Constitution and laws of the United States.

It appears in the Act of March 3, 1875 (18 Stat. at L. 470) in somewhat different phraseology, and the restriction as to suits on promissory notes was removed, but restored by the Act of 1887.

In *Sheldon* v. *Sill*, 49 U. S. 8 How. 441 [12:1147], it was held under the Act of 1789 that the indorsee of a negotiable promissory note, secured to the payee by a mortgage, could not sue in the courts of the United States to foreclose the mortgage, unless the mortgagee could, but this was necessarily ruled otherwise under the Act of 1875. *Tredway* v. *Sanger*, 107 U. S. 323 [27:582].

As remarked by *Mr. Justice* Blatchford in *Corbin* v. *Black Hawk County*, 105 U. S. 659, 665 [26:1136, 1138], "the contents of a contract, as a chose in action, in the sense of section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulations is a suit to recover such contents." In that case it was held that a suit to compel the specific performance of a contract, or to enforce its other stipulations, is a suit to recover the contents of a chose in action, and not maintainable in the circuit court by an assignee, if it could not have been prosecuted there by the assignor, had no assignment been made.

In *Shoecraft* v. *Bloxham*, 124 U. S. 730, 735 [31:574, 576], it was said by *Mr. Justice* Field that the terms used in the statute "were designed to embrace the rights the instrument conferred which were capable of enforcement by suit." And see *Plant Investment Co.* v. *Jacksonville, T. & K. W. R. Co. ante*, p. 358.

*In *Walker* v. *Powers*, 104 U. S. 245 [434 [26:729], it was held that the assignee of a judgment founded on contract could not maintain a suit thereon in a court of the United States unless such a suit might have been prosecuted there if an assignment had not been made. *Mississippi Mills* v. *Cohn*, 150 U.S. 202 [37:1052].

The facts in *Ober* v. *Gallagher*, 93 U. S. 199 [23:829], were these: Thompson, a citizen of Louisiana, purchased from Fleming, a citizen of Arkansas, a plantation situated in Arkansas and gave his notes for the purchase price, secured by a lien reserved in the conveyance, which notes Fleming transferred to Gallagher, a citizen of Louisiana. Gallagher afterwards sued Thompson in a court of Louisiana and recovered judgment. At the time of the purchase there was a judgment in Arkansas against Fleming upon which the lands were sold and conveyed to Ober, to whom Thompson also conveyed them. Gallagher afterwards filed his bill against Ober, a citizen of Arkansas, and Thompson who had become a citizen of Tennessee, praying that the land might be subjected under the lien reserved in the deed of Fleming to Thompson to the payment of his judgment. Fleming at the time of the commencement of the suit had also become a citizen of Tennessee, and it was objected that as Fleming and Thompson had both become citizens of Tennessee and therefore Fleming could not sue Thompson in the courts of the United States, that Gallagher could not maintain the suit; but this court held that Gallagher, a citizen of Louisiana, was entitled to enforce the lien on the land, in Arkansas, against Ober, a citizen of Arkansas, and Thompson, a citizen of Tennessee, in collection of the judgment in which the note had become merged.

Mr. Justice Story in *Bean* v. *Smith*, 2 Mason, 252, held that the circuit court had jurisdiction on the ground of diverse citizenship in a suit of equity brought by a judgment creditor to set aside conveyances made after suit commenced and a few days before the term at which judgment was expected to be obtained, in fraud of such creditor, although the judgment was recovered in the state court on a negotiable chose in action on which before judgment a suit could have been maintained in the circuit court. But there, as *Mr. Justice* Story *observed, the right to sue the fraudu- [435 lent grantees was not a right which had vested in another person and passed to complainant by assignment; and as to the fraudulent grantor the right was a new right growing out of a direct judgment between the parties

and a fraud injurious to complainant, which had been devised to avoid the satisfaction of that judgment.

The case before us is not of that character. If the board had not been abolished, judgment could not have been recovered against it by complainants in the circuit court; and if a judgment had been recovered by them in the state court, a creditor's bill would have been merely ancillary to the judgment, and could not have been entertained in the circuit court as an original bill. Upon the facts appearing in this record, the assignees would have acquired no new and independent right of recovery, by reason of the judgment, not possessed by the assignors. The board being abolished, recovery of a judgment was dispensed with, but the establishment of the claims was still required as the basis for further relief, and that relief involved nothing more than recovery over, or a direct decree within the principles of *New Orleans* v. *Christmas*, 131 U. S. 191 [33:99], analogous to judgment on garnishee process. The suit must, therefore, be regarded as a suit to enforce the payments of the warrants and certificates, and as such, a suit to recover their contents, and this is so on any other ground of equity jurisdiction which has been suggested.

In our judgment the pleadings show a suit to recover the contents of choses in action, and, as the bill contained no averment that it could have been maintained by the assignors, if no assignments had been made (from the statement accompanying the certificate it appears affirmatively that it could not) the jurisdiction of the circuit court cannot be sustained on the ground of diverse citizenship.

The first question is answered in the negative, and the third in the affirmative, and it will be so certified.

Mr. Justice **White** took no part in the consideration and decision of this case.

436] OSSIAN D. ASHLEY ET AL., *Plffs. in Err.*,

v.

DANIEL J. RYAN, Secretary of State of the State of Ohio.

(See S. C. Reporter's ed. 436–446.)

Review of state judgment—conditions of granting corporate privileges—power of state—charge for filing articles of consolidation—law of Ohio.

1. A writ of error to a state court brings before this court only the Federal questions in the case.
2. A state, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have obtained.
3. A state has the right to determine upon what conditions its laws as to the consolidation of corporations may be availed of.
4. The exaction of a charge by a state for the filing of articles of consolidation of several railroad companies forming a connecting line, only one of which is a corporation of the state as a condition imposed by the state upon the taking of corporate being or the exercise of corporate franchises, constitutes no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and its enforcement involves no attempt on the part of the state to extend its taxing power beyond its territorial limits.
5. The law of Ohio requiring a corporation to pay the secretary of state for filing articles of agreements of consolidation of corporations a percentage on the capital stock of the new consolidated corporation created by such articles, is valid and constitutional when applied to the consolidation of foreign corporations with a domestic corporation of the state forming a continuous line of railroad through several states.

[No. 888.]

Argued and Submitted April 26, 1894. Decided May 14, 1894.

IN ERROR to the Supreme Court of the State of Ohio, to review a judgment of that court, affirming the judgment of the Circuit Court of Franklin County, Ohio, affirming the judgment of the Court of Common Pleas of said county, sustaining a demurrer to the petition in and dismissing an action brought by Ossian D. Ashley *et al.*, plaintiffs, against Daniel J. Ryan, secretary of the state of Ohio, defendant, to restrain the defendant from paying into the treasury of the state certain moneys, paid him as a fee for filing in his office articles of agreement of consolidation of certain railway companies which the plaintiffs claim had been wrongfully exacted of them, and which had been paid under protest, and also to recover the moneys so paid for said fee, over and above $700. *Affirmed.*

Statement by *Mr. Justice* **White**:

The Wabash, St. Louis & Pacific Railroad Company, which owned and operated lines running through the states of Ohio, Indiana, Illinois, Missouri, and Michigan, having defaulted in the payment of interest on its bonds,

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NOTE.—*As to jurisdiction of Federal over state courts; necessity of Federal question; what constitutes Federal question*, see note to Hamblin v. Western Land Co. 37: 267.

As to corporations, when deemed citizens or persons, see note to United States v. Amedy, 6: 502.

As to when consolidation dissolves former companies, see note to Shields v. Ohio, 24: 357.

As to forfeiture of franchises of, for misuse, nonuse, or abuse, see note to Chicago L. Ins. Co. v. Needles, 28: 1084.

As to when taxation of stock or shares in corporation impairs obligation of contracts, see note to Providence Bank v. Billings, 7: 939.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

foreclosure proceedings were commenced in the Federal courts for the sale of its property. Subsequently a committee was entrusted with the duty of buying in the property. After purchase by the committee the property in the several states was transferred to companies incorporated in those states. The following were the companies thus organized, and to whom the necessary transfers were respectively made:

In Ohio: The Toledo & Western; capital stock, $700,000.

In Michigan: The Detroit & State Line Wabash; capital stock, $300,000.

In Indiana: The Wabash Eastern, of Indiana; capital stock, $9,000,000.

437] *In Illinois: The Wabash Eastern, of Illinois, capital stock, $12,000,000.

In Missouri: The Wabash Western; capital stock, $30,000,000.

Thereafter these several companies were consolidated into one. Section 148*b* of the Revised Statutes of Ohio contains, among other provisions, the following:

"The secretary of state shall hereafter charge and collect the following fees for official services:

"1. For filing the articles of incorporation of any corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one tenth of one per cent upon the authorized capital stock of such corporation.

"2. For filing a certificate of increase of the capital stock of any corporation having a capital stock where the amount of the increase is ten thousand dollars or under, ten dollars; where the amount of increase is over ten thousand dollars, one tenth of one per cent upon the proposed amount of increased capital.

"3. For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the secretary of state: Said articles of agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

By another provision of the Revised Statutes 438] of Ohio, the *fees to be collected under the foregoing law were required to be paid by the secretary of state into the treasury.

The plaintiffs in error presented their articles of consolidation, for filing, to the secretary of state, and tendered $700, that being one tenth of one per cent on the capital stock of the Toledo & Western Railroad, the only Ohio corporation which had entered into the consolidation. The secretary refused to file the proffered articles for that amount, and demanded $52,000, or one tenth of one per cent of the par value of the entire stock of the consolidated corporation. This amount was paid under protest, and suit was at once brought to recover all the excess paid over and above the $700 originally tendered, upon the ground that such excess had been collected without warrant of law; that it constituted a tax for the general purposes of revenue, and, therefore, its exaction was contrary to the constitution and laws of the state of Ohio; and, moreover, that its enforcement would violate the Constitution of the United States, because it would be an attempt on the part of the state of Ohio to lay a burden on interstate commerce, or the instruments of such commerce and to give an extraterritorial force to its taxing power.

Pending the controversy, an injunction issued restraining the secretary of state from covering into the state treasury the sum which had been paid him under protest. The cause was ultimately taken to the supreme court of the state of Ohio, and by that court the judgment which maintained the validity of the charge was affirmed. The plaintiffs in error thereupon brought the cause here for review.

Mr. **Henry Crawford,** for plaintiffs in error:

Illegal fees and taxes paid under compulsion, can be recovered back.

Baker v. *Cincinnati*, 11 Ohio St. 534.

A payment may be, under circumstances, involuntary and an action brought to recove the money, when the position or interests of the party are such as to require from another the performance of a duty enjoined by law and he is illegally compelled to pay money to induce such performance.

Stephan v. *Daniels*, 27 Ohio St. 527; *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 521; *Wilson* v. *Pelton*, 40 Ohio St. 306.

Taxes illegally assessed may always be recovered back, if the collector understands from the payer that the tax is regarded as illegal and that suit will be instituted to compel the refunding.

Erskine v. *Van Arsdale*, 82 U. S. 15 Wall. 75 (21: 63); *Shelton* v. *Platt*, 139 U. S. 595 (35: 276); *Harmon* v. *Chicago*, 147 U. S. 396 (37: 216).

The law under which the charge was exacted is not a police regulation, but an attempted exercise of the taxing power of the state, and its construction and validity must be adjudged exclusively on that theory.

Marmet v. *State*, 45 Ohio St. 68; *State* v. *Hipp*, 28 Ohio St. 199; *Adler* v. *Whitbeck*, 44 Ohio St. 539; *Pittsburg, C. & St. L. R. Co.* v. *State*, 49 Ohio St. 189; *United States* v. *Vassar* ("*License Tax Cases*") 72 U. S. 5 Wall. 462 (18: 497); *Southern SS. Co.* v. *New Orleans Port Wardens*, 73 U. S. 6 Wall. 31 (18: 749); *Mays* v. *Cincinnati*, 1 Ohio St. 268; *Cincinnati* v. *Bryson*, 15 Ohio, 625; *Royall* v. *Virginia*, 116 U. S. 572 (29: 735).

This rule holds good as to exercise or franchise charges.

Home Ins. Co. v. *New York*, 134 U. S. 599 (33: 1029); *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57.

This court should limit the scope of the law and construe it not to authorize the imposition of a unit franchise or organization tax, rated upon the aggregate capitol stock of combined domestic and foreign corporations.

Pennoyer v. *Neff*, 95 U. S. 714 (24: 565); *Pana* v. *Bowler*, 107 U. S. 529 (27: 424); *Gormley* v. *Clark*, 134 U. S. 338 (33: 909); *Wilson* v. *Seligman*, 144 U. S 41 (36: 338); *United States* v. *Wigglesworth*, 2 Story, 369; *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 334 (29: 417); *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117 (32: 94); *Lee* v. *Sturges*, 2 L. R. A. 556, 46 Ohio St. 167; *State Treasurer* v. *Auditor General*, 46 Mich. 224; *Chicago & N. W. R. Co.* v. *Auditor General*, 53 Mich. 79; *People* v. *New York C. & St. L. R. Co.* 15 L. R. A. 82, 129 N. Y. 474.

Under the law as construed by the state court the tax under challenge is in part illegal because it is a unit charge mainly laid upon incorporations and franchises not created or granted by Ohio, or upon business operations carried on outside its boundaries.

Exchange Bank of Columbus v. *Hines*, 3 Ohio St. 1; *Weston* v. *Charleston*, 27 U. S. 2 Pet. 466 (7: 487); *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 (20: 192); *People* v. *Equitable Trust Co.* 96 N. Y. 388; *Northern Cent. R. Co.* v. *Jackson*, 74 U. S. 7 Wall. 262 (19: 88); *Cleveland, P. & A. R. Co.* v. *Pennsylvania* ("*State Tax on Foreign Held Bonds*") 82 U. S. 15 Wall. 300 (21: 179); *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S 504 (33: 690); *California* v. *Central Pac. R. Co.* 127 U. S. 41 (32: 157), 2 Inters. Com. Rep. 153; *Muller* v. *Dows*, 94 U. S. 447 (24: 208).

The assessment of public charges against this class of corporations has always been levied only upon the state's proportional share of the whole property, franchise, stock or earnings.

State v. *Metz*, 32 N. J. L. 199; *Pittsburg, Ft. W. & C. R. Co.* v. *Com.* 66 Pa. 73, 5 Am Rep. 344; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206; (21: 888); *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492 (22: 595); *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 610 (23: 672); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 (31: 790); *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (35: 613), 3 Inters. Com. Rep. 595; *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters Com. Rep. 807; *Sebastian* v. *Covington & C. Bridge Co.* 21 Ohio St. 451; *Covington & C. Bridge Co.* v. *Mayer*, 31 Ohio St. 317.

Upon the theory that the entire orgnization tax of $52,000 was assessed only upon the Ohio constituent of the interstate copartnership, the exaction plainly imposes a unequal and discriminating burden in violation of the 14th Amendment.

Portland Bank v. *Apthorp*, 12 Mass. 252; *Oliver* v. *Washington Mills*, 11 Allen, 279; *Fields* v. *Highland County Comrs.* 36 Ohio St. 476; *Youngblood* v. *Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *McMahon* v. *Palmer*, 102 N. Y. 188, 55 Am. Rep. 796; *Boyer* v. *Boyer*, 113 U. S. 689 (28: 1089); *People* v. *Albany Ins. Co.* 92 N. Y. 460; *Com.* v. *People's Five Cent Sav. Bank*, 5 Allen, 428; *Home Ins. Co.* v. *New York*, 134 U. S. 599 (33: 1029); *Whitbeck* v. *Mercantile Nat. Bank of Cleveland*, 127 U. S. 193 (32: 118); *Yick Wo* v. *Hopkins*, 118 U. S. 357 (30: 221); *Santa Clara County* v. *Southern Pac. R. Co.* 9 Sawy. 165, 18 Fed. Rep. 385; *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 158 (25: 905); *New York* v. *Weaver*, 100 U. S. 539 (25: 705); Cooley, Taxn. 128.

The tax as laid is in principle and result an unlawful interference with interstate commerce and necessarily imposes a burden upon national instrumentalities engaged therein.

Philadelphia & R. R. Co. v. *Pennsylvania* ("*State Freight Tax*") 82 U. S. 15 Wall. 272 (21: 160); *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 444 (6: 687); *Cook* v. *Pennsylvania*, 97 U. S. 566 (24: 1015); *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 (18: 745); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 282; *McCall* v. *California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181; *Crutcher* v. *Kentucky*, 141 U. S. 47 (35: 649).

Mr. **J. K. Richards,** Atty. Gen. of Ohio, for defendant in error:

By consolidation, whether between Ohio companies or between an Ohio company and companies of another state, a new company is formed by the extinguishment of the old ones.

Shields v. *Ohio*, 95 U. S. 324 (24: 359); *Compton* v. *Wabash, St. L. & P. R. Co.* 45 Ohio St. 592; *Lee* v. *Sturges*, 2 L. R. A. 556, 46 Ohio St. 163; *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 618 (23: 675).

As to the validity of a state law as affected by the constitution of the state, the decision of the state courts are to be accepted as the rule of decision for the Federal courts.

Pembina Consol. S. Min. & M. Co. v. *Pennsylvania*, 125 U. S. 183 (31: 651), 2 Inters. Com. Rep. 24; *Bucher* v. *Cheshire R. Co.* 125 U. S. 582 (31: 798); *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 (17: 261); *Luther* v. *Borden*, 48 U. S. 7 How. 1 (12: 581); *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 21 (35: 614), 3 Inters. Com. Rep. 595.

There are two broad grounds for sustaining the act: power to regulate corporations, and power to raise revenue.

Baker v. *Cincinnati*, 11 Ohio St. 534; *Adler* v. *Whitbeck*, 44 Ohio St. 562; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 531 (31: 790); *California* v. *Central Pac. R. Co.* 127 U. S. 40 (32: 157).

This franchise, the grant of which rests with the discretion of the state, may be taxed as the legislature of the state may choose.

Home Ins. Co. v. *New York*, 134 U. S. 599 (33: 1029); *Monroe County Sav. Bank* v. *Rochester*, 37 N. Y. 365.

The state has the power to put a price on corporate privileges, and to exact a bonus for the grant of a franchise.

Gordon v. *Appeal Tax Court*, 44 U. S. 3 How. 133 (11: 529); *Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall. 456 (22: 678).

For the privilege of foreign corporations to do business in a state other than that in which

it was created, the state may exact such contribution as it sees fit.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519 (10: 274); *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 (15: 451); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410 (19: 972); *Doyle* v. *Continental Ins. Co.* 94 U. S. 535 (24: 148); *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110 (30: 342); *Pembina Consol. S. Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650), 2 Inters. Com. Rep. 24; *Milwaukee Fire Dept.* v. *Hefenstein*, 16 Wis. 136; *Leavenworth* v. *Booth*, 15 Kan. 627; *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 523; *State* v. *Reinmund*, 45 Ohio St. 218.

The raising of revenue being a recognized purpose of government, the legislature, under the general grant, may exact this contribution. *Union Pac. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 (21: 787).

The fees are for official services in granting a franchise.

The character of the investments of the corporation will not be permitted to affect the tax on its corporate franchise.

Society for Savings v. *Coite*, 73 U. S. 6 Wall. 594 (18: 897); *Provident Inst. for Savings* v. *Massachusetts*, 73 U. S. 6 Wall. 611 (18: 907); *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 632 (18: 904); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 (21: 888); *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807.

The effect of filing articles of consolidation of a railway company of Ohio with railway companies of other states, is to create a new corporation.

Shields v. *Ohio*, 95 U. S. 324 (24: 359), 26 Ohio, 86; *Compton* v. *Wabash, St. L. & P. R. Co.* 45 Ohio St. 592; *Ferguson* v. *Meredith*, 68 U.S. 1 Wall. 25 (17: 604); *McMahan* v. *Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *State* v. *Sherman*, 22 Ohio St. 411; *Wabash, St. L. & P. R. Co.* v. *Ham*, 113 U. S. 587 (29: 235); *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359 (25: 185).

There is no denial of the equal protection of the laws. An equal and uniform contribution is required.

Barbier v. *Connolly*, 113 U. S. 31 (28: 924); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 (35: 1035), 3 Inters. Com Rep. 810; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463); *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107); *Horn Silver Min. Co.* v. *New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57; *Munn* v. *Illinois*, 94 U. S. 113 (24: 77); *Budd* v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. (Rep. 45; *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229); *Waltson* v. *Nevin*, 128 U. S. 578 23: 544); *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 (32: 585); *Hayes* v. *Missouri*, 120 U. S. 68 (30: 578); *Dow* v. *Beidelman*, 125 U. S. 680 (31: 841), 2 Inters. Com. Rep. 56.

The exaction of this fee for a franchise which Ohio alone can grant, in no way interferes with or places a burden on interstate commerce.

Philadelphia & R. R. Co. v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 293 (21: 167); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 232 (21: 896); *Taylor* v. *Secor* ("*State R. Tax Cases*") 92 U. S. 608 (23: 671); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Brown* v. *Houston*, 114 U. S. 623 (29: 257); *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 (31: 790); *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S; 18 (35: 613), 3 Inters. Com. Rep. 595; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 354 (35: 1040), 3 Inters. Com. Rep. 810.

Mr. Justice **White** delivered the opinion of the court:

With the question whether the sum paid was authorized by the Ohio statutes, or constituted a fee, a license, or a tax, under the Ohio laws and constitution, we are not concerned. The writ of error brings before us only the Federal question. *Watson* v. *Mercer*, 33 U. S. 8 Pet. 88 [8: 876]; *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]. Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed, for, whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.

The purpose of the tender of the articles of consolidation to the secretary of state was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the state of Ohio, and depended for their existence upon the provisions of its laws. Without that state's consent they could not have been procured. Ohio Rev. Stat. 3239, 3382, 3384*b*, amended by act of April 1, 1890, 87 Ohio *Laws, 184. Hence, [441 in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the state of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the state charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the secretary of state exacted. As it was within the discretion of the state to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as pre requisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a vol-

untary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the state and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought.

That the right to be a state corporation depends solely upon the grace of the state, and is not a right inherent in the parties, is settled. Thus, in *California* v. *Central Pac. R. Co.* 127 U. S. 40 [32: 157], 2 Inters. Com. Rep. 153, speaking through *Mr. Justice* Bradley, the court said: "A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. . . . Under our system, their existence and disposal are under control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. 442] . . . *No private person can take another's property, even for public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

In *Home Ins. Co.* v. *New York*, 134 U.S. 595 [33:1026], through *Mr. Justice* Field, we said: "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporation or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely within the discretion of the state."

These citations only reiterate principles established beyond controversy by a series of decisions. *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 519 [10:274]; *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 [15:451]; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 [19:357]; *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410 [19:972].

Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta* v. *Earle*, and *Lafayette Ins. Co.* v. *French*, *supra*; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 181 [19: 357, 360].

In the latter case, speaking through *Mr. Justice* Field, we observed: "Now a grant of a corporate existence is a grant of special privileges to the corporators, enabling them to act for certain *designated purposes as a single in- [443 dividual and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta* v. *Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even, by other states, and the enforcement of its contracts made therein depend purely upon the comity of these states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. . . . At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state, would, in fact, be controlled by corporations created in other states."

It follows from these principles that a state, in granting a corporate privilege to its own citizens, or what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have obtained. In *Paul* v. *Virginia*, *supra*, the court said: "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper *to impose. They [444 may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgement will best promote the public interest."

In the case of the *Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall. 453 [22: 678], considering a grant by the state of Maryland to a railroad company of a right to build a branch from Baltimore to Washington, upon condition that the company should pay semi-

annually to the state one fifth of the amount received from the transportation of passengers over the road authorized, the court spoke as follows: "The state could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorized its private citizens to build the road and reserved for its own use a portion of its earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the state, as a consideration of the franchise, had stipulated that it should have all the passenger money, and the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It was simply the exercise by the state of absolute control over its own property and prerogatives." And the contention that the charge imposed a burden upon interstate commerce was thus answered: "It may, incidentally, affect transportation, it is true; but so does every burden or tax imposed on corporations or persons engaged in that business. Such burdens, however, are imposed *diverso intuitu*, and in the exercise of an undoubted power. The state is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation effects more or less the charges it is compelled to make upon its customers. So, the state has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of 445] the franchise will *be obliged to impose. The stipulated payment in this case, indeed, is nothing more or less than a bonus."

In *Ducat* v. *Chicago, supra*, the court said: "The only difference between the statute of Virginia and that of Illinois is that the latter is more onerous to the companies than the former. The difference is in degree, not in principle." That was a case in which an insurance company was not only required to comply with the general law of the state of Illinois, but also to pay a portion of its premium to the city of Chicago as a condition of doing business therein.

The case of *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110 [30: 342], involved the validity of a tax imposed by the state of New York on an insurance company which had been incorporated in Pennsylvania. *Mr. Justice* Blatchford, in delivering the opinion of the court said: "This Pennsylvania corporation came into the state of New York to do business by the consent of the state under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given."

Indeed, the cases illustrating this doctrine are too numerous for review, and need only be referred to. *Society for Savings* v. *Coite*, 78 U. S. 6 Wall. 594 [18:897]; *Provident Inst. for Savings* v. *Massachusetts*, 73 U. S. 6 Wall. 611 [18:907]; *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 632 [18:904]; *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Tax on Railway Gross Receipts*") 82 U. S. 15 Wall. 284 [21:164]; *Union Pac. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 [21: 787]; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*The Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21:888]; *Taylor* v. *Secor* ("*State R. Tax Cases*"), 92 U. S. 575 [23:663]; *Philadelphia & S. M. SS. Co.* v. *Pennsylvania*, 122 U. S. 326 [30:1200], 1 Inters. Com. Rep. 308; *California* v. *Central Pac. R. Co* 127 U. S. 1 [32:150]; **Home Ins. Co.* [446 v. *New York*, 134 U. S. 594 [33:1025]; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 [35:994], 8 Inters. Com. Rep. 807.

The question here is not the power of the state of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the state to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

Considering as we do, that the payment of the charge was a condition imposed by the state of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that state, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the state to extend its taxing power beyond its territorial limits.

Judgment affirmed.

THE EAGLE INSURANCE COMPANY of Cincinnati, and John K. Green, President, and Samuel P. Post, Secretary, *Plffs. in Err.*,

v.

STATE OF OHIO *ex rel.* W. H. KINDER, Superintendent of Insurance of the State of Ohio.

(See S. C. Reporter's ed. 446-456.)

Compliance with state law by insurance company.

The charter of the Eagle Insurance Company of Cincinnati, did not exempt it from obligation to comply with the subsequently established police regulations of the state, contained in sections 3654 and 3655 of the Revised Statutes of Ohio, requiring insurance companies to make annual statements of their condition.

[No. 1051.]

Argued April 20, 1894. Decided May 14, 1894.

IN ERROR to the Supreme Court of the State of Ohio, to review a judgment of that court, requiring the Eagle Insurance Company of Cincinnati, by mandamus, to comply with the requirements of sections 3654, 3655, of the Revised Statutes of Ohio. *Affirmed.*

Statement by *Mr. Justice* **White:**

The Insurance Company, plaintiff in error, was incorporated on March 22, 1850, by an Act of the General Assembly of Ohio (48 Ohio Laws, 490). Sections 3654 and 3655 of the Revised Statutes of Ohio read as follows:

"Sec. 3654. The president or vice president and secretary of each insurance company organized under any law of this state shall, annually, on the first day of January, or within thirty days thereafter, prepare, under oath, and deposit in the office of the superintendent of insurance, a statement of the condition of such company on the thirty-first day of De-
450] cember, *then next preceding, exhibiting the following facts and items, and in the following form, namely:

"*First*—The amount of the capital stock of the company, specifying the amount paid and unpaid.

"*Second*—The property or assets held by the company, specifying:

"1. The value of the real estate owned by such company, where it is situated, and the value of buildings thereon.

"2. The amount of cash on hand and deposited in banks to the credit of the company, specifying in what banks the same is deposited.

"3. The amount of cash in the hands of agents and in course of transmission.

"4. The amount of loans secured by bonds and mortgages, which are the first lien on real estate, and on which there is less than one year's interest due.

"5. The amount of loans on which interest has not been paid within one year.

"6. The amount due the company on which judgments have been obtained, and the cash value thereof.

"7. The amount of stocks in this state, the United States, of any city of this state, and of any other stocks owned by the company, specifying the amount, number of shares, and the par and market value of each kind of stock.

"8. The amount of stock held as collateral security for loans, with the amount loaned on, and the par and market value of each kind of stock.

"9. The amount of unpaid assessments on stock, premium notes, or contingent liabilities.

"10. The amount of interest due and unpaid, and the amount of interest accrued, but not due.

451] *"11. The amount of premium notes or contingent liabilities on which policies are issued.

"12. The number of policies in force.

"13. The amount insured under all policies in force.

"14. The amount of premiums received thereon.

"15. The amount and a description of all other assets.

"*Third*—The liabilities of the company, specifying:

"1. The amount of losses due and unpaid.

"2. The amount of claims for losses resisted by the company.

"3. The amount of losses incurred during the year, including those claimed and not due, and those reported to the company upon which no action has been taken.

"4. The amount of dividends declared and due, and remaining unpaid.

"5. The amount of dividends, either cash or scrip, declared but not due.

"6. The amount of money borrowed, and the security given for the payment thereof.

"7. The amount required for re-insurance, being in stock companies a sum equal to fifty per cent of the whole amount of premiums on unexpired risks and policies, and in mutual companies a sum equal to fifty per cent of the cash premiums received on unexpired risks and policies.

"8. The amount of all other existing claims against the company.

"*Fourth*—The income of the company during the preceding year, specifying:

"1. The amount of cash premiums received.

*"2. The amount of notes or contin- [**452**
gent assets received for premiums.

"3. The amount of interest money received.

"4. The amount of income received from other sources.

"*Fifth*—The expenditure during the preceding year, specifying:

"1. The amount of losses paid during the year, stating how much of the same accrued prior, and how much subsequent to the date of the preceding statement, and the amount at which losses were estimated in each preceding statement.

"2. The amount of dividends paid during the year.

"3. The amount of expenses paid during the year, including commissions and fees to agents and officers of the company.

"4. The amount paid for taxes.

"5. The amount of all payments and expenditures.

"6. Amount of scrip dividend declared.

. . . . . .

"Sec. 3655. The statement of any such company, the capital of which is composed in whole or in part of notes, shall, in addition to the foregoing, exhibit the amount of notes which originally formed the capital, and also what proportion of such notes is still held by the company and considered capital; and every company organized under any law of this state which fails to make and deposit such statement, or to reply to any inquiry of the superintendent with respect to such statement, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance, to be recovered by action in the name of the state, and, on collection, paid into the state treasury for the benefit of the state common school fund; and the attorney general, on the request of the superintendent of insurance, shall institute such action against any company so delinquent, in the court of appropriate jurisdiction in Franklin county, or in the court of appropriate jurisdiction of the county in which said company is located or has its principal place of business, as he prefers."

Under these sections proper blanks were furnished to the company by the state superintendent of insurance, and on its refusal to make the returns required by law, proceedings by mandamus were begun against it. The defense was that the above provisions impaired the obligation of the contract which grew out of its charter. Upon the decision of the supreme court of the state making the writ peremptory, the case was brought here by error.

Messrs. **Thomas H. Kelley** and *John F. Follett* for plaintiffs in error.

Court declined to hear further argument.

Mr. J. K. Richards, Atty. Gen. of Ohio, for defendant in error.

453] **Mr. Justice* **White** delivered the opinion of the court:

The only question presented is whether or not the charter of the plaintiff in error exempted it from obligation to comply with the subsequently established police regulations of the state, contained in sections 3654 and 3655 of the Revised Statutes of Ohio. This subject was fully considered by this court in the case of *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 [28:1084]. There, the company had been chartered by the state of Illinois to carry on a life insurance business, and the question was whether subsequently enacted police regulations of that state for the inspection of such business, and for the liquidation thereof, in the event of insolvency, could be enforced against a corporation working under a prior charter without impairing the obligation of the contract. The statute considered in the Needles case authorized the auditor, whenever the actual funds of any life insurance company doing business in the state were not of a net value equal to the net value of its policies, according to the "combined experience" or "actuaries," rate of mortality, with interest at four per cent to give notice to such company and its agent to discontinue issuing policies in the state until such time as its funds should become equal to its liabilities, valuing its policies as aforesaid. The law, in addition, required every life insurance company incorporated in Illinois to transmit to the auditor on or before the 1st day of March in each year a sworn statement of its business, standing, and affairs, in the form prescribed and authorized by law. It also empowered the officer to address inquiries to any company in relation to its "doings and condition," and any other matter connected with its transactions, which inquiries, it provided, should be "promptly answered;" and it imposed upon him the duty of making an examination of 454] the *condition and affairs of any company, whenever he deemed it expedient to do so, and had reason to suspect the correctness of any annual statement, or that the company was in an unsound condition. By another statute it was provided that if, upon examination of the affairs of an insurance company, the auditor should conclude that it was insolvent, or that its further continuance in business would be hazardous to the insured or the public, he should apply by petition to the judge of any circuit court for an injunction restraining the company from proceeding with its business until further hearing, etc. Upon the case as thus presented the court said:

"The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the state, in its original and amended charter, will be impaired, if that company be held subject to the operation of subsequent statutes regulating the business of life insurance and authorizing the courts, in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained consistently with the power which the state has, and, upon every ground of public policy, must always have over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the state in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett* v. *Taylor*, 13 U. S. 9 Cranch, 43, 51 [3:650,653]; Angell & Ames, Priv. Corp. (9th ed.) ¶ 774, *note*.

*"Equally implied in our judgment, is [455 the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the subsantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created. *Union Pac. R. Co.* v. *United States* ("*Sinking Fund cases*") 99 U. S. 70 [25: 496]; *Com.* v. *Farmers & M. Bank*, 21 Pick. 542, 32 Am. Dec. 290; *Commercial Bank* v. *State*, 4 Smedes & M. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all."

These views are decisive of the issue here. An attempt was made to distinguish that case from this upon the ground that, in the former, the proceedings were for the purpose of com-

pelling the company to cease from business because of insolvency; while, in this case, the question is as to the obligation of the company to make the statements required by the statute. This distinction is without foundation. In the Needles case, the duty was expressly imposed upon the corporation to make statements identical in form and substance with those which insurance companies are required to make under the Ohio statute we are here considering. Many additional police powers were conferred by the Illinois law, among them being the authority which, as stated above, was given to the state auditor to apply for an injunction restraining a company from continuing its business, whenever, by its statement, it appeared 456 [to him to be insolvent. It is indeed, *true that the relief there invoked was the restraint of the corporation from doing business on the ground of insolvency. But that case substantially involved not only the right to compel the statement, but the greater right to prevent, in case of insolvency, the continuance of the business of the corporation. Hence, as the greater includes the less, the Needles case necessarily embraces every issue presented here.

Another contention is that compliance with the provisions in regard to statements of its business would bring the company under the operation of the general law of the state relating to corporations, and thus place it in the position of voluntarily subjecting itself to many provisions which would, if applied, impair the obligations of the charter. In March, 1892 (89 Ohio Laws, 73) the general assembly of Ohio specifically enacted that any fire insurance company which should comply with the requirements of sections 3654 and 3655, or any other police regulations contained in chapter XI. of the Title relating to Corporations, and Chapter VIII. Title 3, Part 1, of the Revised Statutes of Ohio, relating to the insurance department of the state, "shall not be deemed to have consented to and shall not be affected by the provisions" of the title relating to corporations.

The judgment of the supreme court of Ohio in the case before us expressly finds that, under the operation of this last provision, the plaintiff in error would not subject its charter to any conditions or modifications by making the statement which it now refuses to submit.

Judgment affirmed.

JOHN STEWART, *Plff. in Err.*,

v.

BENJAMIN H. BARNES, Exr. of WILLIAM H. BARNES, deceased, late Collector of Internal Revenue.

Taxes paid under protest—interest, when not recoverable.

(See S. C. Reporter's ed. 456-464.)

1. In an action to recover back revenue taxes on distilled spirits unlawfully collected, if plaintiff's allegation that the taxes were paid under protest is admitted by the plea, it is unnecessary to show the nature of the protest made.

2. Interest cannot be recovered, as damages for the detention of the principal, after the principal sum has been paid and accepted.

[No. 316.]

Submitted March 22, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment in favor of defendant, Benjamin H. Barnes, executor of William H. Barnes, deceased, late collector of internal revenue, in an action brought against him by John Stewart, plaintiff, to recover internal revenue taxes alleged to have been unlawfully collected from the plaintiff on distilled spirits. *Affirmed.*

The facts are stated in the opinion.

Messrs. **T. W. Neill** and **James W. M. Newlin** for plaintiff in error.

Mr. **Holmes Conrad**, *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

This was an action of assumpsit brought by John Stewart against Benjamin H. Barnes, executor of William H. Barnes, deceased, late collector of internal revenue, to recover the sum of $250.40, alleged to have been unlawfully collected from the plaintiff as internal revenue taxes on distilled spirits, with interest from June 26, 1869. The action was commenced in the court of common pleas of Bucks county, Pennsylvania, on April 25, 1887, and was thence removed by the defendant, *by* certiorari, into the Circuit Court of the United States for the Eastern District of Pennsylvania, where the declaration was filed and proceedings were had which resulted in a verdict and judgment for the defendant. From that judgment the plaintiff sued out a writ of error.

In his bill of particulars the plaintiff alleged that on June 26, 1869, he drew out certain distilled spirits which had been placed in a United States bonded warehouse prior to July 20, 1868, and upon the withdrawal thereof he was required by the collector to pay taxes on fractions of gallons as though they were whole gallons, amounting to $8.62, and also the sum of $241.78, as taxes on spirits which had been lost by leakage, evaporation, etc.; that those amounts were unlawfully exacted, and that he paid the same under protest.

The defense made by the defendant is set out in the record, as follows:

"And now, to wit, the fourth day of April, 1889, the court, on motion of John R. Read, Esq., U. S. attorney, grant leave to amend the plea filed in the above case by filing an additional plea as follows, to wit:

*"And the defendant says that to entitle the above plaintiff to maintain the above [458

NOTE.—*As to action to recover back duties paid under protest; protest, how made, and its effect*, see note to Greely v. Thompson, 13: 397.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to interest, when recoverable, as damages or on money, see note to Sneed v. Wister, 5: 717.

As to rate of interest after maturity, see note to Ohio v. Frank, 26: 531.

Interest when recoverable after the principal has been paid; when recoverable generally.

Receiving the principal, where interest is only recoverable as damages, is a bar to the action for interest. Jacot v. Emmett, 11 Paige, 142; Gillespie

suit appeal was not duly made to the Commissioner of Internal Revenue according to the provisions of law, and the above suit was not brought within the period of time allowed thereby; and this the defendant is ready to verify, etc."

Although the language quoted seems to indicate that there was another plea filed, no other plea appears in the record; neither does it appear that there was a replication. The record shows that a jury was sworn "to try the issue joined."

The purpose of this plea was evidently to invoke the operation of those acts of Congress which relate to the presentation of claims for alleged illegal exaction of taxes to the Commissioner of Internal Revenue, and which lay down the conditions upon which alone the government permits a recovery by suit of amounts so exacted.

The provisions of the statutory law which bear directly upon the present case are section 19 of the Act of July 15, 1866, chap. 184 (14 Stat. at L. 152) and section 44 of the Act of June 6, 1872, which appears in the Revised Statutes as section 3227. Under either of those acts before an action could be maintained in any court an appeal must first have been made to the Commissioner. In the Act of 1866 there was no limitation of the time within which such an appeal was to be made. The Act of 1872 required that it should be made within two years from the time the cause of action accrued. Under the earlier Act, if such appeal had been made, still no action could be maintained in any court unless a decision should have been made upon the claim by the Commissioner, in which event the suit must have been brought within six months from the time of the decision, or within the

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v. New York, 3 Edw. Ch. 512; Tillotson v. Preston, 3 Johns. 229; Johnson v. Brannan, 5 Johns. 268; Williams v. Houghtailing, 3 Cow. 86; Consequa v. Fanning, 3 Johns. Ch. 587.

This rule applied where the calls of a corporation on subscribers for stock were paid, in full, but tardily, and the corporation gave receipts, but afterwards claimed interest. Southern Cent. R. Co. v. Moravia, 61 Barb. 180.

Receiving the principal and a part of the interest as so much paid generally, and not as payment of the principal itself, does not preclude a recovery of the remainder of the interest. Stevens v. Barringer, 13 Wend. 639.

The fact that the sum sued for is precisely the amount of interest, does not, however, show that the principal, as such, has been paid. People v. New York County, 5 Cow. 331.

An action will lie for interest, the payment of which is stipulated for in the contract, and which has accrued, though the principal is satisfied. Fake v. Eddy, 15 Wend. 76.

An attorney, duly authorized, and with knowledge of the facts, received a balance for his client, and gave a receipt therefor, on an account stated by the other party, not charging the latter with interest. Held conclusive against the client's claim for interest, made a year afterwards. Jacot v. Emmett, 11 Paige, 142.

For the negligent or tortious destruction of property, interest may be added to the value. Sedgw. Dam. 441, § 385; Buffalo & H. Turnp. Co. v. Buffalo, 58 N. Y. 639, affirming 1 Thomp. & C. 537.

Interest is properly chargeable against a wrongdoer upon money obtained by fraud, being a legitimate part of the damages incurred. So held, although the defendant was in the hands of a receiver, and had other creditors, since the latter should not benefit from their debtor's fraud. Holden v. New York & E. Bank, 72 N. Y. 286.

Where the claim sounds purely in damages, is unliquidated and contested, and the amount so uncertain that a demand cannot set the interest running, interest cannot be allowed, even from the commencement of the suit. So held, in an action for breach of warranty in the sale of cabbage seeds. White v. Miller, 78 N. Y. 393, 34 Am. Rep. 544.

Although the general rule is that a trustee acting in good faith, keeping funds in hand ready to disburse, without mingling them with his own, should not be charged with interest thereon, after a trustee's accounts are stated, and he ordered to pay them over forthwith, he should, if any delay in payment occurs after such a report is made, be charged with interest. Lyons v. Chamberlin, 25 Hun, 52; Hunn v. Norton, Hopk. Ch. 344.

An administrator should be charged with interest from the date that it was in his power to have his accounts settled and funds paid over, unless he shows that the money was kept in bank or otherwise ready to be paid over when called for. By long delay in settling his account the use of the money may be inferred and interest be chargeable. Hasler v. Hasler, 1 Bradf. 252.

Under ordinary circumstances, where the defendant refuses to pay over moneys held by him in a fiduciary character, he should be charged with interest; but where the money has been kept ready to be paid over, interest is not to be charged. Young v. Brush, 24 How. Pr. 72, 38 Barb. 296; DePeyster v. Clarkson, 2 Wend. 77.

When there is no agreement to pay interest, interest, when allowable, is allowed not as a part of the contract, but as an incident and by way of damages for the default, to make the creditor good for the loss he has sustained by reason of the breach or default. Southern Cent. R. Co. v. Moravia, 61 Barb. 189.

Where there was no express contract on the part of the city to pay interest, it was recoverable, if at all, only as damages upon some usage to be shown, from which a contract might be implied; and in such cases the acceptance of the principal in full, especially if accompanied by a waiver of interest as a condition of the payment of the principal, must be held to terminate all right of action for the debt or any of its incidents. Tenth Nat. Bank v. New York, 4 Hun, 430.

When interest is only recoverable as damages after default in the payment of the principal, the receipt of the principal debt is a bar to the claim for such interest. Hamilton v. Van Rensselaer, 43 N. Y. 246; Roberts v. Brandies, 44 Hun, 468; Cutter v. New York, 92 N. Y. 166.

Interest does not run upon a contract until the time fixed for payment, in the absence of a special provision therefor. Booth v. Pittsburg, 154 Pa. 482.

A purchaser of land who, upon petition of the executors of the vendor, is compelled to make specific performance, is chargeable with interest upon the unpaid purchase money only from the date of the tender of a deed pursuant to the decree, and not from that of his answer to the petition. *Re* Smith's Estate, 152 Pa. 102.

Interest is allowable on mechanics' liens only to the time of sale, and not to the day of distribution of the proceeds. Allen v. Oxnard, 152 Pa. 621.

Interest may be allowed from delivery, on the contract price of grain sold, where the delay in payment has been unreasonable and vexatious. Larson v. Johnson, 42 Ill. App. 198.

An agreement to pay a yearly salary does not, in the absence of any usage or understanding, imply

same period after the Act took effect. Under the later Act, if the Commissioner delayed his decision for more than six months, the claimant was not compelled to await it, but might have sued within six months next following the six months of the Commissioner's delay, or one year from the time of appeal; but if the claimant had allowed that period to ter-
459] minate without instituting *suit, he must then have waited, as before, until the claim should have been passed upon, and have sued within one year thereafter.

It was shown on the trial that, as to the sum of $241.78, the defendant had duly appealed to the Commissioner of Internal Revenue, that the claim was rejected, and that the suit was brought within the required time after such decision; but nothing appears in the bill of exceptions to show that an appeal was made concerning the amount of $8.62 of the claim.

Though the effect of the plea was to confess the plaintiff's cause of action, as to the exaction of the alleged amounts of money from him and as to the payment of the same under protest (see *Gale* v. *Capern*, 1 Ad. & El. 102) nevertheless, to prove the exaction the plaintiff introduced as a witness in his behalf a deputy collector, John F. Cline, who testified that the sums of money mentioned in the bill of particulars had been paid by the plaintiff to the collector of internal revenue for the first district of Pennsylvania; that the spirits were bonded prior to July 20, 1868, and that the sum of $8.62 had been paid upon fractions of gallons taxed as whole gallons, and the sum of $241.78 upon spirits lost by leakage, etc. The defendant admitted that certain official regulations promulgated by the Commissioner of internal revenue prior to and upon April 22, 1869, which were offered in evidence by the

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that it is to be paid at the end of the year, and interest is not recoverable until demand for payment—or in the absence thereof, from the date of the writ. Soule v. Soule, 157 Mass. 451.

Interest cannot be allowed from their date upon negotiable coupons while they remain in the hands of the holder of the bonds to which they were originally attached. Williamsburgh Sav. Bank v. Solon, 136 N. Y. 465, modifying 65 Hun, 166.

A draft specifying no time of payment is due immediately and draws interest from its date. Clark v. Lake Avenue Permanent Sav. & L. Asso. 48 N. Y. S. R. 189.

Coupons after their maturity, bear interest at the rate fixed by the law of the place where they are payable. Cairo v. Zane, 149 U. S. 122 (37: 673).

Interest upon a note due upon demand begins to run from its date. Packer v. Roberts, 40 Ill. App. 613.

Interest is allowable upon a recovery of damages for breach of a contract of purchase. Woods v. Cramer, 34 S. C. 508.

Interest may be allowed on damages in an action of tort, when they are not exemplary. Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213.

Interest accrues from the date of a bond worded "I owe and promise to pay." M'Veigh v. Howard, 87 Va. 599.

Interest is recoverable by an assured from and after the expiration of sixty days after delivery of proofs of loss, under a policy providing that the loss shall be payable sixty days after proof thereof. Randall v. American F. Ins. Co. 10 Mont. 340.

Interest is not recoverable, under Cal. Civ. Code, § 1917, upon items of account for goods sold, which have never been settled and balanced. Heald v. Hendy, 89 Cal. 632.

The balance found due upon an account stated bears interest. Coughlin v. Gutta Percha & R. Mfg. Co. 33 Ill. App. 71.

A wife cannot claim interest on money of which she permitted her husband to have the use during his life without any claim for interest, but is entitled to interest from the time of his death. *Re* Wormley's Estate, 137 Pa. 101.

Where interest is reserved expressly in a contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages, it is often matter of discretion. Redfield v. Bartels, 139 U. S. 694 (35: 310).

Interest on the value of the property may be allowed as damages, for its detention, upon a verdict in defendant's favor, for a return of the property in replevin. Collins v. Houston, 138 Pa. 481.

A legacy becomes due and interest begins to run thereon, in the absence of an express direction in the will as to the time of payment, in one year from the issuing of letters testamentary, and not in one year from the death of the testator. *Re* Prior, 32 N. Y. S. R. 712.

An executor should not be charged interest on unproductive securities from which he derives no advantage. *Re* Myers, 38 N. Y. S. R. 889, modifying 58 Hun, 173.

A claim by a principal against his agent for money which the latter was bound to account for and pay over bears interest from the time the cause of action accrued. McCormick v. Eliot, 43 Fed. Rep. 469.

While interest might be properly allowed on the value of a pilot boat lost by reason of a collision, it cannot be awarded against the stipulators beyond the sum in which they have bound themselves. The Wanata v. Avery, 95 U. S. 600, 24 L. ed. 461.

Interest on the value of a vessel destroyed in a collision cannot be allowed against stipulators who have bound themselves only in a sum equal to the value of the vessel. The Ann Caroline v. Wells, 69 U. S. 2 Wall. 538, 17 L. ed. 838.

Interest was allowed on the value of a cargo of barley lost by collision with the canal boat carrying it on the Hudson river. The Mary J. Vaughan, 2 Ben. 47.

The jury may allow interest on the damage done to a vessel by a collision. Fitch v. Livingston, 4 Sandf. 492.

An attorney should not be charged with interest on a debt given him for collection, which is lost through his negligence. Rootes v. Stone, 2 Leigh, 650.

An attorney is not liable for interest on money collected by him until demand made by the party entitled to receive it, or until a wrongful conversion. Walpole v. Bishop, 31 Ind. 156.

An attorney is liable for interest on money collected for a client from the time of judicial demand, when the entire means of ascertaining the balance due his client is in his hands. Dwight v. Simon, 4 La. Ann. 490.

An attorney is liable for interest on money which he neglects to turn over to his client for an unreasonable time, even though no demand had been made for it. Chapman v. Burt, 77 Ill. 337.

In a case of tort, where the law allows the jury in its discretion to award exemplary damages, interest cannot be allowed. Ratteree v. Chapman, 79 Ga. 574.

In National Steam Nav. Co. v. Dyer ("The Scotland") 105 U. S. 24, (26: 1001), an action for causing the loss of a ship by collision on the high seas, six per cent was held to be the proper rate of interest.

plaintiff, provided that the taxes on distilled spirits placed in bonded warehouses before July 20, 1868, should be exacted, upon the withdrawal of the spirits, only upon the actual quantity thereof so withdrawn. No evidence was introduced to show the nature of the protest made, but it was unnecessary to prove more than that the payment was made, "under protest," which was admitted by the plea. *Wright* v. *Blakeslee*, 101 U. S. 174 [25: 1048].

The defense made on the trial consisted of the introduction of evidence tending to show that the plaintiff had received from the government under the provisions of an Act of Congress approved July 26, 1886, the sum of $241.78, for which his attorney, T. W. Neill, gave a receipt to the Commissioner of Internal [460] Revenue. The Act *is entitled "An Act for the Relief of Richard C. Ridgway and Others," and is as follows:

"Whereas from the time bonded warehouses were first established until April 14, 1869, the law has been uniformly construed and administered to allow for loss by leakage on spirits distilled prior to July 20, 1868, while in warehouse; and whereas it was the uniform practice and in accordance with the rules and regulations of the Commissioner of Internal Revenue, approved by the Secretary, to collect internal revenue taxes upon only so much of the spirits distilled prior to July 20, 1868, as were actually withdrawn from warehouse, under which established regulations large quantities of spirits were bought and sold while in bond; and whereas in a few exceptional cases taxes were also collected on that portion of such spirits which were lost by leakage while remaining in warehouse: therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, required to pay, out of any money in the treasury not otherwise appropriated to the following named persons in the city of Philadelphia, Pa., or their legal representatives, such amounts as shall be shown to the satisfaction of the Commissioner of Internal Revenue to have been paid by them as tax on distilled spirits in excess of the quantity withdrawn from warehouse: *Provided*, That the amount paid to each shall not exceed the sum herein stated—that is to say:" [Here follows a list in which appears the sum of $241.78 opposite the name of John Stewart.]

The receipt was as follows:

"Original receipt for draft in payment of claims for refunding:

"August 17, 1886.

"Received of the honorable Commissioner of Internal Revenue the sum of two hundred and forty one dollars and seventy-eight cents ($241.78) on account of my claim, No. 10,073, for taxes improperly paid by me.

"(Signed) John Stewart,
"By T. W. Neill, Attorney."

[461] *Whether or not this evidence of the acceptance of payment was relevant to the issue, no objection was made to its introduction. On the contrary, the plaintiff admitted on the trial that he had received the money, and also embodied, in a request for instructions to the jury, a statement that the amount of his claim, with interest, was subject to a credit of the amount so received.

As nothing else of present importance appears in the record the position of the plaintiff, after all the evidence had been offered, seems to have been this: The merit of his claim was established, as was also his right to prosecute the suit for $241.78 of his claim. No evidence had been introduced, nor admissions made, with regard to his right to sue for $8.62 of his demand, and as to that sum he was not entitled to seek relief. He had admitted the receipt by him from the Commissioner of Internal Revenue of $241.78 on account of his claim. The plaintiff's position being thus, the court directed a verdict in favor of the defendant. This action of the court was excepted to by the plaintiff, and is assigned by him as error.

The plaintiff now contends that, although he has accepted from the government the sum named, this fact should not effect his right to recover in the action, since he had a right to apply the money, and did apply it, so far as it was adequate, to the payment of interest on his claim, and was entitled to maintain an action for the principal and the balance of the interest. These views, however, of the purpose of the payment and the character in which it was received, are not sustained by the facts shown on the trial. The plaintiff admitted that he had received the sum of $241.78 on account of his claim for taxes improperly paid by him; the amount received was the same as the amount of the claim; the manner of the exaction indicated in the Act of Congress is the same as that set out in the bill of particulars, and there is nothing upon which to base an inference that this payment from the government was related to any other transaction than the one in question. The Act of Congress, then, furnishes the best evidence of the purpose and the character of the payment, and from it we are to learn whether the payment was of the *principal or of interest. The Act pro- [462] vided for the payment to the plaintiff and others of such amounts as should be shown to the satisfaction of the Commissioner of Internal Revenue "to have been paid by them as tax on distilled spirits in excess of the quantity withdrawn by them from warehouse." It is presumed that the terms of the Act were known to the plaintiff, and by his acceptance of the money it must be understood that he agreed to take it as a payment of the amount shown to have been paid by him, or, in other words, as a refunding of the money exacted.

It is apparent, therefore, that the principal, as such, has been received by the plaintiff, and hence, to treat the action as having any object at all, we must regard it as an action for interest alone. Whether in the circumstances of this case, an action for interest can be maintained, is the only question to be determined. In deciding this we shall not find it necessary to consider in what respect these suits against collectors may differ from other actions, but shall assume, for the purpose of this opinion, that they are governed by the same rules.

Where money is retained by one man against the declared will of another who is en-

titled to receive it, and who is thus deprived of its use, the rule of courts in ordinary cases is, in suits brought for the recovery of the money, to allow interest as compensation to the creditors for such loss. Interest in such cases is considered as damages, and does not form the basis of the action, but is an incident to the recovery of the principal debt. The right of action is the right to compel the payment of the money which is being retained. When he who has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost.

This principle is well illustrated by an early case (*Moore* v. *Fuller*, 47 N. C. 205) decided by the supreme court of North Carolina. That was an action of debt on a bond. The **463**] *principal of the debt had been paid, and at the time of payment the parties had agreed to refer the question of interest, the payment of which was refused, to arbitration. Upon an award made in favor of the plaintiff, the defendant still refused to pay the interest, and it was sought to be recovered in an action, not upon the award, but on the bond. The supreme court said: "The general principle is, that when the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties, all its incidents go with it. Thus, in an action of ejectment, if the plaintiff, pending the suit takes possession of the premises, upon the plea of the defendant or upon its being shown, the plaintiff will be nonsuited. *Johnson* v. *Swain*, 41 N. C. 335. So, in an action of detinue, if the plaintiff takes possession of the property claimed, he can recover no damages, for they are consequental upon the recovery of the thing sued for. *Morgan* v. *Cone*, 18 N. C. 234. This is an action of debt on a bond to recover the interest, the principal having been paid by the defendant before the bringing of the action; by that payment, the bond was discharged, and by analogy to the cases refered to, the plaintiff cannot recover the interest, which is but an incident to the principal—the bond."

To the same effect is the case of *Tillotson* v. *Preston*, 3 Johns. 229. This was an action of assumpsit for money had and received. In addition to the general issue, there was a plea of payment of the sums mentioned in the declaration. To this plea of payment the plaintiff demurred especially, alleging for one ground of demurrer that the plea did not allege that the defendant had paid to the plaintiff the interest. The court said: "The demurrer is not well taken. If the plaintiff has accepted the principal, he cannot afterwards bring an action for the interest."

Other cases announcing the same principle are to be found in the books, but the rule seems to be founded in reason, and hardly to need the support of precedent.

In a case where a demand of damages constitutes the very ground of the action, it would seem that the rule would be different. If, for **464**] instance, in covenant on the part of *the lessee to repair a building, the lessee should prove performance, the plaintiff might still be entitled to have the jury pass upon the question of his damages, however small they might be, because in such a case the right to damages constitutes the right of action. It might then be said that, since the present case is an action of assumpsit, of which damages constitute, in theory, at least, the basis, the rule we have stated would not be applicable. But, without considering how far, in an inquiry like this, we would be prevented by the form of an action from ascertaining its purpose, and without adverting to the fact that one of the cases just cited was an action of assumpsit, it is to be noticed that in Pennsylvania, where the suit was brought, the form of the action of assumpsit is employed not only in cases where, at the common law, it would have been appropriate, but also in cases in which the action would formerly have been in debt or covenant.

Treating the action of assumpsit as of such extensive scope, the object sought would not only be permitted, but required to be considered if it were desired to ascertain the real nature of a case. In this case the bill of particulars shows that the object sought is a liquidated sum of money, with interest. The evidence introduced with the acquiescence of the plaintiff, and his own admission, furnished proof that the liquidated sum has been paid. It thus appears that the action is not one sounding in damages, but that the damages, or interest, is demanded simply in respect of the detention of the principal.

Perhaps it might not unreasonably be argued that the payment by the government, and the acceptance of the money by the plaintiff, without a demand of interest, constituted a complete settlement of his claim, irrespective of the operation of the principle which we have been examining. But however this may be, it is evident from what has been said that the plaintiff has parted with his right of action by accepting the money which was withheld from him, and has at the same time given up his right to sue for the incidental damages. Therefore the court below was right in directing a verdict for the defendant, and the judgment of that court is affirmed.

MARTHA GROVES ET AL., *Admr.*, *Appts.*, [**465**
v.
GEORGE W. SENTELL ET AL.

(See S. C. Reporter's ed. 465-486.)

Decree, when final—note, when not joint—mortgage upon joint property—divisibility of a debt—partition of property—effect on mortgage—Louisiana law—when prescription ceases—bill of interpleader.

1. Parties who do not appeal from a decree cannot be heard against it; the decree is final as to them.

NOTE.—*Mortgage defined; nature of*, see note to New Orleans Nat. Bkg. Asso. v. Adams, 27: 910.

As to equitable mortgage by deposit of title deeds, see note to Biebinger v. Continental Bank of St. Louis, 25: 271.

As to deed with contract to reconvey, when a mort-

2. A note written "we promise to pay" and signed by two or more persons, is a joint note and not a solidary one, under the Louisana law.

3. A mortgage given by two upon property jointly owned by them to secure a joint note signed by them is, under the Louisiana law, a mortgage of the whole property for the whole debt unless stipulated otherwise.

4. The divisibility of a debt does not necessarily import the divisibility of the mortgage securing it; the indivisibility of the mortgage does not render the obligation itself indivisible, under the civil law.

5. The fact of the voluntary partition of the property covered by an indivisible mortgage does not operate to prevent the mortgage creditor from enforcing his mortgage against either part thereof.

6. A mortgage creditor cannot be compelled to divide his security in consequence of the voluntary partition of the property made after the mortgage was inscribed.

7. In Louisiana creditors of all persons who may have an interest in the acquiring of an estate or the extinguishment of an obligation by prescription, have the right to plead it, even in case the person claiming such an estate or bound by such obligations renounces the right of prescription.

8. In Louisiana, prescription ceases to run whenever a possessor makes an acknowledgment of the right of a person whose title they prescribe.

9. A party who has an interest in the subject-matter of the suit cannot file a bill of interpleader, strictly so called; the assertion of perfect disinterestedness is an essential ingredient of such a bill.

[No. 278.]

Argued and Submitted March 13, 1894. Decided May 14, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, in a suit brought by Martha Groves *et al.*, plaintiffs, against George W. Sentell, defendant, in which Sentell filed a bill of interpleader, making Martha Groves *et al.*, defendants, decreeing that a mortgage executed by Fanny B. Randolph and Dora Stark (by her maiden name) upon their undivided property to secure a joint note executed by them was the mortgage of each obligor, hypothecating her half of the property to pay half of the debt owed by her, and not for the amount owed by both obligors, and that there is an imputation of the payments which the obligors have severally made to the extinguishment of the moiety of the debt which they respectively owe, and determining the amount due from Fanny B. Randolph for her moiety after crediting to her the payments made by her, etc., and decreeing the disposition of a fund arising from the sale under a subsequent mortgage, of a part of the property, etc. *Reversed, and decree rendered directing the payment out of the fund.*

Statement by *Mr. Justice* **White:**

*Fanny B. Lambeth and Dora Lambeth, as heirs of their deceased father, were the owners, in equal undivided proportions, of certain parcels of real estate situated in the parish of Avoyelles in Louisiana. Two of these parcels were known, respectively, as the "Leinster Plantation" and the "Lucky Hit Plantation." Fanny B. Lambeth was married in April, 1865, to Christopher M. Randolph. The Leinster plantation was leased during 1865, '66, and '67 to John Rhea, who died in October, 1867, pending the lease. [466

On the 15th day of January, 1868, Fanny B. Lambeth, wife of Christopher M. Randolph (whom we shall hereafter refer to as Mrs. Randolph) and Miss Dora Lambeth appeared before Generes, a notary in the parish of Avoyelles, and acknowledged themselves indebted to Mrs. Rosetta Rhea, widow of John Rhea, of Madison county, Indiana, in the sum of $8970.12, which they declared was a balance due by them for the purchase price of certain movable property—mules, cane, implements, etc.—which belonged to Rhea at the time of his death, and which had been placed on the Leinster plantation by him, for use in its cultivation. The act declared that the movable property which they bought belonged to Mrs. Rhea, who was the widow of John Rhea, and as such was, under the laws of Indiana, where Rhea was domiciled, his sole heir, as he died intestate and left no ascendants or descendants. To evidence the indebtedness, Mrs. Randolph, authorized by her husband, and Miss Lambeth drew their joint note, as follows:

"Avoyelles, La.,

"$8970.12.

"Leinster Plantation, January 1, 1868.

"Two years after date we promise to pay to the order of Mistress Rosetta Rhea, at the Citizens' Bank of Louisiana in the city of New Orleans, eight thousand nine hundred

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gage and when not; action to have deed declared a mortgage, see note to Conway v. Alexander, 3: 321.

That title of lands taken as security for moneys loaned is simply a mortgage, though the agreement is by parol; absolute conveyance can always be proved by parol to be a mortgage, see note to Hughes v. Edwards, 6: 142.

As to right to keep on foot to protect title; when not merged, see note to Peltz v. Clarke, 8: 199.

As to assumption of mortgage by purchaser of premises; what constitutes; effect of, conveyance subject to mortgage, see note to Elliott v. Sackett, 27: 678.

As to release of grantee by grantor from covenant to assume mortgage, see note to Drury v. Hayden, 28: 408.

As to mortgages on crops to be planted, see note to *Butt v. Ellett*, 22: 183.

As to lien of mortgage on after acquired property, see note to Pennock v. Coe, 16: 436.

As to priority between mortgage and mechanic's lien, see note to Brooks v. Burlington & S. W. R. Co. 25: 1057.

As to strict foreclosure of mortgage, see note to Clark v. Reyburn, 19: 354.

As to effect of agreement in mortgages that the whole shall become due on failure to pay any part, see note to Chicago, D. & V. R. Co. v. Foslick, 27: 47.

As to limitation of time in equity cases, see note to Pratt v. Carroll, 3: 627, and to Thomas v. Brockenbrough, 6: 287.

As to equity of redemption barred by time, see note to Thomas v. Brockenbrough, 6: 287.

As to statute of limitations in cases of fraud in equity, see note to Stearns v. Page, 12: 823.

and seventy and $\frac{12}{100}$ dollars, for value received, with interest at the rate of eight per cent per annum from date until paid. Not negotiable. "Fanny B. Randolph.
"C. M. Randolph.
"Dora Lambeth."

467]*Mrs. Rhea bound herself to obtain a judicial recognition from the courts of Indiana of her right of inheritance to her husband's estate before enforcing payment of the note.

To secure this note, Mrs. Randolph and Miss Lambeth, by the same act, mortgaged, 1st, the Leinster plantation; 2d, a tract of land adjoining the Leinster plantation, known as the "Faulkland tract." This act of mortgage was duly inscribed.

In September, 1868, Christopher M. Randolph, the husband of Fanny B. Lambeth, died. In December, 1868, Dora Lambeth married T. O. Stark. We refer to her hereafter as Mrs. Stark.

In December, 1868, "In the matter of the estate of John Rhea, deceased, in the court of Common Pleas of Jefferson County, Indiana," Rosetta Rhea was recognized as his sole heir, and as such was decreed to be entitled to the promissory note set forth above, and all the rights securing the same.

On the 9th of January, 1873, Mrs. Randolph and Mrs. Stark made between them, by voluntary and private agreement, a partial partition of their father's estate. Mrs. Randolph took a portion of the Leinster plantation and other lands, and Mrs. Stark took the remaining portion of that plantation, also with other lands. Thus, by the terms of the partition, a portion of the land which had been mortgaged to secure the debt due to Mrs. Rhea was allotted to Mrs. Randolph and a portion to Mrs. Stark. Nothing was said in the partition as to the then existing mortgage in favor of Mrs. Rhea.

On the 23d of April, 1873, Mrs. Randolph and Mrs. Stark constituted T. O. Stark their "true and lawful attorney in fact, for us and in our names, to settle and establish the payments made and amounts still due by them on a mortgage note of eight thousand nine hundred and seventy $\frac{12}{100}$ dollars ($8970.12), dated January 1, 1868, held by Mrs. Rosetta Rhea, to indorse on said note the amount paid thereon; to interrupt prescription; to consent to any subrogation in favor of any person or persons or commercial firm who may pay a portion of their said indebtedness on said note, and thus divide their said indebtedness, and to appear and sign, in their name, 468] *any agreement, document, or notarial act carrying out said subrogation, with any clauses or conditions which said attorney may, in his discretion, deem fit; to enter into said arrangements with said Mrs. Rhea, her agents or attorneys, to obtain an extension of time for the payment of the balance due on said promissory note, said extension of time to be granted and accepted upon such terms and conditions as to our said attorney may seem fit; to sign a notarial act for that purpose and to acknowledge therein, in their name, that they recognize said Mrs. Rosetta Rhea as the rightful owner of said note, in her quality of sole heir of her deceased husband, the late John Rhea, of Madison county, Indiana, recognized as such by the court of Jefferson county, Indiana, in the matter of the estate of John Rhea, deceased, and alone entitled to claim payment of said note, with full power of substitution, and generally to do everything necessary to carry out the premises as fully as if done by us in person, hereby ratifying all and whatsoever our said attorney may lawfully do or cause to be done by virtue hereof."

On the 28th day of April, 1873, by act before Trist, a notary public in New Orleans, Stark, as agent of Mrs. Randolph and of his wife, and Victor Olivier, Esq., as agent of Mrs. Rhea, declared that the note which had been given Mrs. Rhea, and secured by the mortgage as aforesaid, had been reduced by partial payments, all arrears in interest having been paid, to the sum of $7577.34, and the time for the payment of this balance was extended by Olivier, as agent for Mrs. Rhea, to the 1st day of March, 1874, interest thereon to be paid at the rate of eight per cent from the 28th of April, 1873. Both Stark and Olivier, on behalf of their respective principals, declared that "after a careful computation of interest and deduction of partial payments made at different times to Mrs. Rosetta Rhea by the drawers of said note," the aforesaid sum was due.

In May, 1875, Mrs. Randolph acknowledged herself indebted to Johnson & Goodrich, a commercial firm of the city of New Orleans, in the sum of $8000, evidencing her debt by her notes, secured by a mortgage of the portion of the Leinster plantation which had been allotted to her in the partition, and also *of her interest in an undivided [469 tract of land which she had inherited from her father's estate, and which had not been included in the partition. In June, 1875, Johnson & Goodrich transferred this note to G. W. Sentell & Co., in liquidation.

In October, 1883, G. W. Sentell and W. B. McLean as executor of B. Conyers, a deceased partner of the former firm of G. W. Sentell & Co., both representing the interest of the firm in liquidation, sued in the district court of the parish of Avoyelles to foreclose the mortgage which the firm in liquidation had, as stated, acquired by subrogation from Johnson & Goodrich. On the 24th of December, 1883, judgment was rendered in favor of Sentell & Co. in liquidation and against Mrs. Randolph, accompanied by a decree for a sale of the mortgaged property. Under this decree, on the 1st of March, 1884, the sheriff of the parish of Avoyelles sold the portion of the Leinster plantation which had been allotted to Mrs. Randolph, and the undivided interest in the tract of land, both of which had been included in her mortgage to Johnson & Goodrich. The property had been adjudicated to G. W. Sentell for $12.002. The mortgage in favor of Mrs. Rhea, being on record and ranking the Johnson & Goodrich mortgage, Sentell, the purchaser, retained in his hands from the amount of his bid, to pay the same—

For principal	$4873 00
For interest up to date of sale	1164 12
Total	$6037 12

The sum thus retained by Sentell to pay the principal of the note was the actual amount due. At the time of the sale the principal had been reduced from $7577.34, as stated in the notarial act of 1873, to $4873, as mentioned in a writing on the reverse of the note. The payments which brought about this reduction were numerous, and made at brief intervals. Some of them were evidenced by notarial acknowledgments between Stark and Olivier, agents; some merely [470] by *indorsements upon the back of the note. Some had been made by Sentell, who took subrogations; these last, however, being made subordinate in rank of mortgage to the amounts due on the original note.

All of these payments were made on the entire note, without any indication that they were imputed particularly to any portion of the debt due by either of the parties. Hence, all the payments were credited at the times they were made on the entire debt. The last credit on the principal of the note is as follows:

"The principal of the within note has been reduced by payment on the same to $4873.00, with interest thereon to March 5, 1881, to which date the payment of said sum has been postponed.

"New Orleans, April 28, 1880.

"Victor Olivier, Jr.,
"Agent for Mrs. Rosetta Rhea.
"T. O. Stark,
"Agent for Mrs. Randolph and Mrs. Stark."

There are two additional credits of payments of interest, the first up to March, 1882, and the second up to March 5, 1884, one of these interest credits being accompanied by a repetition of the statement that the principal of the note was at the time $4873.00.

In April, 1886, Martha Groves, of Indiana, and William J. Groves, of Ohio, sister and brother of Mrs. Rosetta Rhea, were duly recognized by the circuit court of Jefferson county, Indiana, as her sole heirs and distributees, and, as such, entitled to all the rights of Rosetta Rhea in and to the note to which we have referred.

In April, 1886, Martha Groves and William J. Groves, and Pogue, administrator of Rhea, sued in the United States circuit court G. W. Sentell for $1873, with interest thereon at eight per cent from March 5, 1884, until paid. The object of this suit was to compel Sentell to pay the balance thus stated to be due on the note out of the sum which he had retained. Sentell thereupon filed in the [471] circuit court of the *United States a bill of interpleader, in which he averred the fact of his purchase, and his retaining the amount in his hands, and that there were conflicting claims to the fund. He alleged, 1st, that he had been notified by Mrs. Randolph not to pay over the amount apparently remaining due on the note, as the same was not due; 2d, that he had also been notified by W. B. McLean as liquidator of G. W. Sentell & Co., and also as executor of B. Conyers, a deceased member of the firm of G. W. Sentell & Co., that such firm in liquidation was entitled to the fund retained. He averred that he had always been ready and willing to pay over the fund, and prayed that the defendants might be decreed to interplead and adjust between themselves their rights and interests in the money due and payable under the mortgage. He made defendants to the bill Mrs. Martha Groves, William J. Groves, Fanny B. Randolph, and William B. McLean, as liquidator of the firm of G. W. Sentell & Co., and as testamentary executor of B. Conyers. Upon this bill an injunction was issued, restraining Martha Groves and William J. Groves from prosecuting their suit. Sentell deposited in the registry of the court $5743.46, to abide the result of the litigation. Mrs. Randolph answered and charged the nullity of the note on the ground (1st) that it had been given for a debt of her husband, for which she was incompetent to bind herself; and (2d) that the note, if it was originally binding, which she denied, represented nothing due by her, since it had been extinguished, so far as she was concerned, by payment. She charged that this extinction would result from the proper credit to her of the amounts which had been paid; and that many payments had been erroneously credited to the note generally which should have been imputed to her portion of the debt. McLean, liquidator and executor, practically joined in the claim set up by Mrs. Randolph. He charged the nullity of the note because it was given by Mrs. Randolph for a debt of her husband. He further alleged that, as the second mortgage creditor on the property sold, the firm of G. W. Sentell & Co. in liquidation was entitled to the entire balance of the fund, to be applied to the payment of their junior mortgage. He, in addition, *averred that, if [472] any portion of the note was payable out of the proceeds of the property allotted in the partition to Mrs. Randolph, the holders of the note could not exercise their right against such proceeds, without previously exhausting their remedy against that portion of the mortgaged property which had been allotted to Mrs. Stark; that, as junior mortgage creditor on the portion of the property allotted to Mrs. Randolph, he had a right to compel the creditor to exhaust Mrs. Stark's property, before proceeding against the proceeds of Mrs. Randolph's property; and, finally, that the holder of the note was not entitled to be paid the amount due on Mrs. Randolph's half of the debt from the proceeds of her property, unless the holder gave to the second mortgage creditor a subrogation to the rights of the holder against Mrs. Stark's share of the property—which subrogation, he averred, the note holder was unable to give because the proportion of the debt due by Mrs. Stark had become prescribed. During the course of the proceedings below, Mrs. Stark, was, by order of the court, made a party defendant to the bill. She demurred on the ground that she was not a necessary party to the cause.

On these issues the case was tried. The court below held that Mrs. Randolph, having frequently ratified the debt after the death of her husband, was estopped from claiming that she was not bound therefor, and hence rejected the claim of Mrs. Randolph and Sentell & Co. in liquidation as

to the nullity of the note. After reference to a master, to examine and report as to the payments, it appeared that the full amount of the payments had been applied and that the application of them all did not reduce the amount due on the note below the sum of $4873, with interest from March 5, 1884, as stated in the last credit on the note. The court, however, concluded that, as many of the payments had been in fact made from Mrs. Randolph's individual funds, they should have been imputed to her share of the obligation, instead of to the debt as a whole. It held that the correction of the imputations of payments in accordance with this finding reduced the sum remaining due by Mrs. Randolph, on her share of the note, to $601, and this amount it decreed to be paid from 473] *the proceeds deposited by Sentell. Deducting this $601 from the total amount due on the note—$4873—left $4273 due by Mrs. Stark, as her portion of the original obligation. Treating this sum due by Mrs. Stark as not secured by mortgage on that portion of the property which had been allotted to Mrs. Randolph by the partition, the court decreed the payment of the entire remaining proceeds to Sentell & Co. in liquidation, as the junior mortgage creditor. It allowed to the solicitor of the complainant a fee of $250, to be paid from the fund deposited. It dismissed the bill as to Mrs. Stark on the ground that, as she had been made a party solely for the purpose of charging her with notice of the accounting and distribution, and this purpose had been subserved by her appearance, her demurrer must be sustained.

From the decree of the lower court Martha Groves, William J. Groves, and Pogue, administrator of Rosetta Rhea, appealed, citing on the appeal G. W. Sentell, Mrs. Fanny B. Randolph, Mrs. Dora Stark, and W. B. McLean, executor of Benjamin Conyers, deceased, and liquidator of the firm of G. W. Sentell & Co.

Messrs. **George A. King**, *Charles W. Hornor* and *William S. Benedict* for appellants.

Messrs. **E. T. Merrick**, *Sr.*, **E. M. Hudson**, **E. H. Farrar**, **B. F. Jonas** and **E. B. Kruttschnitt** for appellees.

Mr. Justice **White** delivered the opinion of the court:

As Martha Groves and W. J. Groves and 476] Pogue, administrator, *are the only appelants, the correctness of the decree in their favor and against Mrs. Randolph and Sentell is not before us. In this regard that decree is final. *The Stephen Morgan* v. *Good*, 94 U. S. 599 [24: 266].

The first apparent question is the correctness of the decree holding that certain payments which were made on the note should have been imputed to Mrs. Randolph's portion, instead of to the note as a whole. The payments which were thus imputed by the lower court were those made subsequent to the notarial act of 1873, in which the parties fixed the principal of the note at $7577.34. As to the payments made prior to this date there is no dispute in the record, as they are all admitted to have been made in equal proportions from the funds belonging to Mrs. Stark and to Mrs. Randolph.

The first question necessary to be determined is, was the note, under the Louisiana law, a joint or a solidary obligation. A joint obligation under the law of Louisiana binds the parties thereto only for their proportion of the debt (La. Civ. Code, arts. 2080, 2086) whilst a solidary obligation, on the contrary, binds each of the obligors for the whole debt. The note was clearly a joint note, and not a solidary one. Solidarity, under the law of Louisiana, must be expressly stipulated, and is never presumed. La. Civ. Code, art. 2093. We consider it unnecessary, however, to pass upon the question of imputation of payments, because of our conclusions upon another branch of the case. The issue between the parties is not as to the amount of the payments, but as to the manner in which the payments should be applied. It follows, therefore, that the controversy involves, not the sum due, but the person by whom it is due. As we conclude that the whole debt, irrespective of the question of whether it is due by Mrs. Randolph or by Mrs. Stark, is payable out of the fund, it is useless to determine how much is due by one or by the other.

Whether the whole debt was payable out of the whole property, or any part thereof, depends on whether the mortgage was divisible or indivisible under the law of Louisiana. Says the Louisiana Civil Code: "The mortgage is a real *charge on the prop- [477 erty bound for the discharge of the obligation. It is in its nature indivisible, and prevails over all the immovables subject to it, and over each and every portion, and it follows them into whatever hands they pass." Art. 3282.

This provision of the Louisiana Code was derived from the Code Napoleon, where its identical language is found, Code Napoleon, art. 2114. The mortgage in this case contains nothing on its face which takes it out of the general rule. The parties "severally declare" that they are indebted, etc., and that they do "hereby mortgage to and in favor of the said Rosetta Rhea, represented herein by her attorney in fact, the property described in the deed." There is no stipulation in the act showing in the remotest degree an intention to mortgage separately an undivided half of the property for an undivided half of the debt. Thus, on the face of the act, it is a mortgage of the whole property for the whole debt. It was in the power of the contracting parties to have stipulated against indivisibility, and that they failed to do so is self-evident. The provision of the Code is that indivisibility is "in the nature of a mortgage," therefore not of its essence. The commentators on the Code Napoleon agree that indivisibility can be avoided, even where the parties join in a common act of mortgage by stipulating that the mortgage is to be divisible. Laurent, in his "Principes de Droit Civil Français," thus states the rule: "All the authorities teach the doctrine that the law, in saying that a mortgage is indivisible by its nature, intends

simply thereby to declare that it is not so indivisible in its essence. From this it is concluded that parties may by their conventions stipulate to the contrary. The right of the parties to make such agreements in relation to the divisibility of the mortgage as they deem proper cannot be denied, because indivisibility rests upon intention." Vol. 30, p. 159; see also Rodiere "On Indivisibility," ¶ 466. Paul Pont, in his treatise "On Privileges and Mortgages," thus states it: "The words 'in the nature of' have a significance which is applied to them sometimes in other provisions of the law. Thus, the law says [478] that indivisibility *is in the nature of a mortgage, in the same way that it is provided that warranty is in the nature, not in the essence, of contract of sale. And because indivisibility is purely a matter of intention, it can be controlled by the will of the parties." Vol. 1, p. 321, ¶¶ 331, 332.

These expositions of the civil law writers are persuasive as to the proper construction of the Louisiana Code. *Viterbo* v. *Friedlander*, 120 U. S. 707, 728 [30: 776, 783]. Indeed, by the strongest possible analogy, they have been adopted by the Louisiana courts. Thus, a vendor's privilege, under the law of Louisiana, is "in the nature" of the contract of sale. The rule there as to this privilege is that, where a sale is made and the privilege is not excluded by express agreement or by implications clearly deducible from the language of the parties, it is implied to exist, as it is of the "nature of the contract." *Boner* v. *Mahle*, 3 La. Ann. 600.

The parties, then, having had the power, in contracting the mortgage, to exclude indivisibility, and not having done so, indivisibility applies, not alone as a result of their silence, but also because, being the general rule and of the nature of the contract, it exists unless excluded by the express terms or by plain "implication deducible from the contract." It is urged, however, that, as the obligation secured by the mortgage was joint, therefore the mortgage itself must necessarily have been joint. The proposition confounds the nature of the principal obligation with that of the accessory contract of mortgage. That the divisibility of a debt does not necessarily import the divisibility of the mortgage securing it, is unanimously held by the civil law writers. "Under the theory of the law the indivisibility of the mortgage has no reference to the nature of the principal obligation. Thus, there may be a division of the obligation either between joint creditors or joint debtors, or between the heirs of joint creditors and joint debtors." Paul Pont, vol. 1, p. 33. Laurent, in speaking on the same subject, says: "Thus, if the debt is discharged in part, or is divisible, it has no influence whatever upon the mortgage." This will subsist "in its entirety, although the debt may be extinguished in part, [479] and although a third *possessor of the immovable mortgaged may be liable only personally for a portion of the debt. We thus see that the indivisibility of the mortgage does not render the obligation itself indivisible. Where the obligations are joint they may be divided, actively or passively, between the heirs of the creditor and the heirs of the debtor." Laurent, vol. 30, p. 151, ¶ 177. See also Rodiere, p. 167 *et seq.*

The whole subject was at an early date considered by the French Court of Cassation. Certain persons gave a power of attorney to an agent, authorizing him to contract a debt and consent a mortgage. The agent borrowed the money and gave the mortgage. When the mortgage came to be enforced the debtors defended on the ground that the agent had consented a solidary debt when he had only the power to consent a joint one; that, therefore, not only was the debt joint, but the mortgage securing it divisible. The court found that the power only authorized the contracting of a joint debt; but it held that as the power authorized the agent to consent a mortgage, and the mortgage was in its nature indivisible, the debt was joint; but the indivisible mortgage securing it remained and was in force. Cassation, May 6, 1818, referred to and quoted in Paul Pont, vol. 1, p. 328.

It has been contended that a different rule has been established in Louisiana. We are referred, in support of this proposition, to *Walton* v. *Lizardi*, 15 La. 592, and *Erwin* v. *Greene*, 5 Rob. (La.) 70. These cases, instead of supporting the contention, we think refute it. In the Walton case several persons had bought separate undivided portions of a square of ground. To evidence their obligations to pay the purchase price they issued their separate notes for their respective shares, and secured them by one act of mortgage upon the property. Some of the purchasers paid their notes, and others did not. Foreclosure proceedings were commenced upon the unpaid notes, against the whole property, and the issue presented was whether the mortgage was divisible or indivisible. The court held, after a critical examination of the contract, that upon its face it stipulated that the mortgage *should be divisible, [480] and not indivisible. It said that each of the parties had given his separate notes for his separate obligation, and that the agreement between them and the vendor was that the notes should be secured by a special mortgage on "each of the lots for which the same should be given in payment." The language of the mortgage in that case was as follows: "We, in order to secure the following described notes, jointly effect, mortgage, and hypothecate;" again, "and the said purchasers, each in proportion of their respective shares and interest in said property, do hereby confess judgment in favor of said parties;" again, "now the said parties do hereby agree that a sale of said ground shall be made in favor of . . . and in the following proportions." The facts clearly justified the court in saying "from the particular care which the parties appear to have taken to distinguish their proportionate interest in the property, as well as in the payments for which they respectively gave their separate obligations," their intention was clear to create a divisible and not an indivisible mortgage.

The facts in *Erwin* v. *Greene* were very

similar to those just referred to. There the court said: "Each of the obligors promised to pay his portion of the price for which he gave his separate notes, and each took care to distinguish and designate the proportion of their respective interests in the property."

These cases, by converse reasoning, confirm the rule of indivisibility as applied to the contract with which we are dealing. Indeed we think this contract is controlled not by the foregoing cases but by *Potts* v. *Blanchard*, 19 La. Ann. 168, and *Stewart* v. *Buard*, 23 La. Ann. 415.

In the first case, certain heirs sold their undivided interests in land and the vendees gave their notes as evidence of their obligation to pay the purchase price, and secured the same by mortgage upon the property. The question was whether the mortgage thus given covered the whole of the property or a part. The court said: "The question presented is one of the construction of the act [481] of mortgage given by the *purchasing heirs to the vendors. It is, whether or not the whole property described in the act of sale and mortgage is covered by the mortgage or only the proportion of interest sold. We think there can be no doubt that the mortgage was intended to actually cover the whole property subject to the mortgage." Referring to the act of mortgage, it further said: "The property was fully described in the act; . . . it does not say proportion sold, but the property is described and the description is of the whole property."

In the latter case (23 La. Ann. 415) separate notes were given to evidence the price of undivided interests. These notes were secured by mortgage upon the whole property, and the court held the mortgage to be indivisible. It is contended that even although indivisibility of mortgage is the rule, as the parties have the power to stipulate for divisibility, therefore we must not confine our view to the act of mortgage, but must look beyond its terms to ascertain the intention of the parties. If in so doing we find their intention was to make a divisible mortgage, such intention should be enforced. Whether intention can be arrived at beyond the act of mortgage itself, where the party seeking to enforce the mortgage is the innocent third holder of negotiable paper, is a question upon which we express no opinion. The paper here is in the hands of the original holder. If we resort to the intention of the parties as derived from their situation in order to interpret the mortgage, we could reach no different conclusion. We have seen that the joint nature of the obligation does not negative the indivisibility of the mortgage by which the obligation is secured. The very purpose for which the mortgage was given in this case furnishes a cogent reason why the mortgage should have been indivisible. The consideration of the debt which it secured was the purchase price of movable property—mules, cane, and agricultural implements—situated, at the time of sale, on the Leinster plantation. By the very fact of the purchase of these things by the owners of the plantation they became incorporated with the plantation and constituted an integral part thereof. The Louisiana Code declares that "things which the owner of a *tract [482] of land has placed upon it for its service and improvement are immovable by destination," . . . and among the things enumerated are "cattle intended for cultivation, implements of husbandry, seeds, plants, etc." La. Civ. Code, art. 468. It follows, then, from the nature of the things purchased, they became incorporated with the whole plantation upon which they were situated. Being thus indivisibly united with the whole thing, it is reasonable to draw the conclusion that the intention of the parties was that the security given for the purchase price would rest upon the entire entity, of which the things sold became a part by operation of law. If the parties to the contract did not intend such contingency it could have been readily provided against by a stipulation in the act of mortgage. All the conduct of the parties subsequent to the granting of the mortgage during the long term of years over which its payment was extended indicate that they considered the mortgage covered the whole property indivisibly.

Concluding that the mortgage was indivisible, the only remaining question is, did the fact of the voluntary partition of the property covered by the mortgage operate to prevent the mortgage creditor from enforcing his mortgage against either part thereof. The negative of this proposition necessarily results from the doctrine of indivisibility. The writers on the French Code, which is in this regard identical with the Louisiana Code, are unanimous on the subject. Says Laurent (vol. 30, p. 157): "Our code and our law of mortgages have borrowed from Dumoulin the formula which characterizes the effects of indivisibility. 'The mortgage subsists in its entirety upon all the properties affected, upon each of them and upon each portion of them.'" Pont says: "It is, then, admitted that a creditor, having a mortgage upon several pieces of immovable property, can, in consequence of indivisibility, exercise the whole sum of his rights against any particular piece thereof without giving rise to a right on the part of a special mortgage creditor subsequently inscribed to compel him to do otherwise." Vol. 1, p. 330. These principles taught by the civil law commentators are settled in the jurisprudence of *France. See Cassation, March 4, 1833; [483] Dallaz, 1833, vol. 1, p. 35; Cassation, December 24, 1844; Journal du Palais, 1844, vol. 1, p. 98; *Id.* 1846, vol. 2, p. 427. See also authorities quoted by Paul Pont in his treatise on mortgages, vol. 1, p. 330, in foot note. A like rule is the settled law of Louisiana. *Pepper* v. *Dunlap*, 16 La. 163; *Adams* v. *Lear*, 8 La. Ann. 144; *Freret* v. *Freret*, 31 La. Ann. 506; *Bagley* v. *Tate*, 10 Rob. (La.) 45; *Powell* v. *Hayes*, 31 La. Ann. 789. In *Powell* v. *Hayes*, the issue involved not only the right on the part of the second mortgage creditor or third possessor to compel the holder of the first mortgage to proceed against the whole property, but also the question of subrogation. The first mortgage creditor had released a portion of the property, and sought to hold the remainder for the entire amount

of his claim. To this the third possessor objected, not alone upon the ground that the proceeding must be against the whole property, but also on the ground that he was entitled to subrogation to all the rights of the first mortgage creditor, which he could not have by reason of the partial release of the first mortgage. Both these positions were held to be unsound. As to the first, the court said: "In *Bagley* v. *Tate*, 10 Rob. (La.) 45, it was held that the plea of discussion cannot be opposed to a creditor holding a special mortgage (C. P. 73, C. C. 3367); nor can a third possessor of property specially mortgaged for a debt for which other property is also bound require that it shall be liable only for a *pro rata* portion of the debt. Each and every part of the property mortgaged is liable for each and every portion of the debt." Considering the claim of subrogation, the court said: "It may be that the third possessor, having an interest in discharging the debt will, upon payment thereof, be entitled to subrogation to the then existing rights of the mortgage creditor. . . . He [the third possessor] is under no obligation to pay the creditor, and when he does pay, he must be satisfied with a subrogation to these rights as they exist. We cannot see how the rights of a mortgagee may be affected, or put *in duriori casu* by the circumstance of there being a second mortgagor or a sale of the mortgaged premises," etc.

484] *Applying these principles, it is evident that the entire proceeds of the sale of the mortgaged property or a part thereof were stricken with the entire mortgage, and that the creditor could not be compelled to divide his security in consequence of the voluntary partition of the property made after the mortgage was inscribed. Nor does it affect this question that Sentell & Co. in liquidation were junior mortgage creditors on that part of the mortgaged property which belonged to Mrs. Randolph. As the second mortgage creditor, or third possessor, of the property, Sentell could not lawfully complain of the exercise by the first mortgage creditor of his rights against a part of the property mortgaged, and was only entitled by subrogation to the rights of the first mortgage creditor as they existed at the time of the foreclosure proceedings.

The Louisiana Code provides that subrogation takes place of right—

"1st. For the benefit of him, who, being himself a creditor, pays another creditor whose claim is preferable to his by reason of his privileges and mortgage.

"2d. For the benefit of the purchaser of any immovable property who employs the price of his purchase in paying the creditor to whom this property was mortgaged.

"3d. For the benefit of him, who, being bound with others or for others for the payment of the debt, had an interest in discharging it." Art. 2161.

Of course, nothing in this opinion affects any rights of subrogation to which either Sentell & Co. or Mrs. Randolph may be entitled under the laws of Louisiana, as a consequence of the payment of the amount due on the mortgage note out of the fund.

It is true, as the junior mortgage creditor interested in the fund, Sentell & Co. had the right to plead prescription as to the principal obligation, in order thereby to defeat the rights of the first mortgage creditor. "Creditors of all persons who may have an interest in the acquiring of an estate or the extinguishment of an obligation by prescription, shall have the right to plead it, even in case the person claiming such an estate or bound by such obligations renounces the right of *prescription." La. Civ. Code, article [485 3466. The same code, however (article 3463) provides that courts shall not supply the plea of prescription. There is no plea of prescription in the record, unless we hold that such a plea results from the general answer of Sentell & Co. in liquidation that they were entitled to a subrogation, which they could not obtain because the portion of the debt due by Mrs. Stark was prescribed. If this be treated as a technical plea, the record contains abundant evidence showing such interruptions of prescription as prevent the operation of the statute of limitations. It is immaterial whether the payments made by Stark, as the agent of Mrs. Stark and of Mrs. Randolph, were made with the money of Mrs Randolph or with the money of Mrs. Stark. At the time these payments took place such acknowledgments were made as conclusively interrupted prescription. "Prescription," says the Louisiana Code, article 3320, "ceases likewise to run whenever a possessor makes an acknowledgment of the right of a person whose title they prescribe."

We conclude by considering the decree of the court below allowing the solicitor of Sentell & Co. in liquidation a fee from the fund. The general rule is that a party who has an interest in the subject-matter of the suit cannot file a bill of interpleader, strictly so called. In fact, the assertion of perfect disinterestedness is an essential ingredient of such a bill. *Killian* v. *Ebbinghaus*, 110 U. S. 568, 572 [28: 246, 248]; *Mitchell* v. *Hayne*, 2 Sim. & Stu. 63; *Bedell* v. *Hoffman*, 2 Paige, 199; *Atkinson* v. *Manks*, 1 Cow. 691.

Sentell was a member of the firm of Sentell & Co. in liquidation. That firm was practically the real claimant of the fund, and would necessarily be a beneficiary from the successful issue of the controversy in favor of Mrs. Randolph. True, in Louisiana, the civil law regards a partnership as a different juridical entity from the members who compose it. There is, however, no averment in the bill or proof in the record that the firm in liquidation was insolvent or that Sentell had no residuary interest in its assets. The presumption of interest resulting from the partnership remains until rebutted by averment or proof. Sentell was therefore in the *position where he must be presumed to [486 have a substantial, although not direct interest in the result of the litigation. Though it was allowable when so situated to file a bill in the nature of a bill of interpleader (*Bedell* v. *Hoffman*, *supra*) we think it clear that his ultimate interest prevents him from being allowed his solicitor's fee from the fund dedicated to the payment of the mortgage, there-

by diminishing the security of the mortgage creditor.

The decree is reversed, and a decree is rendered in favor of Martha Groves and William J. Groves, directing the payment out of the fund of $4873, with interest at eight per cent from March 5, 1884, until paid, and costs of this and the court below.

Mr. Justice **Jackson**, not having been present at the argument, took no part in the decision of this case.

THE MOBILE & OHIO RAILROAD COMPANY and The Farmers' Loan & Trust Company, *Plffs. in Err.*,
v.
THE STATE OF TENNESSEE, and the counties of Obion, Gibson, Madison, Chester, and McNairy.

(See S. C. Reporter's ed. 486-509.)

Exemption from taxation—state decision—jurisdiction—dividend—profits—net earnings—bonded debt—power to grant exemption—legislative contracts—charter of railroad.

1. State statutes, subjecting the property of a railroad corporation to taxation, impair the obligation of the contract contained in an exemption clause of the company's charter.
2. The decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court.
3. Where the judgment of the highest court of a state gives effect to a state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.
4. The term "dividend" means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders.
5. Dividends can be rightfully paid only out of profits: the term "profits," denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans.
6. Shareholders are entitled only to dividends out of the net earnings derived from the operations of the company.
7. The payment of the annually accruing interest on the bonded debt of a railroad company is a proper charge against the net earnings, to be paid before dividends can be declared thereon.
8. The constitutional power to grant exemption, wholly or partially, and for fixed or indefinite periods, includes the power to exempt upon conditions or contingencies which are to happen in the future.
9. Legislative contracts should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail.
10. By the provision in the charter of the Mobile & Ohio Railroad Company that "no tax shall ever be laid on said road or its fixtures which shall reduce the dividends below eight per cent" an exemption from taxation was granted to the extent and for the purposes stated.

[No. 1004.]

Argued Jan. 26, 1894. Reargued April 24, 1894. Decided May 14, 1894.

IN ERROR to the Supreme Court of the State of Tennessee, to review a decree of that court, declaring the exemption clause of the charter of the Mobile & Ohio Railway Company void, and holding the statutes of the state under which taxes were sought to be collected against it valid and constitutional. *Reversed, and cause remanded for further proceedings.*

The facts are stated in the opinion.

Messrs. **E. J. Phelps**, *Frederick W. Whitridge* and *E. L. Russell* for the plaintiffs in error, on first argument.

Messrs. **E. J. Phelps, Frederick W. Whitridge** and *E. L. Russell* for plaintiff in error, on reargument:

The charter of the Mobile & Ohio Railroad Company constituted an explicit and valid contract between the state of Tennessee and that company.

Memphis & C. R. Co. v. *Gaines*, 97 U. S. 697 (24: 1091).

The contract between the state and the plaintiff in error cannot be avoided, on the grounds set forth in the decree of the supreme court of Tennessee.

Union Bank v. *State*, 9 Yerg. 491; *Tipton County* v. *Rogers Locomotive & Mach. Works*, 103 U. S. 530 (26: 343); *State* v. *Butler*, 13 Lea. 400; *State* v. *Butler*, 86 Tenn. 614; *Memphis* v. *Union & P. Bank*, 91 Tenn. 548; *Memphis* v. *Memphis City Bank*, 91 Tenn. 577; *Farrington* v. *Tennessee*, 95 U. S. 681 (24: 558); *Raleigh & G. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 269 (20: 570).

The question decided by the supreme court of Tennessee in the decree complained of was purely a Federal question. It was decided adversely to the Federal right, and the grounds upon which it was placed do not inhibit the jurisdiction of this court.

New Orleans Water Works Co. v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 (31: 607); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 (17: 173); *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 416 (14: 997); *Delmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20: 757); *Northwestern University* v. *People*, 99 U. S. 321 (25: 389); *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 (29: 770); *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279 (36: 972); *Huntington* v. *Attrill*, 146 U. S. 657 (36: 1123); *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *New Jersey* v. *Wilson*, 11

NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied, see note to Tucker v. Ferguson, 22: 805.

As to when the injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

U. S. 7 Cranch. 164 (3: 303); *Rowan* v. *Runnels*, 46 U. S. 5 How. 134 (12: 85); *Lehigh Water Co.* v. *Easton*, 121 U. S. 388 (30: 1059); *Hall* v. *De Cuir*, 95 U. S. 485 (24: 547); *Clark* v. *San Francisco*, 124 U. S. 639 (31: 553); *Murray* v. *Charleston*, 96 U. S. 432 (24: 760); *Smith* v. *Greenhow*, 109 U. S. 669 (27: 1080); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892).

Messrs. **G. W. Pickle, J. M. Troutt, M. M. Neil,** *Felix W. Moore, Jno. E. Wells, S. A. Champion, J. R. Deason, E. L. Bullock, A. W. Storall* and *Jas. M. Head*, for defendants in error on first argument and re argument:

The last clause of section 11 of the charter of the Mobile & Ohio Railroad Company constitute not an exemption, but a special and discriminative rule for the taxation of this company's property.

Wilmington & W. R. Co. v. *Alsbrook*, 146 U. S. 294 (36: 978).

The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance, unless the deliberate purpose of the state to that effect clearly appears.

Vicksburg, S. & P. R. Co. v. *Dennis*, 116 U. S. 665 (29: 770); *Yazoo & M. V. R. Co.* v. *Thomas*, 132 U. S. 185 (33: 306); *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 435 (14: 1005).

A special and discriminative rule of taxation is not valid under the constitution of 1834.

Memphis v. *Farrington*, 8 Baxt. 552; *Memphis & C. R. Co.* v. *Gaines*, 3 Tenn. Ch. 610; *Louisiana Cotton Mfg. Co.* v. *New Orleans*, 31 La. Ann. 440; *State* v. *Butler*, 13 Lea, 400.

These commutation cases may be treated, under the decisions of this court, as license or franchise taxes.

Society for Savings v. *Coite*, 73 U. S. 6 Wall. 594 (18: 897); *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025).

The last clause of section 11 of the charter of the Mobile & Ohio Railroad Company, providing that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below 8 per cent" is void for uncertainty.

This charter, as construed by this company, in effect delegates the taxing power to the company and enables it to determine for itself whether it will pay taxes. There is not in in this provision that certainty which is essential to the validity of charter exemptions.

This company has, during all the years for which taxes are claimed, earned sufficient surplus to render it liable for taxes.

Mr. Justice **Jackson** delivered the opinion of the court:

The Federal question presented by the writ of error in this case is whether state statutes, subjecting the property of a railroad corporation to taxation, impair the obligation of the contract contained in an exemption clause of the company's charter?

It arises in this way: The state of Tennessee and certain counties therein in February, 1891, **488**] filed their bill against the *Mobile & Ohio Railroad Company (hereafter styled the railroad company) and its mortgagee, the Farmers' Loan & Trust Company, to enforce the collection of state and county taxes, assessed upon the property, roadbed, and fixtures of the railroad company for the years 1885 to 1889 inclusive. The defense specially interposed and which raised the Federal question in the case, was that the revenue statutes of the state, enacted subsequent to the granting of the charter, and under which the taxes sought to be collected were levied, impaired the obligation of the contract contained in the railroad company's charter, and were therefore unconstitutional and void.

The railroad company was chartered by an act of the legislature of the state of Tennessee, approved January 28, 1848. The state in granting the charter reserved no right to amend or repeal the same; nor was there any provision either in the constitution or the general laws of the state—in existence at the time—which reserved to the state the right to alter, modify or repeal the charter. By section 11 of the act of incorporation it was provided: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Various grounds were alleged in the bill on which the effect of section 11 was sought to be avoided or to show that the railroad company had waived or forfeited the benefits of the exemption contained in the last clause thereof. These allegations need not, however, be noticed, as they were found and adjudged by the supreme court of Tennessee against the complainants, and in favor of the railroad company. The pleadings admitted and the proofs established that since the completion of the road to its original northern terminus on the Mississippi river, in April, 1861, the railroad company had neither earned nor declared any dividend, either on its whole *line or [**489**] upon any portion of its road laying in the state of Tennessee. It is also shown that its earnings for the years 1885 to 1889, inclusive, were insufficient to pay any dividend to its stockholders.

The period of twenty-five years from the completion of the road, referred to in the section, having expired on April 22, 1886, the supreme court of the state disallowed the taxes assessed and claimed for the years 1885 and 1886, on the ground that they were covered by the twenty five year exemption, but adjudged and decreed that the railroad company was liable to the respective complainants for the taxes of 1887, 1888, and 1889, in the following amounts: to the state of Tennessee, $24 117 73; to McNairy county, $16,865.52; to Madison county, $13,769 69; to Chester county, $4-210.25; to Obion county, $10,554.61; to Gibson county, $19,182.06; which sums were declared liens upon the property of the railroad company.

The grounds upon which its decree was based, and which are assigned for error, are as follows:

"And the court, construing said 11th section of said Tennessee charter, is further of

opinion, and doth so adjudge and decree, that the true intent and meaning of the said 11th section of the Tennessee charter of the Mobile & Ohio Railroad Company, passed January 28, 1848, is that on and after the 22d day of April, 1886, being twenty five years from the completion of said road, the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, all the property, franchises, etc., of the said Mobile & Ohio Railroad Company, became liable to taxation; and the court is further of opinion, and doth accordingly so adjudge and decree, that from and after said 22d day of April, 1886, all of said properties of every description of the said Mobile & Ohio Railroad Company—that is to say, its roadbed and fixtures and appurtenances, including workshops, warehouses, vehicles of transportation, and all of its property of every kind and description and franchises, become liable to taxation under the rule of equality and uniformity prescribed in article 2, section 28, of the 490 constitution of 1834 of the *state of Tennessee; and it further appearing to the court that the complainants have in their bill in this cause attacked the eight per cent clause in the said section (11) eleven of the said charter of the said Mobile & Ohio Railroad Company, passed by the legislature of Tennessee on January 28, 1848, which eight per cent clause reads as follows: 'And no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent,' and that they have charged in their said bill, among other things, that said eight per cent clause is in violation of the rule of equality and uniformity of taxation prescribed by said article 2, section 28, of said constitution of 1834, and the court being of opinion that said property became taxable as aforesaid on and after April 22, 1886, therefore the court doth adjudge and decree that the said eight per cent clause is in violation of said article 2, section 28, of said constitution of 1834, as aforesaid, and that the same is unconstitutional and void, which said article 2, section 28, of the said constitution of 1834 provides, among other things, 'that all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value;' and the court is also of opinion, and doth accordingly so adjudge and decree, that said eight per cent clause is likewise void because it is so vague, indefinite, and uncertain in its terms as to be non-enforceable in this, to wit, that it does not appear from said clause or anywhere in said charter upon what dividends were expected to be declared, there being no amount or limit of capital stock fixed in said charter, and no means for fixing the same being provided, and no directions being given or means provided as to how said dividends should be ascertained, with a view to taxation or otherwise, and the court is of opinion, and doth accordingly so adjudge and decree, that said eight per cent clause is arbitrary, insensate, and absurd, and is void and unenforceable, and furnishes no obstable whatever to the taxation of said properties.

*"It is therefore adjudged and decreed 491 by the court that the road of the said the Mobile & Ohio Railroad Company, together with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, and all its properties and franchises, are subject and liable to taxation for state and county purposes in said counties of Obion, Gibson, Madison, Chester, and McNairy (counties in said state of Tennessee) and have so been liable since the 22d day of April, 1886, according to and by the several general statutes of assessment and taxation in force in the state of Tennessee during the years 1887, 1888, and 1889, and forever thereafter, under the equal and uniform laws of the state of Tennessee; and it is further adjudged and decreed by the court that the acts of the general assembly of the state of Tennessee, as set forth in the pleadings, to wit, the acts of 1875, chap. 78, p. 103; acts 1877, chap. 19, p. 31; acts 1881, chap. 104 p. 133; acts of 1882 (extra session) chap. 16, all of which are set out in Milliken & Vertrees' compilation of the acts of the legislature of Tennessee, and known as 'Milliken & Vertrees' Code of Tennessee,' chapter 5, pages 140, 141, 142, 143, 144, 145, being section 669 to section 708, inclusive, and the general revenue laws of the state covering the years 1887 to 1889, inclusive, being acts of 1885, chap. 1, p. 1, and acts of 1887, chaps. 1 and 2, and acts of 1889, chaps. 96 and 130, under and by which statutes the complainants have caused to be assessed for taxes the property of the defendant, the Mobile & Ohio Railroad Company, and are seeking to collect and force the payment of the taxes so assessed, are not in violation of section 10, article 1, of the Constitution of the United States of America, which provides, among other things, 'that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility,' but that said acts are valid and constitutional, and said property of said the Mobile & Ohio Railroad Company are under said acts liable for taxes from and including the year 1887, and that the provision of the 11th section of the Tennessee charter of the Mobile & Ohio Railroad Company, which provides that 'no tax shall ever be laid on said road or its fixtures which *shall reduce the dividends below 492 eight per cent,' does not prevent the assessment and collection of said taxes under said statutes enacted for assessing, collecting, and enforcing payment of taxes on said railroad property, for that the court is of opinion and doth adjudge and decree that said eight per cent clause just quoted above is invalid, and that the provision set forth therein that 'no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent' is null and void and doth not, therefore, interfere with or prevent the assessment and collection of taxes against said road under the said several revenue acts of the state of Tennessee, and that said several revenue acts are valid and constitutional and not in violation of said article I, section 10, of the Constitution of the United States of America, for that the same as applies to the taxes of 1887,

1888, and 1889, and future taxes, do not violate or impair the obligation of any contract with the Mobile & Ohio Railroad Company, the said eight per cent clause being null and void, all of which is accordingly so adjudged and decreed by the court."

It is contended by counsel for defendants in error that this court is without jurisdiction to review the judgment of the supreme court of Tennessee, because it was based, or proceeded, upon the ground that there was no contract in existence between the railroad company and the state to be impaired, and that the supposed contract was in violation of the state constitution of 1834, and hence not within the power of the legislature to make. In support of this proposition there are cited *Mississippi & M. R. Co.* v. *McClure*, 77 U. S. 10 Wall. 515 [19:998]; *Boyd* v. *Alabama*, 94 U. S. 645 [24:302]; *Yazoo & M. V. R. Co.* v. *Thomas*, 132 U. S. 174 [33:302]; and *New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 79 [35:943].

These decisions need not be specially reviewed, for they clearly do not apply to the case under consideration. It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which 493] this court will *determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation. A brief reference to some of the authorities is sufficient to show this:

In *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black. 436, 443 [17:173], it was said by this court: Its "(the Supreme Court) rule of interpretation has invariably been that the construction given by the courts of the state to state legislation and to state constitutions have been conclusive upon this court with a *single exception*, and that is when it has been called upon to interpret the contracts of states, 'though they had been made in the forms of law,' or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one within the meaning of that clause of the Constitution of the United States which inhibits the states from passing laws impairing the obligation of contracts. Of what use would the appellate power be to a litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the supreme court of a state whether or not the phraseology of an instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by a supreme court of a state?"

In *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18, 38 [31:607,614], it was said by *Mr. Justice* Gray, speaking for the court: "(1.) When the state court decides against a right claimed under a contract, and there was no law subsequent *to the [494 contract, this court clearly has no jurisdiction. (2.) When the existence and construction of a contract are undisputed, and the state court upholds a subsequent law on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. (3.) When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the right affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may, on that ground, affirm the judgment. (4.) So, when the state court upholds the subsequent law on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld."

In *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 179, 293 [36:972,978], it was said: "The jurisdiction of this court is questioned upon the ground that the decision of the supreme court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question. In arriving at its conclusion, however, the state court gave effect to the revenue law of 1891, and held than the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

Also, in *Huntington* v. *Attrill*, 146 U. S. 657, 684 [36:1123, 1133], the court said: "The case in this regard is analogous to one arising under the clause of the Constitution which forbids a state to pass any law impairing the obligations of contracts, in which if the highest court of the state decide nothing but the original construction and obligation of a contract, this court has no jurisdiction to review the decision, but if the *state court gives [495 effect to a subsequent law which is impugned as impairing the obligations of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

The same general proposition is clearly laid down in the following cases: *East Hartford* v. *Hartford Bridge Co.* 51 U. S. 10 How. 531 [13: 526]; *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 416, 431 [14: 997, 1003]; *Proprietors*

of Passaic & H. River Bridges v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 116, 144 [17:571, 576]; *De'mas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 [20:757]; *Northwestern University* v. *People*, 99 U. S. 321 [25:387]; *Louisvil'e & N. R. Co.* v. *Palmes*, 109 U. S. 244. 256 [27: 922, 926]; *Louisville Gas Co.* v. *Citizens Gas Light Co.* 115 U.S. 683. 697 [29:510, 515]; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665 [29:770]; *Yazoo & M. V. R. Co.* v. *Thomas*, 132 U. S. 174 [33: 302] and in *Bryan* v. *Board of Education*, *ante*, p. 297, it is said: "So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment independently of any adjudication" by the state court.

The rule announced in the sedecisions leaves no room to doubt the jurisdiction of this court in the present case. Aside from the certificate of the acting chief justice of the state supreme court that the constitutionality of the statutes, under which the taxes sought to be enforced were levied, was drawn in question by the plaintiffs in error, and was decided by that court in favor of the validity and constitutionality of such acts, the pleadings in the case, as well as the decree complained of, establish beyond doubt that the question presented was one clearly Federal in its character such as this court has a right to review. The grounds upon which the supreme court of the state held that the contract, claimed by the railroad company under the 11th section of its charter, was invalid, in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of the alleged impairment of the obligations thereof

It appears from the decree of the supreme [496] court of the *state that the exemption clause relied on by the plaintiffs in error was held to be invalid on two grounds: First, that it was in conflict with section 28, article 2 for the state constitution of 1834; and, second, it was invalid and unenforceable for vagueness and uncertainty, because it did not appear from the clause, or otherwise in the charter, upon what the dividends were to be declared, inasmuch as there was no amount or limit of capital stock fixed in the charter, and no means provided for either fixing the same or for ascertaining the dividends thereon.

This last ground on which the court rested its judgment is manifestly unsound, for the clause in question, that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent," is clearly not so incapable of any reasonable construction as to be void. On the contrary, its terms are plain and unambiguous. The only matter involving construction or interpretation is the meaning to be attached to the term "dividend." It admits of no question that the word "dividend" mentioned therein has reference to dividends on the capital stock of the company held and owned by its shareholders. The term "dividend" in its technical as well as in its ordinary acceptation means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders. *Lockhart* v. *Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; Boone, Corp. § 125.

In the present case it appears that the maximum capital stock authorized by the charter was $10,000,000, and that the stock actually issued by the company, at various times during the construction of the road, and outstanding, amounted to the sum of $5,320,600, which, together with the company's bonded indebtedness, fairly represented the cost of building and completing the road. The amount of stock being fixed, it was a matter of mere calculation as to when the profits from net earnings would be sufficient to meet the designated dividend.

Again, dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or *credit- [497] ors from making a distribution in dividends of its capital. Taylor, Priv. Corp. § 565, and authorities cited.

The term "profits," out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans. *Corry* v. *Londonderry & E. R. Co.* 29 Beav. 263.

The net earnings of corporations out of which profits are distributable in dividends are thus defined in *St. John* v. *Erie R. Co.* 10 Blatchf. 279: "Net earnings are properly the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the net earnings." This case was affirmed by this court, 89 U. S. 22 Wall. 136 [22:743].

In *New York, L. E. & W. R. Co.* v. *Nickals*, 119 U. S. 296, 308 [30:363, 368], the same general rule that shareholders are entitled only to dividends out of the net earnings derived from the operations of the company is reaffirmed.

It must be assumed that the legislature of Tennessee used the term "dividends," in the exemption clause under consideration, in the general sense indicated, and had reference to that portion of the net earnings of the company which legitimately constituted profits and could be rightfully apportioned or distributed among shareholders. There is no difficulty in ascertaining the amount of such profits in any year, and the stock actually issued being fixed it is hard to understand how it could be held that the exemption clause was void and unenforceable for want of certainty. The law regards that as certain which is capable of being ascertained and definitely fixed. The state cannot complain that no method has been provided for ascertaining the amount of profits applicable to the payment of the designated dividends. That is a matter purely of administration, which does not touch in any way the validity of the contract embodied in the exemption clause.

*It is stated on behalf of the defend- [498] ants in error that the company earned for the years in question profits more than sufficient to

pay eight per cent dividends, if the interest on its bonded indebtedness was not chargeable against the earnings. This point was not passed upon by the court below, and, if the fact be as stated, it could not avail the defendants in error, for the payment of the annually accruing interest on the bonded debt of the railroad company was a proper charge against the net earnings, to be paid before dividends could be declared thereon. *Mr. Justice* Bradley, in *Union Pac. R. Co.* v. *United States*, 99 U. S. 422 [25:283], declared that interest on the bonded indebtedness of the company, like other current expenses, was payable out of the net earnings before dividends could be distributed to the stockholders.

In *Belfast & M. L. R Co.* v. *Belfast*, 77 Me. 445, it was directly adjudged that the interest on the bonded debt is payable out of the net earnings before dividends can properly be declared.

In *Corry* v. *Londonderry & E. R. Co.* 29 Beav. 263, 272, 274, Sir John Romilly, Master of the Rolls, in discussing this subject, while admitting that the funded indebtedness of a corporation was not properly payable out of profits before there could be a division thereof, held that any and all debts which had been incurred, and which were due from the company and ought to have been paid, and would have been paid at the time had the corporation possessed the necessary funds for that purpose, constituted proper deductions from the earnings before the profits properly distributable could be ascertained.

The further claim is made in the brief, although not insisted upon in argument, that if the earnings of the company were insufficient upon which to declare a dividend, the exemption clause had no operation, because there would be no reductions of dividends. In other words, that the property of the company was taxable during all the years that it could not declare any dividend. This suggestion is wanting in plausibility and needs no further consideration, for if the exemption clause **499**] has any meaning, purpose, or *validity whatever this theory would utterly destroy it, as the company would be taxable when it made no profits, and get the benefit of the exemption only when profits to a certain amount were realized.

We come next to the consideration of the other ground on which the supreme court based its decree. In reaching its conclusion that the eight per cent dividend clause of the company's charter violated that portion of section 28, article 2, of the state constitution of 1834, which provides: "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value," the supreme court of Tennessee gave no effect to that clause of the charter as an exemption, either fixed, conditional, or contingent, but proceeded upon the theory that the property of the railroad company became absolutely liable to taxation on and after April 22, 1886, at the expiration of the twenty-five years from the completion of the road, without regard to the state of the company's earnings, or its capacity to pay dividends in any amount. The construction thus placed upon section 11 of the charter practically assumed the main question of controversy involved in the case.

It is conceded by counsel for defendants in error, as is well settled by the decisions of the supreme court of Tennessee and of this court, that the legislature of Tennessee had the power and authority, under the state constitution of 1834, to grant to corporations, created by it, exemption from taxation; that such exemption might confer either total or partial immunity from taxation, and extend for any length of time the legislature might deem proper. Amongst the authorities establishing this general proposition are the following: *Knoxville & O. R. Co.* v. *Hicks*, 9 Baxt. 445; *State* v. *Butler*, 13 Lea, 400, 86 Tenn. 614; *University of the South* v. *Skidmore*, 87 Tenn. 156; *Memphis* v. *Union & P. Bank*, 91 Tenn. 546; **Memphis* v. *Memphis City Bank*, 91 [**500** Tenn. 577; *Farrington* v. *Tennessee*, 95 U. S. 679 [24:558]; *Tipton County* v. *Rogers Locomotive & Mach. Works*, 103 U. S. 523 [26: 340]; *Bank of Commerce* v. *Tennessee*, 104 U. S. 493 [26:810].

It is also established by the decisions of Tennessee, as counsel for defendants in error properly admit, that there was no imperative constitutional requirement upon the legislature to tax all property. The first paragraph of section 28, article 2, of the constitution of 1834 provided that "all lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, slaves between the ages of twelve and fifty years, and such other property as the legislature may from time to time deem expedient, shall be taxable." This provision, as held in *Knoxville & O. R. Co.* v. *Hicks*, 9 Baxt. 448, 449, did not make it the duty of the legislature to tax all property, but left it discretionary with that body to tax, or to omit to tax, that is to exempt, as it might deem expedient. This provision meant only that when a tax was imposed it must be upon the value of the property, ascertained by some uniform rule.

It being settled that there was no requirement of the constitution that all property should be taxed, and that the legislature of Tennessee, under the constitution of 1834, had the power to grant exemption from taxation in charters of incorporations, and that such charters, after acceptance, became binding and irrevocable contracts, the real controversy in the present case, while extremely important in its consequences to both the state and the railroad company, lies within a very narrow compass, and turns upon the proper construction of the last clause of section 11 of the charter, which provides that "no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent."

Does this clause constitute an immunity, fixed, special, conditional, or contingent, from taxation?

It is undoubtedly a part of the contract of exemption from taxation contained in the eleventh section of the charter, and as such the corporation is entitled to the benefit thereof. The meaning and intent of the provision was

clearly a stipulation on the part of the legislature to forego the exertion of its taxing power to the extent of allowing the corporation to pay 501]*its shareholders eight per cent dividends from the net earnings of the company. The manifest object of the clause was to invite and encourage the investment of private capital in the enterprise of building the road. By the previous clauses of the section the capital stock was exempt from taxation forever, and the road, with all its fixtures and franchises, was exempt for the period of twenty-five years from its completion. These exemptions were primarily for the benefit of the corporation. The shares of stock were subject to taxation against the owners or holders thereof, and this last clause was clearly intended for their benefit to the extent of securing, as far as an immunity from taxation would do so, any reduction of dividends on their stock below eight per cent per annum.

The constitutional power to grant exemption, wholly or partially, and for fixed or indefinite periods, necessarily includes the power to exempt upon conditions or contingencies which are to happen in the future. To hold that an exemption is good for a term of years, and is not good if made to depend upon a plain contingency by which it may take effect in some years and not in others, is, as counsel for the plaintiffs in error justly insist, a distinction neither sound in principle nor supported by authority.

The intent and purpose of the clause in question are clear, not only from its language, but from the history and circumstances preceding and surrounding the grant of the charter. The state constitution of 1834 declared that a well regulated system of internal improvement should be encouraged. The incorporating act recited that "it is deemed a matter of vital importance to this state that a direct communication by railroad to the Gulf of Mexico be established." The state was practically without railroad facilities and needed a line of transportation extending through the interior of its western division, and connecting it with the Gulf of Mexico on the south and the Mississippi river and its tributaries on the north. Its special interest in the road in question was manifested by the third section of the charter, which, "required the company to open books for the subscription of shares in the capital stock of the company in the state of Tennessee, 502] *so as to afford citizens of the state an opportunity to take stock to the amount of one fourth of the capital of the company;" and to induce its own citizens, as well as outside capitalists, to invest and risk their money in the enterprise, more or less hazardous, was the manifest object of the exemption contained in section 11 of the railroad company's charter, the latter clause of which was especially designed to secure or to give an assurance of a reasonable return to the parties taking the stock of the company by postponing the taxing power of the state to the payment of the designated dividends.

In *Preston* v. *Brawder*, 14 U. S. 1 Wheat. 120 [4:51], it was said that in the construction of the statutory laws of a state it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason, as well as the meaning, of many of the provisions in them. The same general rule is stated in *United States* v. *Union Pac. R. Co.* 91 U. S. 72, 80, 81 [23:224,229], and in *Platt* v. *Union Pac. R. Co.* 99 U. S. 48, 64 [25:424,429], where it was applied in construing certain sections of the Act of Congress, approved July 1, 1862, incorporating and granting lands to the Union Pacific Railroad Company. So in *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618 [28:1109].

Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail. In *Platt* v. *Union Pac. R. Co.* *Mr. Justice* Strong expresses this proposition as follows: "There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. . . . But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed; look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances."

In the present case we are clearly of opinion both from the surrounding circumstances and the language of the charter *contract, [503 that an exemption from taxation was intended to be granted by the clause under consideration, to the extent and for the purposes stated.

Counsel for the state contend that this clause, although it fixes no valuation or rate of taxation, is yet a special and discriminating rule for the taxation of the company's property, and it is sought by this designation to escape the legal effect and operation of the provision; but the difficulty in the way of this contention is that the power of exemption would embrace a charter contract which made a special and discriminating rate of taxation. The state, under the power of absolute exemption, could include in a charter contract a provision that the property of the corporation should be only liable for one half the current rate of taxation levied by the state during any year, or it could constitutionally provide by the charter that the corporate porperty should be assessed at only one half of its value. The legislative power to make such terms, especially in charters of corporations, cannot be doubted. They would be clearly included in the general power to grant absolute exemptions.

Again, the distinction sought to be made between an exemption or immunity, and a special and discriminating rule of taxation, as applied to charters, is wholly unsupported by the authorities. On the contrary, the decisions of the supreme court of Tennessee and of this court have ignored any such distinction, and have uniformly given effect to charter provisions which made special and discriminating rates of taxation.

Thus in *Raleigh & G. R. Co.* v. *Reid*, 80 U. S. 13 Wall. 269 [20:570], the property of the company was exempted for a term of years, after the expiration of which the legislature was at liberty to tax individual shares of the stockholders whenever their annual

profit exceeded eight per cent, provided that the tax did not exceed twenty-five cents per share per annum. The pleadings in the case showed that the annual profits on the shares never reached eight per cent, and it was held that they were not subject to any tax.

In *Farrington* v. *Tennessee*, 95 U. S. 681 [24:558] the charter of the company contained this **504**] provision: "That said *company shall pay to the state an annual tax of one half of one per cent on each share of the capital stock subscribed which shall be in lieu of all other taxes."

In *Knoxville & O. R. Co.* v. *Hicks*, 9 Baxt. 445, the charter granted in 1850 contained the following exemption: "Sec. 33. Be it enacted, that the capital stock of the said company, the dividends thereon, and the road and fixtures, depots, workshops, warehouses, and vehicles of transportation belonging to the said company, shall be forever exempt from taxation; and it shall not be lawful for the state or any corporate or municipal police or other authority thereof, or of any town, city, or district thereof, to impose any tax upon such stock or dividends, property or estate: Provided, the stock or dividends, when the said dividends shall exceed the legal interest of the state, shall be subject to taxation by the state in common with and at the same rate as money and interest, but no tax shall be imposed so as to reduce the part of the dividends to be received by the stockholders below the legal interest of the state."

In *State* v. *Butler*, 13 Lea, 400, the provision was that "the said company shall pay an annual tax of one half of one per cent on each share of capital stock subscribed, which shall be in lieu of all other taxes." In *State* v. *Butler*, 86 Tenn. 617, there was the same exemption as in the former case.

So in *Memphis* v. *Union & P. Bank*, 91 Tenn. 548, the exemption clause was "that said company should pay to the state an annual tax of one half of one per cent on each share of stock subscribed, which shall be in lieu of all other taxes;" and in *Memphis* v. *Memphis City Bank*, 91 Tenn. 577, decided in 1892, the exemption in the charter was as follows: "Be it further enacted, there shall be levied a state tax of one half of one per cent upon the amount of the capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, and which shall be in lieu of all other taxes and assessments."

In each of the foregoing cases there was a special and discriminating rate of taxation fixed **505**] by the respective charters. *That fact, however, did not in any way affect the result or impair the legislative power to grant the exemption. In the last of the above cases the exemption clause provides in express terms that there should be *levied* a state tax of a certain per cent upon the capital stock paid in, which was to be collected in the same way and at the same time as other taxes are by law collected. This was a special and discriminating rule of taxation for this company; yet it was held by the supreme court of Tennessee to be "a contract whose obligation may not be violated by subsequent revenue laws or otherwise."

These cases meet the distinction which is attempted to be made between an exemption and a special and discriminating rule of taxation. There is no foundation for the position that they were exemptions or immunities from taxation, while the provision in the present case is something different, which counsel for defendants in error choose to designate as a special or discriminating rule of taxation. Names and designations do not change the character of the provision in question.

The charter granted the Mobile & Ohio Railroad Company in the state of Mississippi, almost concurrently with its Tennessee and Alabama charters, extended the period of exemption until the company was paying an interest of eight per cent per annum on its cost. The attempt to tax it before it had paid any interest on its cost was held to be invalid, the supreme court saying in *Mobile & O. R. Co.* v. *Moseley*, 52 Miss. 129: "We think the language of the section susceptible of no other construction than that the corporation is to be exempted from all taxation until by its earnings it shall pay an annual interest of eight per cent upon that portion of its road sought to be taxed, after which period its road shall be subject to taxation at the rate per cent that lands are taxed by the general revenue laws of the state then in force. If the language employed seems awkward, it is not for us, by verbal refinement, to strip it of its manifest meaning and intention. . . . The claim of exemption can only be successfully met in this case, so far as the point now under *consideration is con-[**506** cerned, by answer and proof showing that, in point of fact, the earnings of that portion of the road located in Mississippi have been sufficient to pay an annual interest of eight per cent upon the capital expended in the construction thereof."

We do not deem it necessary to consider the further point urged by counsel for defendants in error that the exemption clause in question is in conflict with the 14th Amendment of the Constitution of the United States. That amendment conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty, and property that previously existed under all state constitutions. The general object and purpose of the amendment is set out in *Butchers' Gap R. Co.* v. *Pennsylvania*, 134 U. S. 257 [33:895] and *Home Ins. Co.* v. *New York*, 134 U. S. 607 [33:1052], and need not be again gone over.

In dealing with an exemption from taxation, like that under consideration, good faith is required on the part of both parties to the contract. While the state may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation. It is not shown that the railroad company has made any improper or fictitious increase, either of its capital stock or of its bonded indebtedness. On the contrary, the proof establishes that the par value of the 53,206 shares of capital stock outstanding was realized therefor, dollar for dollar, and this amount of capital stock, together with the existing bonded indebtedness of the company, represents the *cost* of constructing and equipping the railroad. The legislature, in granting the exemption in question, doubtless had in

contemplation the cost of the enterprise, and may have intended the immunity from taxation to be estimated on that basis, as in the Mississippi charter.

But however this may be, in sustaining the validity of the exemption in the present case we do not mean to be understood as holding that the railroad company has the right in its discretion, hereafter, to issue additional capital stock, or to increase its bonded indebtedness, **507**] even for legitimate *purposes, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of the charter.

Our conclusion upon the whole case, which has received careful consideration, is that the decree of the supreme court of the state declaring the exemption clause of the company's charter void, and holding the statutes of the state, under which the taxes sought to be collected were levied, to be valid and constitutional, was erroneous.

Judgment reversed and cause remanded to the supreme court of the state of Tennessee for further proceedings not inconsistent with this opinion.

Mr. Chief Justice **Fuller,** with whom concurred *Mr. Justice* **Gray,** *Mr. Justice* **Brewer,** and *Mr. Justice* **Shiras,** dissenting:

In my opinion, the judgment of the supreme court of Tennessee should be affirmed. It is well settled that the taxing power of a state cannot properly be held to have been relinquished in any instance, unless the deliberate purpose of the state to that effect clearly appears. Exemption therefrom is in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant, construed *strictissimi juris.* An exemption is claimed in this case under the eleventh section of the company's charter from the state of Tennessee, which reads: "That the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including shops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty-five years from the completion of the road, and no tax shall ever be laid on said road or its fixtures which will reduce the dividends below eight per cent." The reasonable meaning of this section seems to me plainly to be that the capital stock is exempted forever, and the road, its fixtures, etc., for twenty five years from the completion of the road, **508**] after which the exemption *has spent its force, and the road, fixtures, etc., become taxable, but the taxation must be so laid as not to reduce the dividends below eight per cent. The closing words prescribe a rule of taxation, and do not operate to continue an exemption which has expired by the express terms of the grant. What is forbidden is the laying of a tax in such manner as will produce a particular result. If this be not clear, as I think it is, yet any other construction is certainly not so, and doubt is fatal to the claim.

If the exemption exists as insisted, then the capital stock is free from taxation forever, and the road and its property is likewise free until, after deducting from its earnings all expenses, fixed charges (which include interest on all its bonded debt) and eight per cent upon its capital stock, there remains a surplus sufficient to pay all the taxes on its property according to the current rate. By the company's Alabama charter it was provided that the capital stock should not exceed ten millions; the Mississippi act set forth that act in full; the Tennessee act provided that the citizens of that state might subscribe to the amount of one fourth of the capital. So far as the 11th section is concerned, the amount of capital stock at any particular time, or what the taxes on the company's property in any particular year might be, is left undefined. The view contended for practically leaves it to the company to say when it may be taxed and when not; and while a state must be held to the bargains it makes, however improvident, it ought not to be held to have made such a contract as it is argued this is, unless its terms are so plain as not to be open to construction.

The difference between this provision and that in the company's charter in Mississippi, referring to the same subject, is significant. The latter reads: "That whenever any portion of said railroad shall be completed through this state, and is paying an interest of eight per cent per annum on its cost, *and not before,* such portion may be taxed the same percentage, and no more, upon the capital expended in the construction thereof, as lands in this state shall be taxed." That *difference [**509**] explains why the supreme courts of Mississippi and Tennessee arrived at different conclusions.

In a certain line of cases, absolute exemption from taxation has been recognized as secured in consideration of certain amounts to be paid, sometimes called taxes, although really merely the consideration paid as under contract; but the principle of computation has no application here.

I concur with the supreme court of Tennessee in regarding the last part of the eleventh section as prescribing a special and discriminative rule of taxation; and as that court held it void as such, because in conflict with the equality and uniformity clause of the constitution of 1834, that conclusion should be accepted.

I am constrained, therefore, to dissent from the opinion and judgment just announced, and am authorized to say that *Mr. Justice* **Gray,** *Mr. Justice* **Brewer,** and *Mr. Justice* **Shiras** concur in this dissent.

THE SLIDE & SPUR GOLD MINES (Limited) *Appt.*,
v.
ELLEN R. SEYMOUR ET AL.

(See S. C. Reporter's ed. 509-523.)

Vendor's lien—ground of—intent to abandon—how defeated—when not waived.

1. The courts of the United States enforce grantor's and vendor's liens if in harmony with the jurisprudence of the state in which the action is brought.
2. The principle upon which a vendor's lien rests is that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration.
3. An intent to abandon a vendor's lien is not to be presumed; the evidence of an intent to abandon or waive it should be clear and satisfactory.
4. A vendor's lien may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security, but such intention cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance.
5. The clause in an agreement for the sale of mining property, that the agent of the vendor shall retain control of the property until the purchase money is all paid, makes the property itself security for the price and negatives the idea that the vendor relied for such complete payment solely upon certain shares of the stock of the vendee company, which were agreed to be pledged as security for such payment.

[No. 284.]

Argued March 15, 1894. Decided May 14, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of Colorado, in favor of the plaintiffs Ellen R. Seymour and Wm. G. Pell, against the Slide & Spur Gold Mines (Limited) finding the amount of unpaid purchase money for certain mining property sold by plaintiffs to defendant to be $250,800, and decreeing it to be a lien upon the property, and ordering a foreclosure and sale. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

The facts in this case are as follows: In and prior to the month of October, 1886, the plaintiffs below, Ellen R. Seymour and William G. Pell, were the owners of certain mining 510] *property in the Gold Hill mining district, Boulder county, Colorado, known as the "Slide & Spur lodes." There had been some negotiations with one John Haldeman, with the view to a sale of this property, and on October 19, 1886, the plaintiffs, by their agents, made the following proposition to him:

"Dear Sir: I agree that in case you cannot raise the required sum within the specified time in your contract, dated about the 9th day of October, between W. F. Bruff, acting under our authority, and yourself, to change the conditions as follows, viz: To sell you the Slide mine for $750,000; 25 (M) thousand dollars to be paid one week after the receipt in London of Foster's report, this to be the first payment on the property, the balance of the purchase price, $725,000, to be paid within two months from the date of the payment of $25 M; one ½ in cash and one half in fully paid common shares of the company to be formed. In case the second and last payment is not made when due, the agreement cancels itself, and the $25 M is forfeited. No ore to be taken from the mine after the first payment. I further agree to give you a call at par for two months from date of issue upon the shares received as part payment for the property.

"(Signed) J. F. Seymour.
"A. B. Davis."

Thereafter said Haldeman, in accordance with the understanding at the time of giving this option, went to England and secured the organization, under the laws of Great Britain, of the defendant corporation. The purpose for which this corporation was organized was, as expressly stated, to purchase and develop the "Slide & Spur mines," though the articles of incorporation gave authority for the purchase and development of other properties. So far, however, as appears from the testimony in this case it was simply an organization on paper, with a view of acquiring title to and subsequently working these mines.

The provision in its charter as to capital stock was as follows:

*"The capital of the company is 400,000[511 pounds, divided into four hundred thousand shares of 1 pound each, the whole or any portion of which and any future capital of the company may be issued as full or partly paid shares and at a discount or premium and with the benefit of any preference or priority in the distribution of assets or payment of dividends, and with power also to increase or decrease such capital stock and to issue any part or parts of the increased or decreased capital as consolidated stock or any shares at such times, in such manner, and on such terms as the company shall determine."

The organization of this corporation was completed on the 24th of May, 1887. On August 18, 1887, Haldeman having theretofore made partial payments to the plaintiffs, an agreement was entered into between himself and J. Fenton Seymour, as their agent, which agreement was as follows:

"Memorandum of agreement made this 18th day of August, 1887, between John Haldeman, of 38 Old Jewry, in the city of London, and J. Fenton Seymour, of Denver, Colorado, in the United States of America, acting for himself and partners, the owners of the Slide & Spur gold mines, situate in Boulder county, Colorado, United States of America:

"The said John Haldeman agrees to pay forthwith the sum of ten thousand pounds sterling in addition to twelve thousand five hundred pounds already paid on account of the purchase money of the said mines such sum of ten thousand pounds to be paid through Messrs. Wells, Fargo & Co. (who now hold the deeds of the said property in escrow) and to be held by them and paid over to the said J. Fenton Seymour upon the titles of the said mines be-

NOTE.—*As to vendor's lien when exists: waiver and enforcement*, see note to Fisher v. Shropshire, 37:110.

As to when vendee is estopped from disputing the title of his vendors, see note to Watkins v. Holman, 10: 873.

ing registered in the name of the 'Slide & Spur gold mines,' limited, free from all charges and incumbrances: and the said J. Fenton Seymour hereby undertakes and agrees to register the titles as above upon the said ten thousand pounds being deposited with Messrs. Wells, Fargo & Co.

"The said J. Fenton Seymour hereby undertakes and agrees to have the 'Slide mine' worked to its full capacity, and after the due [512] and legal registration of the title to *the said company he further agrees that the returns from the said mine shall be cabled weekly to the said company in the form of cables sent herewith, it being understood and agreed that the money value of the first weekly returns so cabled shall not be less than the sum of two hundred pounds sterling, and that each successive weekly return shall show a moderate increase over that sum.

"The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed. The said John Haldeman agrees that three hundred and seventy-five thousand shares of one pound each in the above company shall be transferred to Mr. Clarence Preston Elder as trustee and deposited with Messrs. Wells, Fargo & Co. in London, to the intent that the said shares shall be held as security for the due performance of the following conditions, viz:

"1st. The payment of ten thousand pounds, in addition to the above mentioned twenty two thousand (J. F. S.) five hundred pounds, within three days (J. F. S.) after the receipt of the third successive weekly return from the mine, as hereinbefore mentioned; and,

"2nd. The balance of forty-five thousand pounds at the expiration of ten days after the receipt of eight successive weekly returns of the nature and value above specified. Upon the completion of the above mentioned payments the said J. Fenton Seymour hereby undertakes and agrees to release the above mentioned three hundred and seventy-five thousand shares, less seventy-seven thousand five hundred, to which he is entitled, and also less the number of shares sold with the consent and under the supervision of the aforesaid Clarence Preston Elder, acting for the said J. Fenton Seymour.

"In case the weekly returns cabled from the mine shall from any cause fall below the sum of two hundred pounds sterling per week, then, in that case, such returns shall not count, but the time for paying the second ten thousand pounds and the balance of forty-five thousand pounds [513] shall be *extended *pro rata;* but should the successive weekly returns amount to two hundred pounds sterling per week (J. F. S.), with a moderate increase weekly, as hereinbefore mentioned, and the said John Haldeman shall make default in the payment of the balance of forty-five thousand pounds, then, in that case, the said J. Fenton Seymour shall have the right to forfeit the amounts already paid and to claim the above mentioned three hundred and seventy-five thousand shares.

"As witness the hands of the said parties the day and date first above written.

"(Signed) J. Fenton Seymour.
"Jno. Haldeman."

Subsequently there were some further payments. On October 5, 1888, the larger portion of the purchase money still remaining unpaid, the plaintiffs, through their agent, J. Fenton Seymour, made to the company this proposition:

"1st. On payment of 3500 pounds to Wells, Fargo & Co., we agree to start the mine at work in name of Co., said sum to cr. of Col. Seymour.

"2d. Company to send cashier and engineer (if they think fit) & Col. Seymour to be resident manager and director for the period of one year.

"3d. All proceeds to be transmitted to company bankers.

"4th. Mr. Elder to deliver 75,000 shares of the Scotch subscribers and 45,000 to Mr. Rust on payment of said sum.

"5th. The balance of shares to remain in Mr. Elder's hands, as trustee, until a final settlement can be made, inside of three months after acceptance of this proposition.

"6th. Col. Wilson, or whoever pays the £3500, to receive 15,000 shares from Mr. Elder on the final settlement (not later than three months), and meantime receive a legal obligation from Mr. Elder as trustee.

"7th. On resignation of Mr. Elder as a director, Mr. Allen to be elected.

"8th. £3500 to be paid so soon as the company can register the transfer of the 75,000 shares.

"(Signed) J. F. Seymour."

*This proposition was accepted and the [514] thirty-five hundred pounds mentioned in the first clause were paid on December 15, 1888. In pursuance of the agreement of August 18, 1887, the plaintiffs delivered to the defendant a deed for the property, which deed was duly recorded in the office of the recorder of Boulder county on September 16, 1887. A large portion of the purchase money still remaining unpaid, on February 16, 1889, the plaintiffs filed their bill in the Circuit Court of the United States for the District of Colorado, in which bill they prayed for an accounting, that the amount of purchase money found due be adjudged a lien upon the property, and that such lien be foreclosed and a sale ordered.

The defendants answered, proofs were taken, and on July 8, 1890, a decree was entered finding the amount of the unpaid purchase money to be $250,800, decreeing it a lien upon the property, and ordering a foreclosure and sale. From such decree the defendant has appealed to this court.

Mr. **Harvey Riddell,** for appellant:

The appellees waived or abandoned any right to a vendor's lien.

Gilman v. *Brown*, 1 Mason, 191.

Where lands were conveyed to enable the purchaser to raise money thereon by mortgage for the purpose of paying the purchase money, the lien is abandoned.

Clower v. *Rawlings*, 9 Smedes & M. 122, 47 Am. Dec. 108; *Strong* v. *Strong*, 126 Ill. 301;

Springfield & M. R. Co. v. *Stewart*, 51 Ark. 285.

The lien may be waived, or relinquished by express agreement, or by conduct plainly inconsistent with an intention to retain it

Coos Bay Wagon Co. v. *Crocker*, 4 Fed. Rep. 577; *Fisk* v. *Potter*, 2 Abb. App. Dec. 138; *McGonigal* v. *Plummer*, 30 Md. 422; *Cordova* v. *Hood*, 84 U. S. 17 Wall. 1 (21: 587); *Fisher* v. *Shropshire*, 147 U. S. 133 (37: 109); *Hubbard* v. *Buck*, 89 Ala. 440.

The contract of sale for these mines was made in England, but the law of that country on this subject seems to be the same as that of Colorado.

Their courts have settled the law there, upon principles and circumstances peculiarly applicable to this case.

Re Brentwood Brick & Coal Co. L. R. 4 Ch. Div. 562; *Kettlewell* v. *Watson*, L. R. 21 Ch. Div. 703.

Taking collateral security, unless the merely personal obligation of the vendee, which is construed as a means of payment, is a waiver of a vendor's lien.

Brown v. *Gilman*, 17 U. S. 4 Wheat. 255 (4: 564), 1 Mason, 191; *Cordova* v. *Hood*, 84 U. S. 17 Wall. 1 (21: 587); *Chilton* v. *Lyons*, 67 U. S. 2 Black, 458 (17: 304); *Fisher* v. *Shropshire*, 147 U. S. 133 (37: 109); *Marshall* v. *Christmas*, 8 Humph. 616, 39 Am. Dec. 199; *Kauffelt* v. *Bower*, 7 Serg. & R. 64, 10 Am. Dec. 423; *Conover* v. *Warren*, 6 Ill. 498, 41 Am. Dec. 196; *Clower* v. *Rawlings*, 9 Smedes & M. 122, 47 Am. Dec. 108; *Coos Bay Wagon Co.* v. *Crocker*, 4 Fed. Rep. 577; *Dudley* v. *Dickson*, 14 N. J. Eq. 252; *Selby* v. *Stanley*, 4 Minn. 65; *Young* v. *Wood*, 11 B. Mon. 123; *Stuart* v. *Harrison*, 52 Iowa, 511; *Kyle* v. *Bellenger*, 79 Ala. 516; *Neal* v. *Speigle*, 33 Ark. 63; *Strong* v. *Strong*, 126 Ill 301; *Crans* v. *Hamilton County Comrs.* 87 Ind. 162; *Fish* v. *Howland*, 1 Paige, 20.

A pledge of stock waives the lien.

Jackson v. *Stanley*, 87 Ala. 270; *Hett* v. *Collins*, 103 Ill. 74; *Nairn* v. *Prowse*, 6 Ves. Jr. 752.

A vendor's lien is recognized in Colorado.

Francis v. *Wells*, 2 Colo. 660.

Federal courts enforce such liens when consistent with jurisprudence of states wherein the action is brought.

Fisher v. *Shropshire*, 147 U. S. 133 (37: 109); *Rice* v. *Rice*, 36 Fed. Rep. 858.

Equity cannot relieve from the consequences of an election once made, by restoring and re-establishing the lien.

Jackson v. *Stanley*, 87 Ala. 270; *Richards* v. *McPherson*, 74 Ind. 158; 2 Washb. Real Prop. 96.

Appellees are estopped from asserting a vendor's lien.

Strong v. *Strong*, 126 Ill. 301; *Fisk* v. *Potter*, 2 Keyes, 64; *McGonigal* v. *Plummer*, 30 Md. 422.

Mr. **William Teller**, for appellees:

The purposes and ends for which sale was made are consistent with the retention to retain a lien.

Fisher v. *Shropshire*, 147 U. 143 (37: 115); *Chilton* v. *Lyons*, 67 U. S. 2 Black, 458 (17: 304); *Cordova* v. *Hood*, 84 U. S. 17 Wall. 1 (21: 587); *Coos Bay Wagon Co.* v. *Crocker*, 4 Fed. Rep. 582; Story, Eq. Jur. 1219.

Upon the sale of real property on credit, without collateral security, equity raises a lien thereon in favor of the vendor, as a security for the unpaid purchase money.

Mackreth v. *Symmons*, 15 Ves. Jr. 329; *Bayley* v. *Greenleaf*, 20 U. S. 7 Wheat. 49 (5: 394); *Lewis* v. *Hawkins*, 90 U. S. 23 Wall. 125 (23: 113); *Gilman* v. *Brown*, 1 Mason, 212; *Pease* v. *Kelly*, 3 Or. 417; *Baum* v. *Grigsby*, 21 Cal. 175, 81 Am. Dec. 153; *Garson* v. *Green*, 1 Johns. Ch. 308; *Champion* v. *Brown*, 6 Johns. Ch. 462, 10 Am. Dec. 343; *Chamberlin* v. *Winn*, 1 Wash. 502-504; Adams, Eq. 126-129; Story, Eq. Jur. § 1217; 4 Kent, Com. 151-154.

Directors of an incorporated company are trustees, for both stockholders and creditors of the corporation, and the capital stock is a trust fund to which creditors had a right to look for payment of their claims.

Putnam v. *New Albany & S. C. J. R. Co.* ("*Burke* v. *Smith*") 83 U. S. 16 Wall. 390 (21: 361); *New Albany* v. *Burke*, 78 U. S. 11 Wall. 96 (20:155); *Sawyer* v. *Hoag*, 84 U. S. 17 Wall. 620 (21: 735).

Pledging of stock of a company to secure its own debt cannot, in the absence of some proof of intent on part of those accepting the pledge, be held even evidence of a waiver of their lien.

It is, in effect, but an additional security, and not a waiver of other security.

Perry, Tr. § 237; Jones, Liens, § 1074.

One who acquires an interest in land that may be affected by a vendor's lien, with notice that the money is still due on the purchase, takes it subject to such lien, though he had no knowledge that a lien was claimed.

Jones, Liens, § 1083; *Ledos* v. *Kupfrian*, 28 N. J. Eq. 164; *Armstrong* v. *Ross*, 20 N. J. Eq. 109; *Brinkerhoff* v. *Vanscoven*, 4 N. J. Eq. 251.

In cases of conveyance to the vendee, the purchase price not being paid, the vendee is held to be a trustee for the vendor.

Lewis v. *Hawkins*, 90 U. S. 23 Wall. 119 (23: 113); *Holbrod* v. *Marshall*, 10 H. L. Cas. 191; *Burt* v. *Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Mackreth* v. *Symmons*, 15 Ves. Jr. 348; Story, Eq. Jur. 1218, *et seq.*

A vendor's lien is founded upon the natural justice of allowing a party to reach the property which he has transferred to satisfy the debt which constitutes the consideration of the transfer.

Baum v. *Grigsby*, 21 Cal. 177, 81 Am. Dec. 153.

The lien is always implied from the fact of purchase price remaining unpaid, in whole or in part.

Jones, Liens, 1064; *Mackreth* v. *Symmons*, 15 Ves. Jr. 342.

If, under all the circumstances, it remains in doubt whether the lien has been waived, then the lien attaches.

Story, Eq. Jur. § 1224; *Garson* v. *Green*, 1 Johns. Ch. 308; *Wilson* v. *Lyon*, 51 Ill. 169; *Dyer* v. *Martin*, 5 Ill. 147; *Dunton* v. *Outhouse*, 64 Mich. 419; *Truebody* v. *Jacobson*, 2 Cal. 269; *Wilkinson* v. *May*, 69 Ala. 33; *Befeld* v. *Woodfolk*, 63 U. S. 22 How. 327 (16: 375).

The taking of security, no matter what the security is, raises a presumption of waiver of lien only, and this presumption is open to rebuttal.

Cordova v. *Hood*, 84 U. S. 17 Wall. 7 (21: 588); *Bayley* v. *Greenleaf*, 20 U. S. 7 Wheat. 50, 51 (5: 395).

It is not lost or barred by a statute of limitations which bars the mere debt.

Lewis v. *Hawkins*, 90 U. S. 23 Wall. 127 (23: 114); *Hardin* v. *Boyd*, 113 U. S. 765 (28: 1144).

The directors are the representatives of the corporation, the agents of the corporation, but not the agents of the stockholders or the representatives of the stockholders, since if they were they could do what the stockholders might do.

Chicago City R. Co. v. *Allerton*, 85 U. S. 18 Wall. 233 (21: 902); *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 113 (6: 569).

Mr. Justice **Brewer** delivered the opinion of the court:

It is conceded that a vendor's lien is recognized in Colorado (*Francis* v. *Wills*, 2 Colo. 669) and such a lien, therefore, will be recognized and enforced in a Federal court. As said in *Fisher* v. *Shropshire*, 147 U. S. 133, 139 [37:109, 113]: "The courts of the United States enforce grantor's and vendor's liens if in harmony with the jurisprudence of the state in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. *Chilton* v. *Lyons*, 67 U. S. 2 Black, 458 [17: 304]; 2 Story, Eq. Jur. § 1219."

517] *Such a lien is one which appeals strongly to the favorable consideration of a court of equity. In *Baum* v. *Grigsby*, 21 Cal. 172, 176, 81 Am. Dec. 153, it was declared to be a right not arising from any agreement of the parties, but a creature of equity, "founded upon the natural justice of allowing a party to reach the property, which he has transferred, to satisfy the debt which constitutes the consideration of the transfer." So, in *Refeld* v. *Woodfolk*, 63 U. S. 22 How. 318-327 [16 370-375], this court said: "A court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and, the one failing, leaves the other without a cause." An intent to abandon it is not to be presumed, and while of course, like any other right, it may be abandoned or waived, the evidence of an intent to so abandon or waive should be clear and satisfactory. 2 Story, Eq. Jur. § 226, and cases cited in notes. In *Cordova* v. *Hood*, 84 U. S. 17 Wall. 1 [21:587], it was held that while the taking of security may raise a presumption of a waiver of the lien, it is a presumption which is open to rebuttal. In 2 Story's Eq. Jur. section 1224, the author says that: "If, under all the circumstances, it (the waiver) remains in doubt, then the lien attaches." And in the case of *Fisher* v. *Shropshire*, *supra* the *Chief Justice* observed: "Undoubtedly, a lien of the character we are considering may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security; but this must be an act substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance."

There is nothing in the cases cited from the English courts inconsistent with the authorities heretofore cited, or questioning the general rule therein laid down in respect to a waiver of vendor's lien. The case *Re Brentwood Brick & Coal Co.* L. R. 4 Ch. Div. 562, was one in which the property was transferred to a corporation, not for a fixed sum to be paid absolutely, but, as stated, thus: "Fifty per cent of all sum or sums of money received, or to be received, by the *company on the sale of [**518** its shares, and the like sum of fifty per cent upon all money by way of capital to be at any time borrowed by the company until the payments so made" should amount to the sum of 6000 pounds. It was held that the vendor had waived his lien. James, *L. J.*, saying: "I am of opinion that the order of the Vice Chancellor must be affirmed. The case of the appellant may be a hard one, but the nature of the transaction excludes vendor's lien. This is not the case of a simple agreement to sell for £6000. No doubt the vendor got a higher price by agreeing to accept payment in the way he did, and taking his chance of capital being subscribed or capital being borrowed to an amount sufficient to pay him. He says in fact, 'half of the first capital moneys that come in to the extent of £6000 is to be my purchase money.' No day for payment was named; he agreed to receive his purchase money if and when capital should come in. He got for his property a charge upon and a right to the capital of the company to the extent of £6000 when it came in. To my mind it is clear that he intended to rely on that fund for payment, and intended that the company should have the means of borrowing. This is quite inconsistent with a lien which would probably make the company unable to pledge their property. I am, therefore, of opinion that the Vice Chancellor came to a correct conclusion." And Baggallay, *J. A.*, adding: "I think it is evident that the party selling did not intend to rely on the security of the estate but on the funds of the company." In *Kettlewell* v. *Watson*, L. R. 21 Ch. Div. 685; on appeal, L. R. 26 Ch. Div. 501, the appellate court held, while recognizing the general rule that the vendor has a lien for his purchase money, that the circumstances disclosed a knowledge on the part of the vendors or their agent that the vendees sought a registry of the deed of conveyance for the purpose of subdividing the property and selling it in lots, and with that knowledge assented to such registry, and also knowledge that the vendees were selling lots, and hence that they should not be permitted to assert a lien as against the bona fide purchasers of such lots, who had paid full price therefor to the vendees. The decision was rested on the doctrine of *estoppel, the court saying: "In [**519** our opinion the conduct of Dibb (plaintiffs' agent) induced purchasers of the portions of the estate sold reasonably to believe that Richardson & Watson (the vendees) had power to deal with the estate as absolute owners free from the lien now insisted on; and as he so acted the plaintiffs, who left everything to him, cannot, in our opinion, assert their lien against lots purchased

without notice that the trustees desired to insist on their lien even though such purchasers have an equitable title only."

It is not questioned in this case that a large part of the money consideration for the sale of these mines remains still unpaid, and the defendant is in the attitude of one who, admitting that the vendors have not received the money for which they sold the land, nevertheless insists upon retaining the property discharged of any obligation for its payment. Its contention is that the plaintiffs sold to Haldeman and that Haldeman sold to it, and that inasmuch as the terms of the original proposition of October 19, 1886, were not complied with, a new agreement was made on August 18, 1887, by which the plaintiffs were to pass [illegible] free from all charges and encumbra[illegible] ly for their security [illegible] of the stock of the grantee d[illegible] one of its directors. But the [illegible] that the property should be free from charges and encumbrances obviously refers to prior charges and encumbrances, and does not exclude any which arise out of the conveyance itself. It means simply that the grantors shall have removed all burdens which rested upon the property prior to the time of making their deed, and that that deed shall pass the title perfect and unencumbered, but not that the grantee shall take it free from all obligation of payment or discharged from the lien for the purchase price which rests upon real estate until such price is paid. The language of the covenants in the deed is in harmony with this thought; for, after the covenant of seizin and of the right to sell, follows one that the premises "are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and encumbrances of whatever kind or nature soever." It will be [520] noticed that this agreement was *not between the grantors and grantee, but between the grantors and a third party who was seeking to accomplish, with profit to himself, a sale from the plaintiffs to the defendant at the price they demanded, and who was seeking to utilize the stock of the defendant in securing money for the cash part of the consideration. There is no presumption from the delivery of the deed that the plaintiffs intended to waive their lien for the purchase money. Indeed, it is characteristic of a vendor's lien, as distinguished from a contract lien, that it arises upon a transfer of title. It is a doctrine of equitable jurisprudence which says that land, which is immovable, is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security. The actual conveyance of the title to the company was not for the interest or the benefit of the plaintiffs. They were not thereby placed in any better position or given any new advantage. It is said that the agreement in terms provides that 375,000 out of 400,000 shares of stock in the defendant company shall be transferred to one of its directors, as trustee for the plaintiffs, and held as security for the payment to them of the unpaid purchase money; but the obligation of the company, its duty to pay, an obligation and a duty resting upon it as the representative of all its shares of stock, are clearly of more value than the security obtained by the deposit of a portion of its shares. For, in the one case, even if there were no personal liability of the stockholders, the promise of the company could be enforced to the extent of the appropriation of all its property, and thus the exhaustion of the value of all its shares, while in the other the transfer of a portion of its shares of stock would enable the vendor in case of a failure of payment to obtain relief, not to the full extent of the property owned by the corporation, but only to that fractional portion thereof, represented by the number of such shares. It must be borne in mind that this corporation had no other properties than these mines. It had a nominal capital stock of 400,000 pounds, with authority, apparently, to increase it without limit; yet this thing of paper contends that it bought of Haldeman *these valuable min[521]ing properties upon the sole consideration of [illegible]ths of its shares of stock, and that the plaintiffs sold to Haldeman, and intended by their agreement and conveyance to part absolutely with the title, to abandon every lien, and trust for the payment of the purchase money entirely to the security of these shares, transferred to one of the directors of the corporation. It will be perceived that at first there was not even this security, for the agreement provides for the registry of the title not upon the issue, transfer, and deposit of the shares, but upon the deposit with Wells, Fargo & Co. of 10,000 pounds. Is it to be supposed that they delivered the deed upon the deposit of that money to their credit, and, waiving all lien upon the property, were relying alone upon the promise of Haldeman to obtain from the company (their vendee) the issue of 375,000 shares, and to then make transfer to Elder and deposit with Wells, Fargo & Co.? If there had been no stipulation in respect to the control of the property it would be difficult to sustain the contention that the provision for the transfer and deposit of a portion of the shares of the company was sufficient evidence of an intent to abandon the vendor's lien. But the agreement furnishes direct evidence to the contrary. It is made by J. Fenton Seymour, "acting for himself and partners, the owners" of the property (the plaintiffs in this case), and contains this clause: "The said J. Fenton Seymour hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed." This negatives the idea that the plaintiffs were relying for the payment of the unpaid purchase money solely upon the security of these shares of stock. It is an express affirmation that their dominion over the property is not to cease until the purchase money is all paid. It thus makes the property itself the security for the price. In the face of this stipulation it would require very cogent testimony to convince any one that the plaintiffs had abandoned all lien upon the property itself, and were resting alone upon the security of the shares. *There is no [522] such testimony; nothing which makes against this express purpose of the plaintiffs to retain control of the property until the purchase price was paid.

The transaction with what is called in the

record the Scotch syndicate does not seem to us to have the significance which counsel contends, and this notwithstanding the recitals in the agreement respecting it. That transaction was this: The 10,000 pounds which, by the agreement of August 18, 1887, Haldeman was to pay immediately, were advanced by that syndicate, and on the 19th of August, the day after the contract between Haldeman and Seymour, Seymour entered into an agreement with the representatives of the syndicate that 75,000 of the 375,000 shares should be held for its benefit. This, instead of supporting defendant's contention, tends to show that the plaintiffs were not relying upon these shares as their security, but, having a lien upon the property itself, were willing that Haldeman, or the corporation, should use the shares for the purpose of securing money with which to make payment. And while there is in the agreement signed by J. Fenton Seymour a recital which, to some extent, makes against the claim of the plaintiffs in that it states that by the agreement of August 18 the company was to issue to John Haldeman 375,000 fully paid up shares "in payment in full for the said mines against a clean transfer of the property to the company free of all encumbrances and liabilities whatsoever," yet that recital is qualified by that which follows immediately thereafter, to the effect that the shares are "to be transferred to the said Clarence P. Elder, a director of the company, as trustee for behoof of all concerned," and also to be deposited with Wells, Fargo & Co. "as a guarantee for the fulfillment by the said John Haldeman of the terms of said agreement so far as incumbent upon him, all as fully set forth in the said agreement."

These last words refer to the agreement of August 18 as disclosing fully the agreement between the plaintiffs, Haldeman, and the defendant. Evidently there was no thought in this of enlarging the scope or adding to the significance of that agreement. If it be said that 523] here is an interpretation by the *parties of its meaning, it will be seen that all that it asserts is that the corporation transfers to Haldeman the shares in full payment for the property. Or, in other words, that it leaves to him the perfecting of the title free from encumbrances, and in consideration therefor issues the 375,000 shares. It contains no assertion, directly or by implication, that the plaintiffs either take these shares in payment or accept them as the only security for payment. It recites that they are transferred to the trustee, not for the plaintiffs, but for behoof of all concerned, thus plainly implying that they are to be used by Haldeman with the assent of the plaintiffs as a means of obtaining money for the purpose of completing the payment to them; but there is in none of these recitals, either in terms or by fair implication, an agreement or a statement on the part of the plaintiffs that they forego their vendor's lien, and that they intend to look thereafter simply to those shares and to the good faith of the trustee and the depositary for the payment of the purchase price. There surely is in all this nothing to convince that the plaintiffs intended to abandon the lien upon the property which existed when they executed the deed to the company and which the agreement for a retention of control by their agent directly asserted.

We see, therefore, no reason to question the conclusions reached by the circuit court, and its decree is affirmed.

J. FENTON SEYMOUR, *Plff. in Err.*,
v.
THE SLIDE & SPUR GOLD MINES
(Limited).

(See S. C. Reporter's ed. 523-525.)

Possession of real estate—agent of corporation.

1. One who holds possession of real estate as manager for or under another cannot dispute that other's title.
2. If a foreign corporation takes and holds title to real estate in a state, and by so doing, any laws of the state are violated the state is the one to challenge the act; it does not lie in the mouth of the agent of the corporation to raise the question.

[No. 263.]

Argued March 15, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the District of Colorado, to review a judgment for the plaintiff, in an action in the nature of ejectment brought by the Slide & Spur Gold Mines (Limited), to recover the possession of mining properties from J. Fenton Seymour, defendant. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

*This was an action in the nature of an [524 action of ejectment, commenced October 18, 1889, by the Slide & Spur Gold Mines (Limited) in the Circuit Court of the United States for the District of Colorado, to recover the possession of the mining properties which were the subject of the controversy in the case just decided, wherein said company was appellant, and Ellen R. Seymour, the wife of defendant, and William G. Pell, were appellees. The complaint was in the ordinary form, alleging that the plaintiff was seized in fee of the premises, and that the possession was wrongfully detained by the defendant. The answer, besides a general denial of the allegations of the complaint, set forth at length the transactions between Mrs. Seymour and Mr. Pell, the prior owners of the properties, and the plaintiff, which were noted in the opinion in the former case. A reply having been filed, the case, on June 28, 1890, went to trial before a jury. Under direct instructions from the court, the jury returned a verdict for the plaintiff. Judgment having been entered thereon, defendant sued out this writ of error.

Messrs. **Willard Teller** and *Harper M. Orahood* for plaintiff in error.

Mr. **Harvey Riddell** for defendant in error.

NOTE.—*As to ownership of mines; United States statutes as to; right of support of surface,* see note to United States v. Castillero, 17: 448.

As to title to water by appropriation; common law rule; rule of mining states, see note to Atchison v. Peterson, 22: 414.

Mr. Justice **Brewer** delivered the opinion of the court:

The pleadings put in issue all questions of fact. Outside of the pleadings the only matter before the jury was a deposition of the defendant, taken in a prior litigation between the same parties. In that deposition he admitted that he had been in possession of the property as a managing director; that he at no time denied the right of the company to the possession of the property, and that his term as managing director had expired. There was nothing in the deposition to qualify this admission. There was, therefore, no impropriety in the court's directing a verdict for the plaintiff. *Jackson* v. 525 | *Denison*, *4 Wend. 558. One who holds possession of real estate as manager for or under another cannot dispute that other's title. *Johnson* v. *Baytup*, 3 Ad. & El 188; *Phelan* v. *Kelly*, 25 Wend. 393. The estoppel is like to that which arises in the case of landlord and tenant, and comes within the scope of the general rule that an agent in possession cannot deny the title of his principal.

Neither is it necessary to inquire into the right of the plaintiff as a foreign corporation to take and hold title to real estate in Colorado, a question which, in some of its aspects, was before this court in the case of *Fritts* v. *Palmer*, 132 U. S. 282 [33: 317], for if, by so doing, any laws of the state are violated, the state is the one to challenge the act (Devlin, Deeds, § 127, and cases cited in note) and it does not lie in the mouth of the agent of the corporation to raise the question.

The judgment is, therefore, affirmed.

SUSAN LUXTON, *Plff. in Err.*, *v.* NORTH RIVER BRIDGE COMPANY.

(See S. C. Reporter's ed. 525-534.)

Congress may create corporations—public highway—right of eminent domain—power to construct bridges—North river bridge.

1. Congress may create corporations as appropriate means of executing the powers of government.
2. Congress has the power to authorize the construction of a public highway connecting several states.
3. Whenever it becomes necessary, for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie.
4. Congress may, directly or through a corporation created for that object, construct bridges for the accommodation of interstate commerce by land.
5. The Act of Congress of July 11, 1890, authorizing the construction of the North River Bridge between the states of New York and New Jersey by a corporation created by said Act, and making due provision for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners, is constitutional.

[No. 1040.]

Submitted Jan. 5, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the District of New Jersey, to review a judgment confirming the report and award of the Commissioners assessing damages for the appropriation and condemnation of the land of Susan Luxton, for the approaches to the bridge across the Hudson river between the states of New York and New Jersey of the North River Bridge Company, said land being in the city of Hoboken, and adjudging that upon payment or the tender of the sum awarded, the company might take possession of the land. *Affirmed.*

See same case 147 U. S. 347 (37: 194).

Statement by *Mr.* **Justice Gray:**

This was a petition by the North River Bridge Company, incorporated by the Act of Congress of July 11, 1890, chap. 669 (the material part of which is copied in the margin*) for the *appointment under that Act [526

NOTE.—*As to power of Congress to regulate commerce*, see note to Gibbons v. Ogden, 6: 23, and to Brown v. Maryland, 6: 678.

As to power of Congress to charter the bank of the United States, see note to McCulloch v. Maryland, 4: 578.

As to power of Congress over territories, see note to First National Bank of Brunswick v. Yankton County, 25: 1046.

*An act to incorporate the North River Bridge Company, and to authorize the construction of a bridge and approaches at New York city across the Hudson river, to regulate commerce in and over such bridge between the states of New York and New Jersey, and to establish such bridge a military and post road.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authorization is hereby given to Jordan L. Mott, John King McManahan, James Andrews, Thomas F. Ryan, Garrett A. Hobart, F. W. Roebling, Charles J. Canda, Edward F. C. Young, Henry Flad, Gustav Lindenthal, A. G. Dickinson, John H. Miller, William Brookfield, Samuel Rea, William F. Shunk, Philip E. Chapin, and their associates, as a corporation as hereinafter provided, to locate, build, maintain, equip and operate a bridge, proper approaches thereto, and terminals, appurtenances and works connected therewith, across the Hudson river in and between the city of New York, in the state of New York, and the state of New Jersey, and to lay tracks thereon for the connection of the railroads on either side of said river, in order to facilitate interstate commerce in the transportation of persons and property, and for vehicle, pedestrian, postal, military and other purposes: Provided, That said bridge shall have not less than six railroad tracks, with a capacity for four additional tracks for future enlargement, and shall be constructed with a single span over the entire river between the towers, located between the shore and the established pier head lines in either state, and at an elevation above the river not less than that of the existing Brooklyn suspension bridge over the East river, and which elevation may be increased by the Secretary of War as hereinafter provided, and that no pier or other obstruction to navigation, either of a temporary or permanent character, shall be constructed in the river between said towers.

Sec. 2. That the construction of said bridge shall be commenced within three years after the passage of this Act, and shall be completed within ten years after the commencement of construction. But that the Secretary of War is hereby authorized to extend the time for the commencement of construction for two additional years upon cause shown by the company, and provided that the Secretary of War shall deem such cause sufficient and satisfactory; and that, if the company fail to commence the construction of said bridge within the time so extended, this Act shall be null and void. And the company, at least three months

of commissioners to assess damages for the appropriation and condemnation, for the ap-
527 [proaches to *its bridge across the Hudson or North river, between the states of New York and New Jersey, of land of Sarah Luxton in the
528]*city of Hoboken and the county of Hudson in the latter state. Upon the order of the circuit court, appointing commissioners, she sued out a writ of error, which was dismissed by this court at the last term, because that order was not a final judgment. 147 U. S. 337 [37:194]. The commissioners afterwards made an award and report, assessing her damages at the sum of $2000, to the acceptance of which she objected, upon the ground that the Act of Congress was unconstitutional, and particularly that Congress could not confer the right of eminent domain upon the company. But the court overruled the objection, and adjudged that the award be approved and confirmed, and remain of record in the office of its clerk; and that, upon payment or tender of the sum awarded, the company might enter upon and take possession of the land for the purpose for which it was condemned. She thereupon sued out this writ of error.

Mr. **Gilbert Collins,** for plaintiff in error: Congress cannot confer the right of eminent domain upon a private company to take land in a state for a bridge.

Milnor v. *New Jersey R. & Transp. Co.* reported only in U. S. Sup. Ct. Rep., 16 L. ed. 799, 806; *King* v. *American Transp. Co.* 1 Flip. 1.

The state might authorize the construction of the bridge and approaches in question to the boundary line, and might confer the power of eminent domain for that purpose. Such power for such purpose has been often exercised. The power of eminent domain when thus exercised by the state is beyond Federal control. The subject-matter is one of which the United States courts cannot take jurisdiction.

West River Bridge Co. v. *Dix*, 47 U. S. 6 How. 507 (12: 535); *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.* 17 W. Va. 812, 866; *Colorado M. R. Co.* v. *Jones*, 29 Fed. Rep. 193; *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 403 (25: 206).

The interpretation of the constitution necessary to sustain the charter in question has often been repudiated by eminent judges of this court.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1 (6:23); *State* v. *Hudson County Freeholders*, 23 N. J. L. 206; *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 (11: 565); *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96); *United States* v. *Railroad*

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previous to commencing the erection of said bridge, shall submit to the Secretary of War a plan of the bridge, with a detailed map of the river at the proposed site of the bridge, and for the distance of one half of a mile above and below the site, with such other information as the Secretary of War may require for a full and satisfactory understanding of the subject. And the Secretary of War may, upon receiving said plans and map and other information, order a hearing before a board of engineers, appointed by him for taking testimony of persons interested in railroads and navigation, relative to the clear height of the superstructure above ordinary high water. Such clear height shall not be less than that named in section one of this Act, and the Secretary of War may thereupon order such additional clear height as he shall deem necessary for the security of navigation. And he is hereby authorized and directed, upon being satisfied that a bridge built on such plan and at said locality will conform to the conditions of this Act, to notify the said company that he approves the plans therefor; whereupon said company may proceed to the erection of said bridge. But until the Secretary of War approves the plan and location of said bridge the erection of the same shall not be commenced; and should any change be made in the plan of the bridge during the progress of the work thereon, such change shall likewise be subject to the approval of the Secretary of War.

Sec. 3. That the bridge, with its approaches and railroads thereover, constructed under the provisions of this Act, shall be a lawful structure, and a military and post road, but no toll charges shall be made for the transmission over the same of the mails of the United States, or for the right of way for the United States postal telegraph purposes.

Sec. 4. That for the purpose of carrying into effect the objects stated in this Act, the persons named in the first section hereof, and their associates, are hereby constituted and created a body corporate in law, to be known as the North River Bridge Company, and by that name, style and title shall have perpetual succession; may sue and be sued, implead and be impleaded, complain and defend in all courts of law and equity, of record and otherwise; may make and have a common seal, and shall have and possess all the rights, powers, franchises, and privileges incident to or usually possessed by such companies. It may receive, purchase, and also acquire by lawful appropriation and condemnation, upon making proper compensation therefor, to be ascertained according to the laws of the state within which the same is located, real and personal property and rights of property, and may mortgage, encumber, charge, pledge, grant, lease, sell, assign, and convey the same. And to aid in the construction of said bridge and approaches thereto, and railroad terminals, appurtenances and works connected therewith, and to carry out the purposes of this Act, the said North River Bridge Company is hereby authorized to issue its bonds, and secure the same by mortgage on its property and rights of property, of all kinds and descriptions, and its franchise to be a corporation. And generally and specially for the fully carrying out of the purposes and intentions of this Act, the said North River Bridge Company, and its successors, shall have and possess all such rights and powers to enter upon lands, and for the purchase, acquisition, condemnation, appropriation, occupation, possession and use of real estate and other property, and for the location, construction, operation, and maintenance of said bridge with its approaches, terminals, and appurtenances, as are possessed by railroad or bridge companies in the states of New York and New Jersey, respectively. That all persons, railroad and telegraph companies, respectively, desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage over and the use of the same, and the approaches thereto, for a reasonable compensation, to be approved by the Interstate Commerce Commission as hereinafter determined, and to be paid to the North River Bridge Company, which is hereby duly empowered to collect the same. And sufficient trackage and terminal facilities shall be provided for all railroads desiring to use said bridge and appurtenances. In case any litigation arises out of the construction, use or operation of said bridge or approaches thereto and railroad thereon, or for the condemnation or the appropriation of property in connection therewith under this act, the cause so arising shall be heard and tried before the circuit court of the United States for the judicial district in which the bridge or one of the approaches is located. Applications for condemnation or appropriation of property shall be made in the circuit court of the United States for the district in which such property is situated, upon the petition of said company; and the hearing and trial of all other proceedings thereon shall conform as nearly as may be to the practice in the courts of the state, in which such district is situated, in the case of condemnation or appropriation of property for railroads. 26 Stat. at L. 268-270.

Bridge Co. 6 McLean, 517; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421 (15: 435); *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470 (26: 1143).

Mr. **Joseph D. Bedle**, for defendant in error:

Congress has full power to charter corporations as an appropriate means of carrying out any of the authorized purposes of the Federal government.

Morawetz, Priv. Corp. § 9.

The power to regulate commerce is amply sufficient to maintain this Act, although the other purposes alike justify it.

Kohl v. *United States*, 91 U. S. 367 (23: 449); *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641 (34: 295); *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9.

Mr. Josiah M. Vale filed a brief on behalf of John C. Crevier, who was allowed to intervene in the case.

529] **Mr. Justice* **Gray** delivered the opinion of the court:

The validity of the Act of Congress incorporating the North River Bridge Company rests upon principles of constitutional law, now established beyond dispute.

The Congress of the United States, being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by *Chief Justice* Marshall, "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states. *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316, 411, 422 [4: 579, 602, 605]; *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 861, 873 [6: 204, 233, 236]; *Union Pac. R. Co.* v. *Myers* ("*Pacific R. Removal Cases*") 115 U. S. 1, 18 [29: 319, 325]; *California* v. *Central Pac. R. Co.* 127 U. S. 1, 39, [32: 150, 157]. Congress has likewise the power, exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to authorize the construction of a public highway connecting several states. See *Indiana* v. *United States*, 148 U. S. 148 [37: 401]. And whenever it becomes necessary for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and **530**] take private lands, making *just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie. *Van Brocklin* v. *Anderson*, 117 U. S. 151, 154 [29: 845, 846], and cases cited; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 656 [34: 295, 301].

From these premises the conclusion appears to be inevitable that, although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water. 1 Hare, Const. Law, 248, 249. See Acts of July 14, 1862, chap. 167 (12 Stat. at L. 569); February 17, 1865, chap. 38 (13 Stat. at L. 431); July 25, 1866, chap. 246 (14 Stat. at L. 244); March 3, 1871, chap. 121, § 5 (16 Stat. at L. 572, 573); June 16, 1886, chap. 417 (24 Stat. at L. 78).

The judicial opinions cited in support of the opposite view are not, having regard to the facts of the cases in which they were uttered, of controlling weight.

Mr. Justice McLean, indeed, in an opinion delivered by him in the circuit court, by which a bill by the United States to restrain the construction of a bridge across the Mississippi river was dismissed, no injury to property of the United States and no substantial obstruction to navigation being shown, and there having been no legislation by Congress upon the subject, took occasion to remark that "neither under the commercial power, nor under the power to establish post roads, can Congress construct a bridge over navigable water;" that "If Congress can construct a bridge over navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turnpike or railroads throughout the entire country;" and that "the latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas and upon our rivers and lakes." *United States* v. *Railroad Bridge Co.* 6 McLean, 517, 524, 525.

*The same learned justice repeated and **531**] enlarged upon that idea in his dissenting opinion in *Pennsylvania* v. *Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 442, 443 [15: 435, 442], where, after the Wheeling bridge, constructed across the Ohio river under an act of the state of Virginia, had by a decree of this court, at the suit of the state of Pennsylvania, been declared to be in its then condition an unlawful obstruction of the navigation of the river, and in conflict with the acts of Congress regulating such navigation, and therefore ordered to be elevated or abated, Congress passed an Act, declaring the bridge to be a lawful structure in its then position and elevation, establishing it as a post road for the passage of the mails of the United States, authorizing the corporation to have and maintain the bridge at that site and elevation, and requiring the captains and crews of all vessels and boats navigating the river to regulate the use thereof, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge. Act of August 31, 1852, chap. 111, §§ 6, 7 (10 Stat. at L. 112).

But the majority of this court in that case held that "the Act of Congress afforded full authority to the defendants to reconstruct the bridge." 59 U. S. 18 How. 436 [15: 439]. *Mr. Justice* Nelson, in delivering its opinion, said: "We do not enter upon the question, whether or not Congress possess the power, under the authority in the Constitution to establish postoffices and post roads, to legalize this bridge; for conceding that no such powers can be derived from this clause, it must be admitted that it is, at least necessarily included in the power conferred to regulate commerce among the several states. The regulation of commerce includes intercourse and navigation, and of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistently with the continuance of the bridge." 59 U. S. 18 How. 431 [15: 437]. And *Mr. Justice* Daniel, in a concurring opinion, sustaining the validity of the Act of Congress, said: "They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that 532] commerce which pursues *the course of the river, and to that which traverses its channel, and is broadly diffused through the country. They have at the same time, by what they have done, secured to the government, and to the public at large, the essential advantage of a safe and certain transit over the Ohio." 59 U. S. 18 How. 458 [15: 448]. A similar decision was made in *Gray* v. *Chicago, I. & N. R. Co.* ("*The Clinton Bridge*") 77 U. S. 10 Wall. 454 [19: 969]. See also *Miller* v. *New York*, 109 U. S. 385 [27: 971].

In the cases, cited at the bar, of *The Passaic Bridges*, 3 Wall. appx. 732, decided by *Mr. Justice* Grier in the circuit court, and of *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 [18: 96], and *Wright* v. *Nagle*, 101 U. S. 791 [25: 921], in this court, the bridge in question had been erected under authority of a state and was wholly within the state, and no question arose, or was considered, as to the power of Congress, in regulating interstate commerce, to authorize the erection of bridges between two states.

But in *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, *Mr. Justice* Bradley, sitting in the circuit court, upheld the constitutionality of the Act of Congress of June 16, 1886, chap. 417, authorizing a corporation of New York and one of New Jersey to build and maintain a bridge, as therein directed, across the Staten Island Sound or Arthur Kill. 24 Stat. at L. 78.

The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards delivered by him in behalf of this court, in which the power of Congress, by its own legislation, to confer original authority to erect bridges over navigable waters, whenever Congress considers it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated, as to render further discussion of the subject superfluous.

In *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1[31:629], in which it was held that section 2 of the Act of February 14, 1859, chap. 33 (11 Stat. at L. 383), for the admission of Oregon into the Union, providing that "all the navigable waters of the said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States," *did not [533 prevent the state, in the absence of legislation by Congress, from authorizing the erection of a bridge over such a river, *Mr. Justice* Bradley, speaking for the whole court, said: "And although, until Congress acts, the states have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the states, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges, when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the state." 125 U. S. 12, 13 [31:633, 634].

In *California* v. *Central Pac. R. Co.* 127 U. S. 1 [32:150], 2 Inters. Com. Rep. 153, it was directly adjudged that Congress has authority, in the exercise of its power to regulate commerce among the several states, to authorize corporations to construct railroads across the states, as well as the territories of the United States; and *Mr. Justice* Bradley, again speaking for the court, and referring to the acts of Congress establishing corporations to build railroads across the continent, said: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the *Cumberland or National [534 road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress

over the territories of the United States, and its power to grant franchises exercisible therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories, and employing the agency of state as well as Federal corporations." 127 U. S. 39, 40 [32:157], 2 Inters. Com. Rep. 160.

The Act of Congress now in question declares the construction of the North River Bridge between the states of New York and New Jersey to be "in order to facilitate interstate commerce;" and it makes due provision for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners, which has been accordingly awarded to the plaintiff in error.

In the light of the foregoing principles and authorities, the objection made to the constitutionality of this Act cannot be sustained.

Judgment affirmed.

535] FRANKLIN P. MILLER,
Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 535-539.)

Carrying of dangerous weapons—constitutional amendment—state judgment—omission to claim immunity—due process of law.

1. The statute of Texas prohibiting the carrying of dangerous weapons does not abridge the constitutional privileges or immunities of citizens of the United States.
2. The restriction of the second and fourth amendments to the Constitution of the United States operate only upon the Federal power, and have no reference whatever to proceedings in state courts.
3. If the constitutional right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review in this court is concerned.
4. A privilege or immunity under the Constitution of the United States cannot be set up in this court under Rev. Stat. § 709, when suggested for the first time in a petition for rehearing after judgment.
5. Where the proceedings in the state court were conducted under the ordinary forms of criminal prosecutions there was no denial of due process of law.

[No. 1166.]

Submitted April 23, 1894. Decided May 14, 1894.

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

IN ERROR to the Court of Criminal Appeals of the State of Texas, to review a judgment of that court, affirming the judgment of the District Court of Dallas county, Texas, of conviction and sentence to death of Franklin P. Miller for the murder of one Riddle. On motion to dismiss. *Dismissed.*

Statement by *Mr. Justice* **Brown:**

The plaintiff in error was indicted by the grand jury of Dallas county, Texas, for the murder of one Riddle on June 18, 1892. He was convicted July 23, 1892, and sentenced to death. From the judgment of the district court of Dallas county, before which he was tried, he appealed to the court of criminal appeals of Texas, the court of last resort in criminal cases, where the judgment of the court below was affirmed. A motion for a rehearing was then made and overruled. Defendant thereupon sued out this writ, assigning as error that the statute of the state of Texas prohibiting the carrying of dangerous weapons on the person, by authority of which statute the court charged the jury that, if defendant was on a public street carrying a pistol, he was violating the law, infringed the right of the defendant as a citizen of the United States, and was in conflict with the 2d Amendment to the Constitution of the United States, providing that the right of the people to keep and bear arms shall not be infringed; *second,* that the same statute, which provided that any person carrying arms in violation of the previous section, might be arrested without warrant, under which the court charged the jury that defendant, if he were carrying arms in violation of the statute, was subject to arrest *without warrant, was in contravention [536] of the 4th Amendment of the Constitution, which provides that the right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated; and of the 5th and 14th amendments, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall pass or enforce any law which shall abridge the privileges or or immunities of citizens of the United States.

Mr. **C. A. Culberson,** for defendant in error, in favor of motion.

Mr. **Jo Abbott** and *Robt. B. Seay.* for plaintiff in error, in opposition.

Mr. Justice **Brown** delivered the opinion of the court:

Motion is made to dismiss the writ of error in this case upon the ground that it was issued and signed by the clerk of the court of criminal appeals of Texas, and was therefore, insufficient to give this court jurisdiction, and the case of *Bonduraut* v. *Watson,* 103 U. S. 278 [26: 447], is cited as authority for the position. In that case, however, the writ ran in the name of the chief justice of the supreme court of the state, to the clerk of that court, was tested in the name of the chief justice of the supreme court of the state, signed by its clerk, and sealed with the seal of that court. "It had not," said the court, "a single requisite of a writ of this court." Revised Statutes, section 909, provides that when a writ of error

"is issued by the supreme court to a state court, the citation shall be signed by the chief justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice." And by section 1003, "writs of error from the supreme court to a state court in cases authorized by law shall be issued in the same manner, and under the same regulations, and 537] *shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

In this case the writ runs in the name of the President of the United States, to the judges of the court of criminal appeals, is tested in the name of the Chief Justice of the Supreme Court of the United States, signed by the clerk of the court of criminal appeals, and allowed by its presiding judge. If there was any error, it was in the signature of the writ by the clerk of the court of appeals, instead of by the clerk of this court, or of the circuit court of the United States for the proper district (*Ex parte Ralston*, 119 U. S. 613 [30: 506]) and such error would be amendable under section 1005, which provides that the Supreme Court may allow an amendment of a writ of error in all particulars of form. *Texas & P. R. Co.* v. *Kirk*, 111 U. S. 486 [28: 481]. Of a similar mistake it was said in *McDonogh* v. *Millandon*, 44 U. S. 3 How. 693. 707 [11: 787, 794]: "If errors had been assigned by the plaintiff here and joined by the defendant, no motion to dismiss for such a cause could be heard." But the court express no opinion as to whether the error was, in itself, cause for dismissal. As was said in *Ex parte Ralston*, it has doubtless "been the prevailing custom from the beginning for the clerk of this court, or of the circuit court for the proper district, to issue the writ, and for such writ to be lodged with the clerk of the state court," but it has never been held that the signature of the clerk of the state court was fatal to the writ. On the contrary, it was held in *Sheppard* v. *Wilson*, 46 U. S. 5 How. 210 [12: 120], that the Act of 1838, providing that writs of error and appeals from the final decisions of the supreme court of a territory, should be allowed in the same manner and under the same regulations as from the circuit courts of the United States, gave to the clerk of the territorial court the power to issue the writ of error, and to a judge of that court the power to sign the citation, and approve the bond.

Without, however, expressing a decided opinion upon the invalidity of the writ as it now stands, we think there is no Federal question properly presented by the record in this 538] *case, and that the writ of error must be dismissed upon that ground. The record exhibits nothing of what took place in the court of original jurisdiction, and begins with the assigument of errors in the court of criminal appeals. In this assignment no claim was made of any ruling of the court below adverse to any constitutional right claimed by the defendant, nor does any such appear in the opinion of the court, which deals only with certain alleged errors relating to the impaneling of the jury, the denial of a continuance, the admission of certain testimony, and certain exceptions taken to the charge of the court. In his motion for a rehearing, however, defendant claimed that the law of the state of Texas forbidding the carrying of weapons, and authorizing the arrest without warrant of any person violating such law, under which certain questions arose upon the trial of the case, was in conflict with the 2nd and 4th Amendments to the Constitution of the United States, one of which provides that the right of the people to keep and bear arms shall not be infringed, and the other of which protects the people against unreasonable searches and seizures. We have examined the record in vain, however, to find where the defendant was denied the benefit of any of these provisions, and even if he were, it is well settled that the restrictions of these amendments operate only upon the Federal power, and have no reference whatever to proceedings in state courts. *Barron* v. *Baltimore*, 32 U. S. 7 Pet. 243 [8: 672]; *Fox* v. *Ohio*, 46 U. S. 5 How. 410 [12: 213]; *Twitchell* v. *Pennsylvania*, 74 U. S. 7 Wall. 321 [19: 223]; *New York Sup. Ct. Justices* v. *United States* (*Justices* v. *Murray*) 76 U. S. 9 Wall. 274 [19: 658]; *United States* v. *Cruikshank*, 92 U. S. 542, 552 [23: 588, 591]; *Ex parte Spies*, 123 U. S. 131 [31: 80].

And if the 14th Amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. In *Ex parte Spies*, 123 U. S. 131, 180 [31: 80, 90], objection was made that a certain letter was obtained from the defendant by an unlawful seizure, and the constitutional immunity was set up in the supreme court of Illinois, as well as in this court, but it was not made on the trial in the court of original jurisdiction. It was held, both *by 539] the supreme court of Illinois and by this court, that the defense should have proven that the letter was unlawfully seized by the police, and should then have opposed its admission upon the ground that it was obtained by such unlawful seizure. Said the Chief Justice; "As the supreme court of the state was reviewing the decision of the trial court it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. . . . If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned." So in *Texas & Pac. R. Co.* v. *Southern Pac. Co* 137 U. S. 48 [34: 614], it was held directly that a privilege or immunity under the Constitution of the United States cannot be set up here under Revised Statutes, § 709, when suggested for the first time in a petition for rehearing after judgment. See also *Caldwell* v. *Texas*, 137 U. S. 692, 698 [34: 816, 818].

There was no other question under the 14th Amendment to the Constitution. As the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law, nor did the law of the state, to which reference was made, abridge the privileges or immunities of *citizens of the United States*, as such privileges

and immunities are defined in the *Butchers Benev. Asso.* v. *Crescent City L. S. L. & S. H. Co.* ("*Slaughter House Cases*") 83 U. S. 16 Wall. 36 [21:394], and in *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 [18:745], and *Ward* v. *Maryland*, 79 U. S. 12 Wall. 163 [20:260].

The writ of error is therefore dismissed.

540] THE ANVIL MINING COMPANY, *Plff. in Err.*,
v.
JOHN HUMBLE ET AL.

[See S. C. Reporter's ed. 540-554.]

Contract for mining ore—profits, when recovered as damages—breach of contract—liability for nonperformance—letter, when no estoppel—evidence.

1. Where a contract gave a party thereto the right to terminate it in a certain contingency, he has no right to terminate it arbitrarily.
2. Where a contract for mining the iron ore on and above the first level of a mine, provides that the ore shall contain at least 56 per cent of metallic iron, and the contract is afterwards extended to include the ore on and above the second and third levels, with the exception that the ore extracted under this contract shall contain at least 58 per cent of metallic iron, the stipulation as to the increased per cent applies only to the ore taken from the second and third levels.
3. Profits which are a mere matter of speculation connot be made the basis of recovery in suits for breach of contract, while profits which are reasonably certain may be.
4. Profits may be recovered as damages for breach of a contract for mining ore where they are not uncertain or remote, and were obviously within the intent and mutual understanding of both parties when the contract was made.
5. Whenever one party to a contract prevents the other party from going on with it, the other party is at liberty to treat the contract as broken and abandon it, and recover as damages the profits which he would have received through full performance.
6. When a contract is not performed the party who is guilty of the first breach is generally the one upon whom rests all the liability for the nonperformance.
7. A letter written by a party does not estop him from showing that the facts stated therein were erroneous, nor preclude him from showing the actual facts.
8. Where by the contract the amount due plaintiff was to be determined by the weigh bills which were in the possession of the bookkeeper, an officer of the defendant company and plaintiff applied to him for the bills, the reply of such officer, in possession of them, is competent testimony.

[No. 323.]

Argued March 26, 27, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan, to review a judgment for the plaintiffs, John Humble *et al.*, for the sum of $5943.79, in an action brought against the Anvil Mining Company, defendant, for damages for breach of a contract for mining iron ore, and for work done under said contract. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On May 1, 1888, John Humble, Joseph H. Johns, and James Johns, who were partners doing business under the firm name of Johns Brothers & Humble, entered into a contract with the Anvil Mining Company, for mining iron ore. *The provisions of the con- [541 tract, so far as they are material, are that "they, the said party of the first part, shall and will, in a good and workmanlike manner, and at their own proper charge and expense, mine, remove, and load into the skips all the merchantable iron ore contained on or above the first level of the mine now owned and worked by the said Anvil Mining Company, at its No. 1 shaft, in said township of Bessemer. The said ore shall be mined and removed by what is known as the caving system, and the ore removed shall be at least seventy-five per cent (75 per cent) of the merchantable iron ore contained on or above said first level, and shall be worked, taken out, and removed in such manner as not to interfere with the future workings, and development of said mine. Said party of the first part shall work said mine to its full capacity, and remove the ore therefrom without unnecessary delay, and shall mine from said level at least two hundred (200) tons of merchantable iron ore per day; that is, the average amount of ore removed each month shall not be less than (200) tons per day.

"It is understood and agreed between the parties hereto that should it be determined by said second party that the ore from the second and third levels of said mine can be removed and extracted by the caving system of mining, or by the same system practiced in removing the ore from the said first level, that this contract, at the option of said second party, shall extend to and include the ore contained on and above the second and third levels of said mine.

"It is also agreed that it shall be entirely optional with said party of the second part to extend the contract to the ore below the second level, and that the said party of the second part shall have the right of terminating this contract and the said system of mining at any time when said second party shall decide that said system is prejudical to the future welfare and development of said mine; equitable compensation to be made said party of the first part for damage suffered by them by reason of the said party of the second part so terminating this contract, and should said parties

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NOTE.—*As to contracts by letter or telegram, offer and acceptance; when valid*, see note to Ellason v. Henshaw, 4: 556.

As to contracts; performance; when excused by nonperformance of other party or his prevention of performance, see note to United States v. Peck, 26: 46.

As to what laws are void, as impairing obligation of contracts, see note to Fletcher v. Peck, 3: 162.

As to stated sum in contract; whether penalty or liquidated damages, see note to Tayloe v. Sandiford, 5: 384.

As to how far fraud or illegal consideration will avoid contract, see note to Armstrong v. Toler, 6: 468.

be unable to agree upon the basis of settlement, 542] then the matter *shall be left to two disinterested mining superintendents, one to be chosen by the party of the first part and the other to be chosen by the party of the second part, and in case said referees fail to agree, they shall choose a third, and the decision of said referees, or the majority of them, shall be final and conclusive upon the parties hereto as to the compensation to be made said party of the first part because of the termination of this contract.

"The said party of the first part agrees that the said party of the second part shall have the use of number one shaft for the purpose of raising either rock or ore from said mine, in the sinking of said shaft and developing said mine below the first level. This privilege to use number one shaft is to be considered to apply only to the removal of ore, rock, or other material necessary to be taken out in sinking said shaft, and in drifting, cross-cutting, and opening the lower levels.

"The ore to be taken out by said party of the first part under this contract shall be merchantable iron ore, containing at least fifty six (56) per cent or upwards of metallic iron, and no ore of lower grade shall be accepted or paid for by the said party of the second part.

"The said party of the first part are to mine said ore and place the same in the skips at No. 1 shaft in said mine, ready for hoisting, the ore to be hoisted at the expense of the said party of the second part, who agree to furnish all necessary power to properly run the skip in said No. 1 shaft for the purpose of hoisting the ore mined and placed therein by the parties of the first part, but this covenant shall not deprive the party of the second part of the right to use said skip for the purposes and in the manner hereinbefore provided. In case of any accident to said machinery, said party of the second part shall not be liable for any damages sustained by said party of the first part caused by delay in replacing or repairing said machinery, provided the said party of the second part shall cause the same to be replaced or repaired with all reasonable diligence.

"The said party of the first part are to take out all the ore which can possibly be taken 543] out under the caving system of *mining, and in no case shall the amount taken out be less than seventy-five (75) per cent. of the ore contained therein, as above agreed.

"The party of the second part are to have the right or privilege of superintending and directing said work, and for that purpose to enter said mine and inspect the works thereof at any time, for the purpose of seeing that the work is properly conducted by the said first party, and that the work so done is not prejudicial to the future interest and working of said mine.

"It is further expressly stipulated and agreed that the said party of the second part shall not, under any circumstances, be liable for any damage or injury to either person or property by reason of the carelessness or negligence of the said party of the first part or of their workmen, apprentices, or other persons in their employ, in the furtherance of this contract, and that the said party of the first part shall and will indemnify and forever save harmless the said party of the second part from all actions, claims, suits, and damages by reason thereof. In consideration whereof the said party of the second part covenants and agrees to and with the said party of the first part to pay to them, the said party of the first part, the sum of sixty cents (60 cts.) for each and every gross ton of merchantable iron ore mined and removed by the said party of the first part from the said mine under this contract, each gross ton to contain two thousand two hundred and forty (2240) pounds avoirdupois. The amount of ore shipped from said premises, and the amount due said party of the first part therefor shall be determined by and based upon the weights as ascertained by the reports of the railroad company or companies, made to said party of the second part, of the shipment of the ore from said mine, in case of the shipment of the ore so mined from said premises."

This contract was subsequently extended by the following stipulation, dated the 10th day of July, 1888:

"It is mutually agreed by the parties to the within agreement that this contract shall extend to and include the ore contained on and above the second and third levels, as named *therein, with the exception that the [544 merchantable iron ore extracted under this contract shall contain at least 58 per cent (fifty-eight per cent) or upwards of metallic iron."

The firm commenced the work soon after this contract was entered into and continued it until the 11th of October of that year. On February 11th, 1889, they began this action in the circuit court of the state of Michigan for the county of Gogebic, to recover for work done and damages sustained. The defendant removed the case to the Federal court, where issue was joined, and the case went to trial before a jury, which, on September 16, returned a verdict for the plaintiffs in the sum of $5943.79. Pending the proceedings in the trial court one of the plaintiffs, Joseph H. Johns, died, and the suit was revived in the name of John Humble and James Johns, the surviving partners. Upon the verdict as returned judgment was entered, and to reverse such judgment the defendant sued out this writ of error.

Messrs. **Dan. H. Ball** and **Jas. G. Flanders**, for plaintiff in error:

The contract sued upon was by its terms liable to be terminated. Neither party was bound to continue it, and neither would be entitled to damages against the other for terminating it, except compensation as provided by the terms of the contract.

Finley Shoe & L. Co. v. *Kurts*, 84 Mich. 90; *Wilkinson* v. *Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708; *Utica & S. R. Co.* v. *Brinckerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Lester* v. *Jewett*, 12 Barb. 502; *Dorsey* v. *Packwood*, 53 U. S. 13 How. 126 (13: 921).

After the modification of the contract, July 10, all the ore to be taken out under the contract, from any part of the mine, was required to contain 58 per cent of metallic iron.

Under the facts in this case, the damages claimed for loss of profits were too uncertain,

contingent and conjectural to found a verdict upon.

McKinnon v. *McEwan*, 48 Mich. 106, 42 Am. Rep. 458; *Allis* v. *McLean*, 48 Mich. 428.

There was no evidence that the plaintiffs were stopped and prevented from going on under their contract, at least on the first level.

There is absolutely no evidence to show that there remained any ore containing fifty-eight per cent of metallic iron, on the first level, that could have been taken out.

The contract was entire, and if binding, required the plaintiffs to take out all the ore on three levels, of the grade specified. The plaintiffs would not be entitled to the contract price for taking out a small part of the ore that could be most cheaply mined.

Hubbardston Lumber Co. v. *Bates*, 31 Mich. 158.

Plaintiff cannot rescind the contract, and then insist on damages for not performing; for where a contract is rescinded an action will not lie for the breach of it.

Van Trott v. *Wise*, 36 Wis. 439; *Hunt* v. *Silk*, 5 East, 449.

Past profits are no guide to what might have been made thereafter.

Masterson v. *Mt. Vernon*, 58 N. Y. 391.

Messrs. **Edwin F. Uhl**, *Frank Kutts* and *Barney Hoyt*, for defendants in error:

The profits which might have been realized by the performance of a contract are a just and proper measure of damages for the breach of such contract, when they can be shown with reasonable certainty. Profits will be measured by the difference between the cost of doing the work and what the party was to receive for it.

Atkinson v. *Morse*, 63 Mich. 276; *Burrell* v. *New York & S. S. Salt Co.* 14 Mich. 34; *Goodrich* v. *Hubbard*, 51 Mich. 62; *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 307 (14: 157); *United States* v. *Behan*, 110 U. S. 338 (28: 168); *Loud* v. *Campbell*, 26 Mich. 239; *Boston* v. *Henderson*, 92 Mich. 606; *O'Connell* v. *Main & Tenth Sts. Hotel Co.* 90 Cal. 515; *Crane* v. *Powell*, 46 N. Y. S. R. 668; *Alphin* v. *Working*, 32 Ill. App. 178; *Dr. Harter Medicine Co.* v. *Hopkins*, 83 Wis. 309; *Taylor Mfg. Co.* v. *Hatcher Mfg. Co.* 39 Fed. Rep. 440.

Parties to a contract cannot, by stipulation in the contract, oust the court of jurisdiction.

Utter v. *Traveler's Ins. Co.* 65 Mich. 545.

An exception in a contract is something taken out of a thing granted in the same instrument.

1 Bouvier, Law Dict. 491.

Where the parties gave a practical construction of the contract, such construction by both parties should be adopted by the court.

Topliff v. *Topliff*, 122 U. S. 121 (30: 1113); *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50 (19: 594); *Coleman* v. *Grubb*, 23 Pa. 393; *Stone* v. *Clark*, 1 Met. 378, 35 Am. Dec. 370.

The rule of damages, where plaintiff has failed to substantially perform a non apportionable contract, is, he may recover the reasonable value of anything done under the contract, not exceeding the contract price, from which the other party had derived a substantial benefit and has appropriated.

Allen v. *McKibbin*, 5 Mich. 449; *Wildey* v. *Fractional School Dist. No. 1 of Paw Paw*, 25 Mich. 419; *Wilson* v. *Wagar*, 26 Mich. 452; *Begole* v. *McKenzie*, 26 Mich. 470; *Moon* v. *Harder*, 38 Mich. 566; *Gage* v. *Meyers*, 59 Mich. 300; *Wickes Bros.* v. *Swift Electric Light Co.* 70 Mich. 322.

The presumption is that the contract price is the value.

Gage v. *Meyers*, *supra*.

A party to a contract is entitled to recover against the other party who violated it damages for the profits he would have made out of it if it had been performed.

1 Sutherland, Dam. 113; *Grand Rapids & B. C. R. Co.* v. *Van Dusen*, 29 Mich. 431.

Mr. Justice **Brewer** delivered the opinion of the court:

The claims of the respective parties, as stated by the court in its charge to the jury, are briefly these: Plaintiffs claimed *first, an [547 amount unpaid for ore mined in September and October; second, wages which they had paid during certain periods when they were delayed in the prosecution of the work by the fault of the defendant; and third, the profits which they would have made if the defendant had not prevented them from completing the contract. On the other hand, the defendant claimed first, excessive freights paid by reason of a failure on the part of the plaintiffs to produce the ore seasonably: second, damages for a failure to bring out that per cent of the ore which by the contract plaintiffs had agreed to take out of the mine; and third, damages on account of the unskillful working of the mine.

The first claim of the plaintiffs, to wit, for ore mined in September and October, is not disputed. With regard to the second, the court accepted the rule of law agreed upon by counsel for both parties, and, therefore, there is no dispute as to that. The controversy is in respect to plaintiffs' claim for profits, and here many questions are discussed by counsel. We shall in our examination of them follow the order in which they are presented in the brief of defendant's counsel. The first objection to any recovery under this claim is that by the very terms of the contract the defendant was at liberty to terminate it at any time, hence it is insisted that, even if it did so, plaintiffs were not entitled to recover any profits which they might have made had it not been terminated; that coupled with the right to terminate was a special provision, to wit, an award of referees for estimating the damages which the plaintiffs should sustain in consequence of such termination, and that no attempt to secure such an award was alleged or proved. To this it may be replied that the contract did not give to the defendant a right arbitrarily to terminate the contract, but only when it determined that the caving system was "prejudicial to the future welfare and development of the mine," and that there is no pretense that it ever made such determination. On the contrary, the defendant set up as a defense that the plaintiffs abandoned the work and thus broke the contract, and that it suffered great damage thereby, and on the trial the whole scope *of its testimony in this respect was in [548 denial of the charge that it had stopped the plaintiffs from continuing the mining of ore, or in any manner sought to terminate the contract. For aught that appears to the con-

trary in this record, the defendant now as ever believes that the caving system is not only not prejudicial but the best method of working the mine, and broke the contract with plaintiffs only for the sake of giving it to another party.

A second matter of dispute, and one which bears upon the rightfulness of the conduct of the respective parties pending the work, arises on the construction to be given to the stipulation of July 10. The original contract provided that the ore should contain at least 56 per cent of metallic iron, and that no ore of lower grade should be accepted or paid for by the company. The contention of the defendant is that this stipulation modified the contract so that thereafter all the ore taken from the mine in order to be accepted must contain at least 58 per cent of metallic iron, while the plaintiffs insist that this only applied to the ore from the second and third levels, that from the first level being subject to the provision of the original contract, to wit, 56 per cent of metallic iron. We agree with the plaintiffs in their construction of the stipulation. The original contract was only for removing ore from the first level, the company having, however, the option to extend it to the second and third levels. This stipulation provides for such an extension, but it is made expressly subject to "an exception." The use of the word "exception" indicates that something is taken out from the principal matter provided for in the clause or paragraph in which the word is found, and not that something is taken out of or changed from other provisions in other clauses of the entire contract. It will be borne in mind that this is an independent agreement, made at a subsequent time, though supplemental to and in extension of the original contract. And while for a full understanding of the scope of the obligations created by it, the original contract must be referred to, yet, in determining the import of the language used, it is to be construed as an independent agreement, and when *it makes an extension of the obligations of the plaintiffs to a new matter anything which is stated as an exception is to be taken as an exception to the obligations assumed in respect to this additional matter. If the intent was to change the stipulation as to the first level some other word than "exception" would unquestionably have been used. It is unnecessary to refer to extrinsic testimony, of which there was some and of great significance, in order to establish the meaning of this stipulation. For, standing by itself, the fair and reasonable construction is that the stipulation as to the increased per cent was applicable only to the ore taken from the second and third levels, while as to the first level there was no change. [549]

A third proposition of defendant is that "under the facts in this case the damages claimed for loss of profits were too uncertain, contingent, and conjectural to found a verdict upon." Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which are reasonably certain may be. As said by *Mr. Justice* Lamar, in *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 199, 206 [35: 147, 150]: "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." See also *Cincinnati Siemens Lungren Gas Illuminating Co.* v. *Western Siemens Lungren Co.* *ante*, p. 411.

Now, there was in this case testimony to show the cost of mining each ton of ore, and also the amount of ore remaining in the first level of the mine at the time the work stopped. From these figures the profit which would have been made by the plaintiffs if they had completed the work of mining all the ore on the first level is a mere matter of multiplication. *It is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out. But still, proof of the cost of taking out that which had been mined and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore. Equally true is it that there was no mathematical certainty as to the amount of ore remaining in the mine. Yet, both plaintiff and defendant furnished testimony as to such amount, and testimony which, while not such as to put it beyond doubt, was sufficient to enable the jury to make a fair and reasonable finding in respect thereto. The case is one, therefore, in which the profits are not open to the objection of uncertainty, and certainly not to that of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent and mutual understanding of both parties at the time it was entered into. [550]

Again, it is insisted that there was no evidence that the plaintiffs were stopped and prevented from going on with the contract. But this is a mistake; while there is no pretense that the plaintiffs were forcibly removed from the mine, there was testimony that they were directed to quit. One of the plaintiffs, John Humble, gave this account of a conversation held in October with the defendant's superintendent, and their action in consequence thereof.

"We worked from the 9th to the 11th, and then Mr. Bennett stopped me again. We had worked half a day, and at dinner time my partner and I were going together to the dry house and Mr. Bennett came to us and said: 'You boys can stop in that third level altogether.' 'Well,' says I, 'you mean to bring our tools out?' 'Yes,' says he, 'you can run what ore you have broken in the first level and quit.' Then we went down and stopped the men in the lower level, and commenced to run out what we had in the first level, and we sent out all the tools in the mine and left. We got out all the ore we had broken on the footwall lens; there was no more ore left there to break except the pillar."

*John Rowe testified that the defend- [551

ant's superintendant told him that if he could get the plaintiffs out he would let him have the contract, and that by the superintendent's orders he ordered them to stop work. It must be borne in mind that the plaintiffs were making a profit of some thirty cents a ton in carrying on this mining, and it is hardly to be presumed that they were desirous of giving that up, and more reasonable to believe that they quit under compulsion.

In view of the verdict of the jury, which is equivalent to a finding that the defendant had broken the contract, it is unnecessary to inquire as to whether there was any error in the instructions of the court as to damages recoverable by the defendant in case the jury should find the plaintiffs had broken the contract. It may also be remarked in passing that the court excluded from the consideration of the jury the amount of ore remaining in the second and third levels, and limited the recovery to the profits which the plaintiffs would have made if they had been permitted to continue the work so far as to remove all the ore from the first level.

Defendant also complains of the following instruction:

"If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

It is insisted and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever 552] one *party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrong doing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non performance. A party who engages to do work has a right to proceed free from any let or hinderance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused.

In the course of the trial a letter was produced, signed by the plaintiffs, and directed to the general manager of the company, in which was a statement that the first level had been practically exhausted of all commercial ore, and that not to exceed five per cent was left in it. The defendant insisted that this letter was conclusive upon the plaintiffs, but the court permitted testimony on their part to the effect that this letter was written at the solicitation of defendant's superintendant, who said to one of them that someone was reporting to the company that "they were leaving lots of ore in the first level, and he wanted to have this letter written by us to take the blame off of his back," suggesting at the same time that if anything good was discovered in the bottom level to keep it quiet, and that they could make some money out of a speculation in the stock. The court instructed that this letter had "considerable value," as being "a statement in writing" of a party, but also that it was not conclusive, and if the testimony satisfied the jury that the facts were not as stated they were *at liberty to so find. We see nothing [553 in the ruling of which the defendant can complain. There was nothing in the way of estoppel in such a letter, and even if the plaintiffs had written it voluntarily and without any solicitation they would not have been precluded from showing the actual facts. Much more so is this the case if, as stated, the letter was written at the solicitation of the defendant's superintendent and to accomplish a wrongful purpose on his part.

Another matter is this: The contract provided that "the amount of ore shipped from said premises, and the amount due said party of the first part, shall be determined by and based upon the weights as ascertained by the reports of the railroad company, or companies, made to said party of the second part of the shipment of the ore from said mine." In the bill of exceptions is this statement of what took place when one of the plaintiffs, John Humble, was on the witness stand:

"'In order to get information as to the amount of ore shipped, I had to go to the office and ask the bookkeeper, and he gave me 3610 tons for the month of May. I asked the bookkeeper to give us the weigh bills so that we could copy them off. There was no one present but the bookkeeper when I made this application.'

"The witness was then proceeding without further interrogatory to state what the bookkeeper said to him in answer to his application. Defendant's counsel objected thereto as irrelevant and incompetent, but the court overruled said objection, and to said ruling defendant's counsel excepted.

"The witness proceeded: 'He, the bookkeeper, told me Mr. Bennett's orders were to lock those weigh bills in the safe and keep them and give us our account off the books. The next day I asked Mr. Bennett in the office, in the presence of the bookkeeper, to give us

those weigh bills, and he said there was no need of it as long as they copied them off from the books; that was good enough for us.'"

It is insisted that there was error in permitting the witness to give the statements of the company's bookkeeper, on the ground that such 554] *bookkeeper had no authority to speak for the company, that his admissions were not the admissions of the con pany, and that what he said was mere hearsay, and tended to prejudice the jury against the company. There is no force in this objection. By the terms of the contract the amount due the plaintiffs was to be determined by the weigh bills. They were in the possession of the bookkeeper, an officer of the company, and one of the plaintiffs applied to that officer for those bills. The reply of such officer, in possession of that made by the contract the evidence of the amount due the plaintiffs, was competent testimony. If there were any doubt as to its competency, the objection to it would be obviated by the fact that the next day the superintendent practically assented to the truth of the statement, and if the plaintiffs did not produce the weigh bills, they certainly had a right to show why they were unable to do so, the efforts they had made to obtain them, and how it was that they failed.

These are all the questions that we deem it important to consider. We have examined the record very carefully, and find nothing in the rulings of the court of which the defendant can justly complain; and while, in view of the conflicting testimony, there is room for difference of opinion as to what the facts really were, there was testimony which, in amount and character, was sufficient to uphold the verdict of the jury, and of course, under those circumstances, its determination is conclusive upon these questions of fact.

The judgment will be affirmed.

THE CHICAGO DEPOSIT VAULT COMPANY, *Appt.*, *v.* JOHN McNULTA, Receiver, ET AL.

(See S. C. Reporter's ed. 554-564.)

Powers of a receiver—authority to bind the trust—illegal lease.

1. A receiver is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust.
2. A receiver has no authority, without the sanction of the court, to bind the trust by a contract involving large outlays, and which may extend beyond the life of the receivership.
3. Where a receiver leased rooms for his use as receiver, without the authority or sanction of the court, for a term beyond the continuance of the receivership, and the lessor has been paid for their occupancy during the receivership, the court will not direct the payment from the trust of the rent for the unexpired term of the lease which had no legal validity.

[No. 345.]

Submitted April 24, 1894. Decided May 14, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing the petition of the Chicago Deposit Vault Company, for the payment of the rent of certain rooms leased by the receiver of the Chicago division of the Wabash, St. Louis & Pacific Railroad Company, appointed in a suit for the foreclosure of a mortgage on that division of that road. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George L. Paddock** and **Hiram T. Gilbert**, for appellant:

The lease was valid in the absence of an express disapproval by the court.

Cowdrey v. *Galveston, H. & H. R. Co.* 1 Woods, 336; *Vanderbilt* v. *Central R. Co. of N. J.* 43 N. J. Eq. 669; *Field* v. *Herrick*, 101 Ill. 110.

Even if the receiver exceeded his authority in making the lease, it was rendered valid by subsequent ratification by the court.

Evans, Principal & Agent (Ewell's ed.) 62, 63, 70; *Marshall County Suprs.* v. *Schenck*, 72 U. S. 5 Wall. 772 (18: 556); *Smith* v. *United States Exp. Co.* 135 Ill. 279; *Fisher* v. *School Dist. No. 17*, 4 Cush. 494; *Drakeley* v. *Gregg*, 75 U. S. 8 Wall. 242 (19: 409); *Stark* v. *Starr*, 94 U. S. 477 (24: 276); *Connett* v. *Chicago*, 114 Ill. 239; *Ward* v. *Williams*, 26 Ill. 451, 79 Am. Dec. 385; *Foster* v. *Rockwell*, 104 Mass. 167; *Harrod* v. *McDaniels*, 126 Mass. 413; *Sartwell* v. *Frost*, 122 Mass. 184; *Whitbread* v. *Jordan*, 1 Young & C. 303; Broom, Legal Maxims, 944.

The parties interested in the foreclosure suit, the purchasers, the receiver and the court itself, are estopped from insisting upon the invalidity of the lease.

Rogers v. *Burlington*, 70 U. S. 3 Wall. 654 (18: 79); *Ottawa* v. *First Nat. Bank of Portsmouth*, 105 U. S. 342 (26: 1127); *Anderson County Comrs.* v. *Beal*, 113 U. S. 227 (28: 966).

Mr. **Wells H. Blodgett**, for appellees:

The lease was an improvident one, and not being previously authorized, or subsequently approved by the court, it did not bind the trust.

High, Receivers (2d ed.) § 186; *Union Trust Co.* v. *Illinois M. R. Co.* 117 U. S. 434 (29: 963).

The claim of intervenor for rental, during the unexpired term of the lease is not based on a legal contract, or supported by any equitable principle.

Re Farmers Loan & T. Co. 129 U. S. 206 (32: 656).

The reports filed by the receiver showing monthly disbursements on account of "rent of general offices," committed no one to the lease, because they advised no one of its existence.

Mr. Justice **Jackson** delivered the opinion of the court:

Charles H. Beers, as the holder of certain bonds of the Wabash, St. Louis & Pacific Railroad Company, secured by a mortgage or trust deed on the Chicago division of that road, in 1886 filed a bill on behalf of himself and others in the Circuit Court of the United States for the Northern District of Illinois for

NOTE.—*As to powers and duties of receivers*, see note to Davis v. Gray, 21: 447.

the purpose of foreclosing the mortgage, and prayed that pending the rendition of the decree in the cause the court would appoint some disinterested and practical person receiver of all the mortgaged property, equipment, and appurtenances, to hold and administer the same, and disburse the revenues and income thereof under the orders of the court from time to time to be entered in the cause.

On December 16, 1886, the court appointed Thomas M. Cooley receiver of the mortgaged property. The order appointing the receiver contained among other things the following: "And the said receiver is hereby empowered and instructed to take possession of all of the said property described in said mortgage or appurtenant thereto, and to manage, control, and operate the said railroad described in said mortgage, preserve and protect all said property, and collect, as far as possible, all assets, choses in action, and credits due to said company, acting in all things under the orders of this court. . . . Said receiver shall also have authority, subject to the supervision of the court, to make such repairs to said railway and property as are necessary in his judgment for carrying on the business thereof, and also to make all contracts that may be necessary in carrying on the business of said railroad, subject to the supervision of this court. . . . It is further ordered that the said receiver, out of the income which shall come into his hands [556] by the *operation of said railroads or otherwise, proceed to make payments as follows: That he pay all current expenses incident to the creation or administration of his trust and to the operation of said railroad; That he pay all amounts now legally due or that shall hereafter become due for taxes on any of the property over which he is appointed receiver; That he pay all balances due or to become due to other railroads or transportation companies on balances growing out of the exchange of traffic with such railway accruing six months prior hereto; . . . That he pay all rentals to become due upon rolling stock heretofore sold to said railroad company and partially paid for and necessary for use in the operation of the road over which the said receiver is appointed, covered by the mortgage described in the bill herein, and which come into the hands of the receiver under the operation of this order."

The order further directed that after discharging and making all the payments and outlays required by the terms of the order the receiver should retain any surplus remaining in his hands to be applied to the payment of the past due and matured interest coupons secured by the mortgage.

The receiver qualified and took possession of the mortgaged property, and on December 31, 1886, entered into a contract with the Chicago Deposit Vault Company for the lease of rooms 523 to 547 inclusive in the Rialto Building in the city of Chicago, for his use as receiver in the transaction of the business of the railroad. The term of the lease was from January 1, 1887, to April 30, 1891, a period of four years and four months, at a yearly rental of $10,500, payable in installments of $875 monthly in advance. There was a provision in the lease that the receiver might cancel it on May 1, 1888, by giving notice to that effect on or before February 1, 1888.

Cooley, as receiver, took possession of the rooms and continued to occupy them until his resignation in April, 1887, paying the stipulated rent regularly during that time, for which he took credit in his reports of receipts and disbursements. The monthly items of rent were entered in the *receiver's reports [557] under the heading of "operating expenses" as "rent of general offices." These reports were regularly approved by the court.

Upon Cooley's resignation the court appointed John McNulta as his successor, who took possession of the rented premises and continued to occupy them and pay the stipulated monthly rental until July 31, 1889. Receiver McNulta made his reports of receipts and disbursements in the same form as those made by his predecessor, and they were from time to time approved by the court.

The mortgaged property was sold under foreclosure decree and purchased by James F. Joy, Ossian D. Ashley, Thomas H. Hubbard, and Edgar T. Welles as a purchasing committee. The sale and purchase having been confirmed, the court on June 20, 1889, entered an order directing Receiver McNulta on or before July 1, 1889, to turn over all the property in his possession as receiver to the purchasing committee. This order contained the following provision: "But this order is made, and the surrender and delivery of possession by the receiver shall also be made, . . . subject also to the power and right of this court to consider and determine all questions which have heretofore arisen or shall hereafter arise herein concerning expenses of this cause or of the receivership herein, concerning claims against said receiver or against any of the property now in his possession as receiver, and concerning allowances to counsel or to parties, and to charge upon or against said property any amounts at any time deemed by this court proper to be charged upon it, and this court hereby reserves full power and right to consider and determine all such questions, to make any charges which it deems proper against said property now in the possession of said receiver, notwithstanding the surrender thereof, and to resume possession of all or any of said property, if necessary, at any time hereafter, and to place said property again in the possession of a receiver, and to resell or otherwise dispose of the same for the purpose of securing compliance with any orders which it shall make in this cause."

On June 27, 1889, McNulta, as receiver gave notice to the *Chicago Deposit Vault [558] Company that he would not need the leased rooms after August 1, 1889, and that on July 31, 1889, he would surrender possession of the premises to the lessor. The rent was paid by McNulta up to the latter date, when he vacated and gave up possession of the premises.

The Chicago Deposit Vault Company on June 29, 1889, filed an intervening petition in the foreclosure suit of Beers, setting up the execution of the lease; the taking possession and occupancy of the rooms under it by the receivers Cooley and McNulta, and the payment of the monthly rental therefor during

the period of such occupancy. The petition also set out the notice given by McNulta, receiver, of his intention to surrender possession of the rooms, and that he would cease paying rent after July 31, 1889. The petition insisted that the receiver had no right to surrender the lease; that it would be unjust and inequitable, and prayed that he might be restrained from so doing, and that the purchasers of the mortgaged premises at the foreclosure sale should be required to abide by and perform the terms of the lease; that an adequate fund out of the trust assets should be retained in the court to assure the payment of the rent thereafter to accrue, and that the same be applied to the payment of such rent.

To this intervening petition the receiver and the purchasers filed an answer, which, after admitting the execution of the lease by Cooley, as receiver, averred that he had no power, without the approval of the court, to bind the court or the funds of the receivership beyond the time the premises should be required by the receiver, and that the lease was properly terminated by the last receiver's notice. The answer further stated that on July 1, 1889, the receiver, under and in pursuance of the order of the court of June 20, 1889, had turned over all the property to the purchasers at the foreclosure sale.

An amended petition, filed by the intervenor on April 5, 1890, set forth that $7875 had accrued as rental under the lease since the filing of its original petition, and repeated substantially the same prayer for relief.

Proof was made of the execution of the lease, possession of the premises by the two receivers, [559] payment of the *monthly rental by them, and the approval of their accounts by the court, showing such payment. It was also shown by the petitioner that the rental agreed upon was as reasonable as the receiver could have secured elsewhere.

The monthly reports made by the respective receivers, which show, under the heading of "operating expenses," the payment of certain sums as "rent for general offices," did not disclose to the master by whom the reports were examined, or to the court, that the lease had been made by the first receiver, or that the second receiver (McNulta) had occupied the rooms thereunder.

Upon the hearing the court dismissed the petition on the following grounds: "The order appointing the receiver was not broad enough to authorize him to enter into the contract of lease, and the lease was never reported to or confirmed by the court. It is true that from time to time the receiver's accounts, embracing payments of rent under the lease, were submitted to the master and passed by him, and the master's reports approved by the court. That, however, was not such a confirmation of the lease as concluded the court. Any contract entered into by the receiver not authorized by the order of appointment, and not subsequently confirmed by an order of the court, ended with the termination of the trust. The intervening petition is dismissed, each party paying half the costs."

From this decree the present appeal is prosecuted by the intervenor and the following errors are assigned for its reversal: (1) the court erred in holding that the order appointing the receiver did not authorize him to enter into the contract of lease in controversy; (2) in holding that such lease was never reported to or confirmed by the court; (3) in holding that the action of the court and the master in chancery upon the receiver's reports and accounts was not a sufficient confirmation of such lease; (4) in holding that the equities were with the defendants to the intervening petition; (5) and in ordering and decreeing that such petition be dismissed, and in not granting the relief prayed for in said petition.

The proof fails to show, as said in the opinion of the court below, that the lease was ever reported to or confirmed by the court. The receiver's reports which were approved by the court did not disclose the fact of the existence of the lease, or its terms and provisions, in such manner as to make the court's approval of the reports a confirmation of the lease.

The question then remains whether the order appointing the receiver conferred upon him the requisite authority to *enter into a con- [561] tract of lease, involving a large annual expenditure, and extending beyond the receivership so as to make the contract a proper charge against the trust property under the administration of the court?

While there is some want of harmony in the authorities upon the question as to how far a receiver may make and enter into contracts without the previous approval or subsequent ratification of the court, which shall be binding upon the trust, we are of opinion that the order appointing the receiver in this case was not broad enough in its terms to authorize him to enter into the lease in question so as to give it validity without the approval or confirmation of the court.

It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liability for supplies, material or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or contracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust.

In *Cowdrey v. Galveston, H. & H. Co.* 93 U. S. 352 [23:950], it was held that a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid

in the construction of a railroad parallel with the one in his hands, were properly disallowed 562] in the settlement of his final *account, although such road, if constructed, might have diminished the future earnings of the road in his charge.

This same general principle is recognized in *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434, 479 [29:963, 978], where debts for considerable sums of money, borrowed by the receiver without previous authority from the court, were not allowed any priority out of the trust fund, although the moneys borrowed were applied to pay expenses of the receivership, such as supplies, repairs, and pay rolls, and to replace moneys which had been so applied, for the reason that no order of the court had been obtained to borrow funds for those purposes.

In *Lehigh Coal & Nav. Co.* v. *Central R. Co.*, 35 N. J. Eq. 426, it was said that "the receiver may undoubtedly appropriate moneys in his hands, belonging to the trust, to such purposes connected with the trust as he may think proper, always taking the risk that the court will finally approve his action; but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved and ratified by the court the court is at liberty to deal with them as to it shall appear just, and may either modify them or disregard them entirely. . . . All persons dealing with receivers do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court."

This states the correct rule upon the subject, especially in respect to contracts involving large outlays, and which may extend beyond the life of the receivership. The same general rule is stated in Beach on Receivers, section 257, as follows: "But a receiver is not allowed to exercise his discretion in applying the funds in his hands. These he holds strictly subject to the direction of the court, and only to be disposed of upon its order. Neither can he enter into contracts without the approval of the court. Although, as receiver, he may enter into negotiations and make such agreements as would be binding upon him as an individual, yet, in order to affect the fund in his hands his acts must be ratified by the court. This rule is so well established that it has been decided that all persons contracting 563] with a *receiver are chargeable with knowledge of his inability to contract, and enter into contracts with him at their own peril, and that the court has unquestioned power to modify or even vacate his agreements." To the like effect is a statement of the rule made in section 186 of High on Receivers.

What was said by *Mr. Justice* Bradley in *Goodrey* v. *Galveston, H. & H. R. Co.* 1 Woods, 336, and by the court in *Vanderbilt* v. *Central R. Co.* 43 N. J. Eq. 669, cited and relied on by the appellant, does not conflict with the general principle laid down in the authorities above referred to.

In respect to contracts which have been completely performed by a party dealing with a receiver, and when the claim is merely for compensation, equitable relief is often granted, although there was no previous approval or subsequent ratification of the receiver's act. This is pointed out by the chancellor in *Vanderbilt* v. *Central R. Co.* *supra*.

In the case under consideration the intervening petitioner has been fully paid for the time that its premises were occupied for the benefit of the trust. The receiver not only had no authority to contract beyond that time, but by the order of his appointment his expenditure of the funds was limited and confined to designated objects and purposes. Under these circumstances the court was not bound to recognize any equitable right of the intervening petitioner to be paid for the unexpired term of a lease, which had no legal validity.

The position taken on behalf of the appellant that there was a confirmation of the lease growing out of the fact that the receiver's expenditures in the way of rental for general offices were approved, cannot be sustained. If the doctrine of ratification could be invoked it would have no application in the present case, because there was no knowledge on the part of the court prior to the filing of the intervening petition that such a lease had been entered into by its receiver; and in respect to the remaining contention of the appellant, that the court and the purchasers under the foreclosure sale were estopped from denying the lease, there is nothing in the record on which to predicate such a proposition, even conceding that the doctrine of estoppel could be applied to courts.

*Under the order of June 20, 1889, di- [564 recting the receiver to turn over the property to the purchasers at the foreclosure sale, the court undoubtedly had the authority to charge the property with such claims against the receiver as it might thereafter allow, but that reservation of power did not make it the duty of the court to allow the claim of the intervening petitioner.

The lease having no legal validity without the sanction of the court, the equitable consideration in favor of the purchasers of the trust property at the foreclosure sale are stronger than those of the appellant.

We are, therefore, of opinion that there was no error in the decree of the court below, and the same is accordingly affirmed.

HENRY M. LOUD, *Plff. in Err.*,
v.
THE POMONA LAND & WATER COMPANY.

(See S. C. Reporter's ed. 564-583.)

Dependent covenant — condition precedent — construction of agreement—payment for land —payment by instalment—acts done at different times—partial payment.

1. If the acts covenanted to be performed by the vendor and the vendee respectively, in a contract

NOTE.—*As to covenants in contract; when dependent and when independent*, see note to Goldsborough v. Orr, 5: 600.

As to contracts; performance; when excused by non-performance of other party or his prevention of per-

for the sale of land, are dependent and concurrent, neither party is entitled to an action against the other without the averment of performance or the tender of performance on his part.

2. If the payment of the purchase price for lands contracted to be sold is a condition precedent to the vendor's covenant to convey, then the vendor it entitled to enforce payment without conveyance or tender of conveyance, and the allegation in his complaint of his readiness and willingness to convey, upon payment of the purchase money, is sufficient.

3. The question whether covenants are dependant or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement.

4. Where the terms and provisions of the contract for the sale of land are that the purchaser shall first pay the purchase price of the lands contracted for before he is entitled to demand a conveyance therefor, the payment or tender of payment of the purchase price for the land is a condition precedent to the right to the conveyance.

5. An agreement to pay by instalments, or at different times, for land, makes the covenants to pay, and to deed, independent.

6. Where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent of each other.

7. Where the vendee of land did not pay the first installment in full, and the vendor accepted the partial payment, and both parties have treated the contract as a subsisting one, the vendee cannot claim that the contract was terminated because of his own failure to pay the first installment in full.

[No. 194.]

Argued Jan. 8, 9, 1894. Reargued April 13, 16, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan, to review a judgment for plaintiff, the Pomona Land & Water Company, against Henry M. Loud, defendant, for moneys due upon contracts for the sale and purchase of lands in California, and of stock in irrigation companies. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Benton Hanchett** and **Geo. F. Edmunds,** for plaintiff in error:

The intent of the contracts is that upon payments being made, and when they are made, the conveyance of the land and delivery of the stock will be made. The acts of payment and of conveyance and delivery of the stock are to be concurrent; the undertakings are dependent.

Under these provisions, in order for the plaintiff below to recover, in an action at law, the purchase money, after the last payment became due, the plaintiff must aver and prove that on the date when the last payment became due, the plaintiff tendered to the defendant a conveyance of the land and shares of stock, and tendered the stock itself.

Bank of Columbia v. *Hagner*, 26 U. S. 1 Pet. 455 (7: 219); *Turner* v. *Ogden*, 66 U. S. 1 Black, 450 (17: 203); *Hill* v. *Grigsby*, 35 Cal. 656; *Bishell* v. *Diller*, 41 Cal. 532; *Englander* v. *Rogers*, 41 Cal. 422; *Heine* v. *Treadwell*, 72 Cal. 220; *Johnson* v. *Wiggant*, 11 Wend. 49; *Parker* v. *Parmele*, 20 Johns. 130, 11 Am. Dec. 253; *Kane* v. *Hood*, 13 Pick. 281; *Carman* v. *Pultz*, 21 N. Y. 547; *Berryhill* v. *Byington*, 10 Iowa, 223; *Nelson* v. *Wilson*, 75 Iowa, 710; *Goodrine* v. *Morey*, 111 Ind. 68; *Ackley* v. *Richman*, 10 N. J. L. 305; *Egbert* v. *Chew*, 14 N. J. L. 447; *Shinn* v. *Roberts*, 20 N. J. L. 443, 43 Am. Dec. 636; *Biddle* v. *Corzell*, 18 N. J. L. 377, 38 Am. Dec. 521; *Headley* v. *Shaw*, 39 Ill. 354; *Eddy* v. *Davis*, 116 N. Y. 247; *Becher* v. *Conradt*, 13 N. Y. 108, 64 Am. Dec. 535.

If the delivery of the deed is to be treated as an act separate from the delivery of the stock, then recovery cannot be had because of failure to tender the stock. If the delivery of the deed and stock are to be made at the same time, then the time of delivery is made concurrent by the explicit language relating to the stock.

The only averment on this subject in the declaration is that the plaintiff has been at all times, and is now, ready and willing, upon making the payments, to convey by deed the property described, together with the shares of stock.

Within all the cases, this is not a sufficient averment to meet the requirements of the law. The declaration should aver the ability of the plaintiff to deliver such stock, as well as a tender of it and proofs should be made to sustain the averment in order to warrant a recovery. The defendant is not bound to accept a defective title

Swan v. *Drury*, 22 Pick. 485; *Courtright* v. *Deeds*, 37 Iowa, 508; *Linton* v. *Allen*, 147 Mass. 231; *Burwell* v. *Jackson*, 9 N. Y. 535; *James* v. *Burchell*, 82 N. Y. 108; *Bigler* v. *Morgan*, 77 N. Y. 312.

The right of transfer of capital stock in a corporation cannot be taken away, or limited by by-laws.

Cook, Stock & Stockholders, § 408; *Anglo-California Bank* v. *Grangers Bank*, 63 Cal. 359; *Driscoll* v. *West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Bullard* v. *National Eagle Bank*, 85 U. S. 18 Wall. 589 (21: 923); *First National Bank of South Bend* v. *Lanier*, 78 U. S. 11 Wall. 369 (20: 172); *Kennebec & P. R. Co.* v. *Kendall*, 31 Me. 477; *Sargent* v. *Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Taylor* v. *Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33; *Farmers & M. Bank* v. *Wasson*, 48 Iowa, 336; *People* v. *Fire Dept. of Detroit*, 31 Mich. 458;

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formance, see note to United States v. Peck, 26: 46.

As to contracts, their interpretation and validity, see note to Bell v. Bruen, 11: 89.

As to when vendee is estopped from disputing the title of his vendors, see note to Watkins v. Holman 10: 873.

As to actual delivery, not usually necessary to transfer a title upon a sale of personal property as between vendor and vendee; payment of purchase money, when a condition of vesting title; when right of possession passes to vendee; what is sufficient delivery to vest title; when delivery necessary, see note to Briggs v. United States, 36: 180.

As to covenant of seisin, when broken, and when not measure of damages for breach of same, see note to Le Roy v. Beard, 12: 1151.

Morgan v. *Struthers*, 131 U. S. 252 (33: 134); Angell & Ames, Priv. Corp. § 164.

The capital stock of a corporation gives the holder no legal title to the property of the corporation. It only represents the proportion to which the holder is entitled in the distribution of the profits of the business, and in the estate of the corporation on its final winding up.

Kehl v. *Lilienthal*, 6 L. R. A. 520, 81 Cal. 378; *Farrington* v. *Tennessee*, 95 U. S. 686 (24: 560); *Sanger* v. *Upton*, 91 U. S. 60 (23: 222); *Churchill* v. *Utica* ("*Van Allen* v. *The Assessors*") 70 U. S. 3 Wall. 598 (18: 239); *Field* v. *Pierce*, 102 Mass. 261; *Pimpton* v. *Bigelow*, 93 N. Y. 539; Cook, Stock & Stockholders, §§ 3, 5, 9, 10.

A stockholder is always liable for the debts of the corporation to the amount unpaid on his stock.

Carmon v. *Page*, 62 Cal. 448; Cook, Stock & Stockholders (1st ed.) § 42f, § 46b, § 49c.

Messrs. **Don M. Dickinson** and **Henry M. Duffield**, for defendant in error:

The California decisions, which are the *lex rei sitæ* and *lex loci contractus*, have firmly established the rule in that state that a vendee in a contract for the sale of lands cannot defend an action for the purchase price unless he has surrendered possession.

Rhorer v. *Bila*, 83 Cal. 51; *Gates* v. *McLean*, 70 Cal. 42.

In cases upon contracts with much less specific language the authorities are unanimous that the tender of a deed is not a condition precedent to the commencement of the action.

Paine v. *Brown*, 37 N. Y. 228; *Adams* v. *Wadhams*, 40 Barb. 229; *Davis* v. *Heady*, 7 Blackf. 261; *Gale* v. *Leet*, 20 Wis. 45; *Sayre* v. *Craig*, 4 Ark. 10, 37 Am. Dec. 757; *Mayers* v. *Rogers*, 5 Ark. 417; *Leftwich* v. *Coleman*, 8 How. (Miss.) 167; *Waterman* v. *Banks*, 144 U. S. 394 (36: 479).

Willingness and readiness to deed is all that need be averred, and, therefore, all that need be proved.

Wilcox v. *Ten Eyck*, 5 Johns. 78; *Seers* v. *Fowler*, 2 Johns. 272; *Poole* v. *Hill*, 6 Mees. & W. 835; *Pordage* v. *Cole*, 1 Saund. 320; *Gardiner* v. *Corson*, 15 Mass. 500; *Thorpe* v. *Thorpe*, 1 Salk. 171; *Bailey* v. *Clay*, 4 Rand. (Va.) 346; *Podak* v. *Brush Electric Asso.* 128 U. S. 446 (32: 474); *Terry* v. *Duntze*, 2 H. Bl. 389; *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 18 How. 307 (14: 157).

Even in dependent covenants an averment of readiness and willingness to perform is sufficient.

1 Chitty, Pl. (7th Am. ed.) 324; *Gazley* v. *Price*, 16 Johns. 267; *De Medina* v. *Norman*, 9 Mees. & W. 820; *Howland* v. *Leach*, 11 Pick. 151.

An averment of readiness to convey a title is an avernent of title.

Ferry v. *Williams*, 8 Taunt. 62.

Where defendant has refused to perform his contract, or waived performance on the part of the plaintiff, the latter may recover without offer of performance, even in the case of mutual and dependent covenants and agreements.

Smith v. *Lewis*, 26 Conn. 110; *Williams* v. *Bank of United States*, 27 U. S. 2 Pet. 101 (7: 362); *Fannen* v. *Beauford*, 1 Bay. 238; *Marshall* v. *Craig*, 1 Bibb, 379, 4 Am. Dec. 647.

If the covenantee is the cause why the covenantor cannot perform his covenant, he is excused, and the money to be paid to him for performance becomes due as if he had actually performed.

Couch v. *Ingersoll*, 2 Pick. 302; *Miller* v. *Drake*, 1 Cal. Cas. 45; *Granger* v. *Dwere*, 12 Mees. & W. 430; *Hosmer* v. *Wilson*, 7 Mich. 304, 74 Am. Dec. 716; *Derby* v. *Johnson*, 21 Vt. 31; *Haines* v. *Tucker*, 50 N. H. 311; *Clement & H. Mfg. Co.* v. *Meserole*, 107 Mass. 362; *Collins* v. *Delaporte*, 115 Mass. 162; *Daniels* v. *Newton*, 114 Mass. 533, 19 Am. Rep. 384; 1 Chitty, Pl. (7th Am. ed.) 358; Anson, Cont. (2d Am. ed.) 284, 285.

Where one party to a contract declares to the other party to it that he will not make the performance on the future day fixed by it therefor, and does not, the other party is excused from performance on his part, or offer to perform.

Stam v. *Republic L. Ins. Co.* 69 N. Y. 292; *Franchot* v. *Leach*, 5 Cow. 506; *Travers* v. *Halsted*, 23 Wend. 66; *Cauda* v. *Wick*, 100 N. Y. 127; *North* v. *Pepper*, 21 Wend. 636; *Carpenter* v. *Holcomb*, 105 Mass. 284; *United States* v. *Lee*, 106 U. S. 196 (27: 171); *Ankeny* v. *Clark*, 148 U. S. 345 (37: 475).

A verbal change of the mode of performance or terms of payment of a contract for the purchase and sale of real estate is valid and binding.

Cummings v. *Arnold*, 3 Met. 486, 37 Am. Dec. 155; *Hastings* v. *Lovejoy*, 140 Mass. 264, 54 Am. Rep. 463; *Kimball* v. *Goodburn*, 32 Mich. 10; *Blanchard* v. *Trim*, 38 N. Y. 225; *Organ* v. *Stewart*, 60 N. Y. 419; *Stearns* v. *Hall*, 9 Cush. 31.

Misrepresentations, to constitute sufficient grounds for setting aside a purchase, must be material, as being of such a nature as, if true, to add to the value; must not be evidently merely conjectural statements, and must be made without a belief in their truth, or without reasonable grounds for such a belief. But when the purchaser has not relied upon them, and has had opportunity to judge of their accuracy, he is not entitled to have the contract rescinded by reason of them. The same rule is applied to miscescriptions when vendee has opportunity to examine for himself.

Gordon v. *Parmelee*, 2 Allen, 212; *Mooney* v. *Miller*, 102 Mass. 217; *Clarke* v. *Baird*, 7 Barb. 64.

The defendant has not offered to rescind the contract but he still continues in possession. He cannot, therefore, defend against the action.

Jennings v. *Brangton*, 5 De G. M. & G. 126; *Cobb* v. *Hatfield*, 46 N. Y. 533.

The taking of any benefit under the contract after knowledge of the fraud or changing the condition of the property which is the subject-matter of the contract, is a ratification of it.

Guckenheimer v. *Angerine*, 81 N. Y. 394; *Gould* v. *Cayuga County Nat. Bank*, 86 N. Y. 75; *Stone* v. *Perkie*, 16 Vt. 213.

Rescission will not be allowed, in law or equity, if the party seeking it, after discovery of the fraud, etc., delays taking steps to rescind or recover for the deceit.

Negley v. *Lindsay*, 67 Pa. 217, 5 Am. Rep. 427; *Akerly* v. *Vilas*, 21 Wis. 88; *Grymes* v. *Sanders*, 93 U. S. 55 (23: 798); *Bartlett* v. *Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101;

Fitzpatrick v. *Flannagan*, 106 U. S. 648 (27: 211); *California Steam Nav. Co.* v. *Wright*, 8 Cal. 585.

565] *Mr. Justice* **Jackson** delivered the opinion of the court:

The Pomona Land & Water Company, defendant in error, a corporation duly organized under the laws of the state of California, brought this action of covenant against Henry M. Loud, a citizen of the state of Michigan, to recover various sums of money due upon agreements under seal, embodied in twenty contracts and nine applications for the sale and purchase, at different prices, of separate and distinct parcels of land lying and being in the state of California, together with designated shares of stock in certain irrigation companies.

The twenty contracts declared on in counts one to forty inclusive are substantially the same in form, the difference between them being in the dates, description of land, purchase price, time of payment, and the number of shares of stock in the irrigation companies. The applications declared on in counts forty-one to forty-nine inclusive, while relating to different parcels of land, and varying in dates, purchase price, time of payment, etc., are also substantially alike.

These several contracts and applications need not be separately noticed or considered. One class is represented and illustrated in the contract set out in the first count of the declaration, while the other is set out according to its legal effect in the forty-first count of the declaration. The contract declared on in the first count is as follows:

"This agreement made the eighth day of April, 1887, between Pomona Land & Water Company, a corporation duly organized under the laws of the state of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, state of California, party of the first part, and H. M. Loud of Oscoda, Michigan, party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25, A. D. 1883, and in consideration of twenty-five hundred and thirty-nine dollars, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance 566] of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed, of grant, bargain, and sale, to the party of the second part, his heirs or assigns, the following described real property situated in the county of Los Angeles, state of California, to wit: Lot seventeen (17) of the northeast Pomona tract, according to the map of said track duly recorded in book 5, page 461 of miscellaneous records of Los Angeles county, California, estimated to contain forty and .62 acres of land, together with 406.2 shares of stock of the Del Monte Irrigation Company, representing four and .062 inches of water under four inch pressure, measured from center of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above described land.

"The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water; also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

"And for and in consideration of the foregoing agreement, and as the purchase price of the above described premises, the party of the second part do covenant and agree to pay to the party of the first part, its successors or assigns, the sum of ten thousand one hundred and fifty five dollars, United States gold coin, to be paid in the following manner:

"$2539 on or before delivery of this contract,
3303 on or before April 8, 1888,
3808 on or before April 8, 1889,
—— on or before —— –, 188–,

and interest upon said respective sums from April 8, 1887, until paid, at the rate of eight per cent per annum, payable annually; and if not so paid, at option of said company, to be added to principal and bear like interest.

"And the party of the second part, in consideration that the party of the first part [567 does hereby agree that the party of the second part may at once enter upon, occupy, and enjoy the above described premises, does further covenant and agree to pay and discharge all taxes, assessments, and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second party doing so, the party of the first part may pay the same, and before the final payment of purchase money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from the date of such payment at the rate of one per cent per month.

"And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors or assigns, at their option, to rescind this agreement to convey, to re-enter upon, and to repossess said premises and all improvements existing thereon; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case that all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment, and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

"It is further expressly agreed that time is of the essence of this contract.

"In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its presi- [568

dent and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this third day of May, 1887. Executed in duplicate.

"Pomona Land & Water Company,
"By H. A. Palmer, President.
"[Seal of the Company.]
"By F. L. Palmer, Secretary.
"H. M. Loud, [l. s.]
"Sealed and delivered in the presence of—
"B. F. Nichols."

The applications are in the following form:

"*Application for purchase.*
"Pomona, Cal., April 15th, 1887.

"Received from H. M. Loud seventy-five dollars deposited on application for purchase of Northeast quarter (N. E.¼) of lot twenty-two (22) containing ten (10) acres of land according to map of the San Antonio tract, duly recorded in book 3, p. 7, of map records of San Bernardino county with usual water rights pertaining to said tract, at the price of fifteen hundred dollars and on the following terms; seventy-five dollars cash deposit as above:

"First payment, $300.00, within sixty days from date; second payment, $562.50, on or before April 15th, 1888; third payment, $562.50, on or before April 15, 1889; second and third payments to bear interest from date at the rate of eight per cent per annum, interest to be payable annually. In consideration of the premises I, H. M. Loud, hereby agree to purchase said property and pay for the same at the price and on the terms above set out; and in consideration that the Pomona Land & Water Company has withdrawn from the market the above described land for sixty days, so that the said H. M. Loud may purchase the same at the above agreed on price in case the said H. M. Loud fails or refuses to make said first payment, as above, within the time above mentioned, then the deposit herein made shall be retained by the Pomona Land & Water Company as the estimated damages suf-[569] fered *and the liquidated damages received by said company on account of the withdrawal of the land from the market as aforesaid. Time is hereby declared to be of the essence of the fulfillment of the obligation of the said H. M. Loud to purchase the above land under the terms and conditions above expressed. No title, legal or equitable, nor any right to the possession of the above described land, shall inure to said H. M. Loud until the Pomona Land & Water Company shall have delivered an executed contract to him for the same.

"H. M. Loud, [seal.]
"Thomas & Easton, [seal.]
"F. MacPherson, A'gt.

"Indorsed: Pomona, June 20, 1887. Received $300.00, being balance of first payment on the within application. Pomona Land & Water Company. F. L. Palmer, treas."

The ninth application for the purchase of lot eleven (11) of the northeast section of the Pomona tract differed from the rest in the fact that only part of the first payment was made.

The declaration, after alleging the refusal and failure of the defendant below to pay the respective sums due under the several contracts, averred that the plaintiff had been at all times, and was still ready and willing, upon the making of the payments in said contracts expressed to be made and performed by the said Henry M. Loud, to convey by deed of grant, bargain, and sale to the said Loud, his heirs or assigns, the property described in said contracts, together with the shares of stock of the respective irrigation companies referred to in the contracts. There was no averment in the declaration of any tender of a conveyance or conveyances of the lands or of the stock in the irrigation companies, nor of any tender of any conveyance or contracts referred to in the applications.

The record contains no plea on the part of the defendant below, but there was served upon the plaintiff's attorney a copy of the plea of the general issue, with notice of special matters of defense, which the parties have treated as a pleading by the defendant. The special matters of defense set out in the notice were in effect as follows: That if the *contracts [570] were made they were obtained by fraud and were therefore void; that the use and value of the lands depends upon their proper irrigation by artificial means; that to induce defendant below to make the purchase of the lands the plaintiff representated that it had a good, clear title in fee to the lands; that it controlled and possessed water and water rights by means of shares of stock in the Del Monte, the Palomares Irrigation Companies, and the Irrigation Company of Pomona to furnish ample and sufficient water to fully and sufficiently irrigate said lands, so that each parcel of land should have water to irrigate the same; that the plaintiff below, knowing that defendant's only purpose in making the contracts was to resell the lands at a profit, represented that it had not and would not place any other lands upon the market for sale that defendant relied upon these representations and statements, which proved to be false; that the plaintiff was insolvent and irresponsible; that it did not have a good title to the lands, but that they were heavily encumbered with mortgages, and therefore the defendant could not convey a good title to them; that the plaintiff land company did not possess or control sufficient water or water rights to fully and sufficiently irrigate the lands, and water sufficient to irrigate said lands was not represented by means of the stock in the irrigation companies named, and could not be furnished by said stock; that the supply of water furnished thereby was not and could not be continuous; that the irrigation companies had not sufficient supplies of water to furnish such water or to furnish it continuously or in the quantities called for by the contracts; that the irrigation companies were not responsible for furnishing such supply which was not brought on, or supplied, to said lands; that notwithstanding the agreement of the plaintiff below that it would not put other lands on the market, it at once, after the making of the contracts, placed large quantities of land on the market, and became such a strong competitor that the defendant was prevented from making a sale of said lands; that to some of the lands no water was brought, and to none was it brought in sufficient quantities to irrigate them; that he was a stranger *in [571] California; that he hesitated to enter into the

contracts because he was unfamiliar with the laws of the state and of the business methods in common use by the plaintiff, and did not know the risk or the extent of the liabilities he would incur; but that plaintiff induced him to make such contracts, representing that they were upon the common printed forms it had adopted, and that defendant would not be liable under the laws of the state beyond the amount he should pay upon the contracts, and the loss of the land in case of failure to make payments; that plaintiff only dealt in that manner in its land sales, and in no event would it hold, or seek to hold, the defendant to any personal liability beyond the amount paid; that defendant relied upon these representations in entering into the contracts, and that this suit was in violation of such representations and a fraud upon defendant.

As a further special defense the defendant set up "that the plaintiff did not, on the day when the last installment of the purchase price was made payable by the terms of said alleged contracts respectively, nor at any time, convey or tender a conveyance of the land or stock described in said contracts respectively, or in either or any of them, to this defendant."

Upon the trial of the cause the circuit court directed a verdict for the plaintiff for the various sums due and unpaid under the contracts, amounting with interest to $79,819.30. On motion for a new trial, heard before the circuit justice (*Mr. Justice* Brewer) and the district judge, who tried the case (*Judge* Brown) it was ordered that judgment be entered on the verdict, but that execution should be stayed "until thirty days after the plaintiff had deposited with the clerk of the court for the benefit of the vendee all the deeds to the lands and certificates of stock, so that defendant may have an opportunity of examining the same to see if the titles are perfect, and the transfers of stock are made in accordance with the laws of the state of California."

In compliance with this order the plaintiff below deposited deeds for the land and certificates for the stock in the irrigation companies in accordance with the terms of the several contracts, but the defendant declined to accept **572**] the benefits of *the order or to receive the deeds and stock so deposited, and prosecuted the present writ of error to reverse the judgment of the court below.

Many of the special matters set up by the defendant below were clearly irrelevant and unavailable as defenses to the suit. Thus, the various matters of inducement for entering into contracts, and the alleged representations made by agents of the plaintiff prior to their execu- **575**] tion, and the purpose of *the defendant in making the purchases with a view to the resale of the lands at a profit, together with his being a stranger in California, unacquainted with the laws of that state, the business methods in common use, or those used by the plaintiff; and his hesitancy about entering into the contracts; his want of knowledge as to the extent of the risk and liability he would incur thereby; and his reliance upon representations that he would not under such contracts, by the laws of the state, incur any liability beyond the amounts he should pay and the loss of the lands were matters, which, if true, could constitute no answer to the suit upon the sealed contracts. The errors assigned to the action of the court in excluding testimony relating to these matters are not well taken. The deeds to Charles W. Brown and to other parties, antedating the contracts in suit, and having no connection with the lands covered thereby, offered for the purpose of showing what constituted water rights and water stocks; the representations of the plaintiff's agent as to title to the land and stock, made before the execution of the contracts; the defendant's lack of knowledge of the by-laws of the irrigation companies; the abandonment of the lands since 1885; the transcript of the patent of the United States of January 20, 1875, to Henry Dalton and others of the San José ranch, without an official seal attached and wanting a proper certificate from the presiding judge of the court, were incompetent to control the terms of the written contracts or to show any defect in plaintiff's title.

The other matters set up and relied upon, so far as the same were material or available as defenses to the suit—such as fraud in obtaining the contracts from defendant, want of title in the plaintiff to the lands and stock in the irritation companies representing water rights —were not supported by proof. These irrelevant and unestablished matters of defense need not be further discussed.

The defendant presented twenty-seven requests to charge, the legal questions arising under which are embodied in the general proposition covered by the last special ground of defense that the plaintiff did not, when the last **576**] installment *of the purchase money matured nor at any time, convey or tender a conveyance of the land and stock described in the contracts in suit, respectively, or in either or any of them, to the defendant. This presents the real controverted question in the case, and its determination turns upon the point whether the covenants in the contracts are dependent or independent; that is to say, whether the covenant upon the part of the defendant below to pay the stipulated price for the lands purchased, or agreed to be purchased, is a condition precedent to the performance by the plaintiff of his covenant to convey such lands?

The contention of the plaintiff in error is that the covenants are dependent and concurrent, and that he is not bound to perform his agreement to pay the purchase price without a tender of performance on the part of the land company. On the contrary, the defendant in error insists, as held by the court below, that the covenants were independent, and the plaintiff in error is bound to pay the stipulated price as a condition precedent to its obligation to convey or tender any conveyance of the lands described.

If the acts to be performed by the land company and the purchaser, respectively, are dependent and concurrent, neither party would be entitled to an action against the other without the averment of performance, or the tender of performance, on his part. If, however, the payment of the purchase price for the lands is a condition precedent to the land company's covenant to convey, then it is entitled to enforce payment without conveyance or tender of conveyance, and the allegation of its readi-

ness and willingness to convey, upon payment of the purchase money, was sufficient.

The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such 577] *construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?

In this case there is no ambiguity in the language of the contracts. The covenant and agreement of the land company is that "*after* the making of the payment and full performance of the covenants hereinafter to be made and performed by the party of the second part, (Louis) the party of the first part (the land company) will, in consideration thereof, convey by deed of grant, bargain, and sale to the party of the second part, his heirs or assigns," the described lands, together with the designated shares in the irrigation companies. A subsequent clause of the contract provides that "this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and until the delivery of the final deed of conveyance, or *tender of all payments precedent thereto*, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises," and it is further provided that time is of the essence of the contract.

If these terms and provisions of the contracts are to be understood in their plain and obvious meaning, they clearly express the intention of the parties to be that the purchaser shall first pay the purchase price of the lands contracted for before he is entitled to demand a conveyance therefor. It is also clear that the purchaser (the defendant below) could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid. The payment or tender of payment of the purchase price for the land was a condition precedent to the right to the conveyance. The authorities, both in England and in this country, fully sustain this construction of the contract. A brief reference will be made to some of the principal cases on the subject.

578] *In the learned note of Serjeant Williams to the early case of *Pordage* v. *Cole*, 1 Saund. 320, it is said that, "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act."

In *Porter* v. *Shepherd*, 6 T. R. 665, involving the right of a lessee to terminate the lease, it was held that the words "*from and after* payment of rent and performance of covenants," constituted a condition precedent.

In the subsequent case of *Grey* v. *Friar*, 4 H. L. Cas. 565, where the opinion of the judges was asked by the House of Lords as to whether a proviso constituted a condition precedent, the case of *Porter* v. *Shepherd* was followed, and the proviso held to be a condition precedent.

In *Goldsborough* v. *Orr*, 21 U. S. 8 Wheat. 217 [5:600], it is said that where the acts are stipulated to be done at different times the covenants are to be construed as independent of each other.

So, in *Goodwin* v. *Lynn*, 4 Wash. C. C. 714, the rule was laid down that to ascertain whether covenants are dependent or independent, the intention of the parties is to be sought for rather in the *order of time* in which the acts are to be done, than from the structure of the instruments.

In *Phillips & C. Const. Co.* v. *Seymour*, 91 U. S. 645, 659 [23:341, 343], it was said by *Mr. Justice* Miller, speaking for the court, that "where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if by the terms or the nature of the contract one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other. *There [579 is no doubt that in this class of contracts, if a day is fixed for performance the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party."

In many cases, both in England and in the United States, the rule of construction is adopted that an agreement to pay by installments or at different times would make the covenants independent, since such an agreement manifests a willingness to rely on the covenants of the other contracting party for title or performance as the consideration for such payments. Also, where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent of each other.

The land company's contention as to the proper construction of the contracts is supported by the following authorities, amongst others that might be cited: *Davis* v. *Heady*, 7 Blackf 261; *Gale* v. *Best*, 20 Wis. 45; *Sayre* v. *Craig*, 4 Ark. 10, 37 Am. Dec. 757; *Mayers* v. *Rogers*, 5 Ark. 417; *Hill* v. *Fisher*, 34 Me. 143; and *Leftwich* v. *Coleman*, 3 How. (Miss.) 167.

The cases of *Bank of Columbia* v. *Hagner*, 26 U. S. 1 Pet. 455 [7:219], and *Turner* v.

Ogden, 66 U. S. 1 Black, 450 [17:203], are not in conflict with the foregoing decisions and the propositions they announce. The stipulations of the contract in the former case were not similar to those in the case under consideration, while in *Turner* v. *Ogden* the agreement was expressly made dependent on the surrender and cancellation of a previous contract, made by the plaintiff for the sale of the same lands to a third party, without which surrender the vendor could not give a good title.

Neither do the cases of *Hill* v. *Grigsby*, 35 Cal. 658, and *Bohall* v. *Diller*, 41 Cal. 532, cited on behalf of the plaintiff in error, control the present case. In *Hall* v. *Grigsby* the instrument provided that the plaintiff should convey "*as soon as*" the purchase money was paid. In *Bohall* v. *Diller* the terms of the contract were that the plaintiff, "upon payment of [580] *the purchase money, was to convey." These stipulations were properly held to be dependent covenants, and that neither party could sue without performing, or an offer to perform, on its part. But in the case at bar the terms of the contract contain no stipulation that the covenants of the respective parties are to be performed at the same time or concurrently. On the contrary, the clearly expressed intention was that the payment of the purchase price of the lands should precede the performance of the land company's covenant to convey the lands and water stocks. The consideration to be paid covered both the lands and the stocks, and its payment was a condition precedent to a transfer of either, or both. The provision that the stock was to be delivered by the land company and accepted by the purchaser, (subject to the by-laws of the irrigation companies) "when payment in full is made for the above described land," in no way changes the proper construction of the contracts, or establishes that the stock was to be transferred concurrently with the payment for the lands. The expression, "when payment in full is made for the above described land," confirms the construction that the payment was a condition precedent to the conveyance of either stock or land, or both. The purchaser had no right to a transfer of the stock before he became entitled to a conveyance of the land.

We cannot accede to the contention of the plaintiff in error that the contracts should be so construed as to make payment of the first installment of purchase money a condition precedent to the covenant to convey, but that the last installment of purchase money should be treated as dependent or concurrent with the covenant to convey. The covenants are to be interpreted as of the date of the execution of the contract, and as applying to each and all the installments of purchase money alike. Covenants like those in the case under consideration are not of a shifting character, independent at one time and dependent at another, or independent as to one or more installments of purchase money and dependent in respect to others, unless there is a clearly expressed intention on the part of the contracting parties that such should be the case. No such intention is either expressed or implied in [581] *the language of the contracts in suit. The payment of all the installments of purchase money is a condition precedent to the performance of the land company's covenant to convey.

In respect to the nine applications for purchase declared in counts forty-one to forty-nine, inclusive, of the declaration, while the terms are not so clearly expressed as in the twenty contracts already considered, it is fairly implied that the installments of purchase money were to be paid before the land company was under any obligation to convey.

The forty-ninth count, based upon the application to purchase lot 11, does not stand upon any different principle from the rest. It is true that the purchaser did not pay the first installment in full, but the land company had the right to accept the partial payment, and treat the contract as a subsisting one; and it was so treated by Loud, who took possession of the lot, and exercised acts of ownership over it up to 1888 at least. Under these circumstances he is not in a position to claim that the contract was terminated because of his own failure to pay the first installment in full.

It is earnestly urged on behalf of the plaintiff in error that the contracts declared upon required the land company to deliver stock in the irrigation companies, which should represent and convey title to water or water rights to the extent of one inch of water under four-inch pressure, measured from center of aperture, for each one hundred shares of stock. In other words, that the purchaser's contracts entitled him to water rights as distinguished from stock in the irrigation companies, by means of which water could be procured in the quantity designated. This position cannot be sustained, for the contracts by their express terms stipulated for the transfer of stock in the designated irrigation companies, which stock was to be delivered and accepted subject to the by-laws of such companies. The statement that this stock represented so many inches of water, under a certain pressure, were words of description as to the quantity of water which the irrigation company would undertake to furnish to the owner of the designated shares of stock.

It is urged that the stock which the land company *had transferred to Loud, and pro- [582] duced for his acceptance at the trial, was not shown to have been fully paid up. This objection is not well taken. It appears by the testimony of the secretary of the land company that the land company delivered water until February, 1887—before the organization of the irrigation companies. It is further shown that the land company had numerous artesian wells, pipe lines, flumes, and ditches from which water supplies were furnished for irrigating purposes; and it further appears that these wells, water facilities, pipe lines, etc., were transferred by the land company to the several irrigation companies, which in consideration thereof, delivered fully paid up stock to the land company, or to a trustee for its benefit. Certificates of this stock were, under proper directions of the officers of the land company, made out in the name of Loud, and produced and tendered at the trial. There is no evidence showing that the consideration given by the land company for the shares of stock in the irrigation companies was in any way inadequate, so as to impair its right and

title thereto as fully paid up stock. It is further said on behalf of the plaintiff in error that the stock proposed to be transferred to him gave no special rights or privileges, and constituted no easement to the lands purchased. This is, however, a mistake. In the articles of association of each of the irrigation companies, which were put in evidence, it is declared: "That the purpose of which this corporation is formed is to acquire water, water rights, flumes, ditches, aqueducts, reservoirs, and other property that may be necessary or convenient for the supplying of water to such person or persons or their assigns in the counties of Los Angeles and San Bernardino, state of California, to whom the Pomona Land & Water Company has sold water rights, or to whom it may hereafter sell water rights, or to whom it may transfer water stock of this corporation, but to no other person or persons whomsoever."

In addition to this provision in the charters of the irrigation companies, it is provided by section 552, Deering's Annotated Statutes and Codeof California,relating to the right to water, to irrigate lands sold by water or irrigating 583] companies, that "whenever *any corporation organized under the laws of this state furnished water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law."

Those provisions are recognized and sustained by the courts of California in *McFadden* v. *Los Angeles County Suprs.* 74 Cal. 571, and *Applegarth* v. *McQuiddy*, 77 Cal. 408.

It is shown that the defendant in error had the requisite amount of stock in the irrigation companies to perform its contracts with the defendant in error, and the land company offered to prove, as a matter of fact, that the stipulated quantity of water was attached to the lands by the stock in the irrigation companies, but this offer was withdrawn on the objection of the defendant below that it was immaterial. The proper construction of the contracts was that the defendant in error was to deliver stock in the designated irrigation companies which would attach to the land and entitle the purchaser to the quantity of water represented by the stock, and the stock which the land company thus held and proposed to transfer was clearly within the terms of the contract.

There are other points of minor importance presented on behalf of the plaintiff in error, but the controlling question in the case turns upon the character of the covenants contained in the contracts, and in the view we have taken of that matter the defendant in error had the right to enforce the payment of the purchase money for the lands agreed to be purchased without first having conveyed or tendered a conveyance of the lands purchased. This question of law, depending upon the proper construction of the contracts, was not affected by any evidence, either introduced or offered.

Our conclusion is that there is no error in the judgment of the court below, and it is accordingly affirmed.

NELSON F. EVANS, *Plff. in Err.*, [584
v.
UNITED STATES.

(See S. C. Reporter's ed. 584-608.)

Indictment, when sufficient—misdemeanors—U. S. Rev. Stat. § 5209—willful misappropriation of a note of a bank—negative averments—sufficient count—cashier's power—intent—general verdict.

1. An indictment for a statutory misdemeanor charged in the words of the statute is sufficient only where the words of the statute fully set forth all the elements necessary to constitute the offense.
2. Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged.
3. The willful misapplication made an offense by U. S. Rev. Stat. § 5209, is a misapplication for the use, benefit or gain of the party charged, or of some company or person other than the association.
4. Where a count in an indictment under U. S. Rev. Stat. § 5209 charges defendant with willfully misappropriating a note of the bank for his own use, benefit, and advantage, and with intent to defraud the bank, there is no necessity of therein negativing every possible theory consistent with an innocent delivery of the note to the defendant, nor of averring that the bank did not thereafter receive the value thereof.
5. An indictment need not, by way of negative, introduce matter of defense when it is drawn on a statute any more than when it is at common law.
6. A count in an indictment under U. S. Rev. Stat. § 5209 is good, which charges that defendant knowingly, etc., aided and abetted the cashier of a bank to violate said section, by unlawfully, etc., with intent to defraud the bank and for the use of defendant, misapplying a certain sum by discounting with the money of the bank a note made by defendant, for that sum, which was not well secured to the knowledge of defendant and the cashier, and which note was never paid, by means of which the bank suffered loss to that amount, with intent, in defendant, to injure and defraud the bank.
7. The power to discount paper is not one of the implied powers of the cashier of a bank.
8. Where the intent is a material ingredient of the crime it is necessary to be averred; but it may always be averred in general terms.
9. A general verdict of guilty rendered upon several counts of an indictment should stand if any one of the counts is good.

[No. 922.]

Argued Oct. 20, 1893. Reargued April 17, 18, 1894. Decided May 14, 1894.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania, to review a judgment of conviction and sentence of Nelson F. Evans, for a violation of U. S. Rev. Stat. § 5209, for a willful misapplication of the funds of the Spring Garden National Bank. *Affirmed.*

NOTE.—*As to duties of cashier of bank, when his acts bind the bank*, see note to Cecil Nat. Bank of Port Deposit v. Watsontown Bank, 26: 1039.

Statement by *Mr. Justice* **Brown:**

Plaintiff in error, who was a director in the Spring Garden National Bank, was indicted for an alleged violation of Revised Statutes, § 5209, which reads as follows: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; . . . with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, . . . and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

The indictment contained 146 counts, upon all of which, except 24, a *nolle pros.* was entered. A demurrer was filed to all these remaining counts, which was overruled. The defendant was then arraigned, pleaded not guilty, was put upon trial, and convicted upon **585**] all the 24 counts, and sentenced *to five years' imprisonment. A motion for a new trial and in arrest of judgment being overruled, defendant sued out this writ, assigning as error the action of the court in overruling his demurrer, and in refusing to arrest the judgment on account of the insufficiency of the indictment. The case was originally argued in this court upon the sufficiency of all these counts, and a reargument subsequently ordered upon the eighth, ninth, tenth, and fourteenth.

A copy of the eighth count, which was a representative one of its class, and in its framework and structure was similar to all the counts to which the attention of the court was called, is here given:

"8. And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations aforesaid, do further present that heretofore, to wit, on the eighth day of May, A. D. 1891, the said Nelson F. Evans, yeoman, late of the district aforesaid, at the district aforesaid and within the jurisdiction of this court, did knowingly, willfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy (the said Harry H. Kennedy being then and there cashier of a certain national banking association then and there known and designated as the Spring Garden National Bank, in the state of Pennsylvania, which said association had been theretofore created and organized under and by virtue of acts of Congress in such case made and provided, and which said association was then and there acting and carrying on a banking business at Philadelphia, in the said district, under the acts of Congress in such case made and provided) then and there to willfully misapply a certain large amount of the moneys, funds and credits then and there belonging to the said national banking association for the use, benefit, and advantage of the said Nelson F. Evans, then and there with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association—that is to say, the said Harry H. Kennedy, late of the district aforesaid, heretofore, to wit, on the day and year aforesaid, in the district aforesaid, and within the jurisdiction of this court, being then and there cashier, as afore- *said, of the said national banking asso- [**586** ciation aforesaid, did knowingly, unlawfully, fraudulently, and willfully and with intent to injure and defraud the said national banking association, misapply certain of the moneys, funds, and credits of the said national banking association, to wit, the sum of seventy-five hundred dollars, in the manner and by the means following—that is to say, a certain promissory note, dated, to wit, Philadelphia, November 10, 1890, made and drawn by a certain person, to wit, A. B. Nettleton, for the sum of, to wit, seventy-five hundred dollars, due and payable March 13, 1891, at the said bank, had been theretofore, to wit, upon the day and year aforesaid, discounted by the said bank, and was then and there overdue and unpaid, and held by the said bank as and for funds and credits, as aforesaid; whereupon, the said Harry H. Kennedy did then and there, with intent to injure and defraud the said national banking association, knowingly, unlawfully, and fraudulently, willfully misapply the same, in that he then and there surrendered and delivered the same to the said Nelson F. Evans, without receiving therefor for the said bank the said sum of seventy-five hundred dollars, or any part thereof; and the said Nelson F. Evans did then and there knowingly and unlawfully aid and abet the said Harry H. Kennedy, then and there cashier as aforesaid, knowingly, unlawfully, and fraudulently, to willfully misapply the said funds and credits of the said national banking association, as aforesaid, then and there, with intent in him, the said Nelson F. Evans, to injure and defraud the said national banking association, contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

Messrs. **Hampton L. Carson,** *J. Levering Jones* and *Rufus E. Shapley* for plaintiff in error.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice* **Brown delivered the [**587** opinion of the court:

This case involves the sufficiency of an indictment for the willful misapplication of the funds of a national bank, in violation of section 5209 of the Revised Statutes.

A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States* v. *Mills*, 32 U. S. 7 Pet. 138 [8:636], that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States* v. *Carll*, 105 U. S. 611 [26:1135], "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately

and clearly alleged. *United States* v. *Cook*, 84 U. S. 17 Wall. 174 [21:539]; *United States* v. *Cruikshank*, 92 U. S. 542, 558 [23:588, 593]. "The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *United States* v. *Carll*, 105 U. S. 611 [26:1135].

Even in the cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *United States* v. *Simmons*, 96 U. S. 360 [24:810]; *United States* v. *Hess*, 124 U. S. 483 [31:516]; *Pettibone* v. *United States*, 148 U. S. 197 [37:419]; *Re Greene*, 52 Fed. Rep. 104.

The section in question in this case was before this court in *United States* v. *Britton*, 107 U. S. 655 [27:520], in which the willful misapplication made an offense by this statute was defined to be "a misapplication for the use, benefit, or gain of the party charged or of some company or person other than the association," and that to constitute such an offense **588]** there must *be a conversion to the use of the offender, or of some one else, of the moneys or funds of the association by the party charged. It was said that a count which merely charged a maladministration of the affairs of the bank rather than a criminal misapplication of its funds was insufficient. "It would not," said *Mr. Justice* Woods, "be sufficient simply to aver that the defendant 'willfully misapplied' the funds of the association. . . . There must be averments to show how the application was made, and that it was an unlawful one." The case again came before this court in 108 U. S. 199 [27:698], and it was then held that the declaring of a dividend by the association when there were no net profits to pay it was not a criminal application of its funds, but an act of maladministration which, while it might subject the association to a forfeiture of its charter, and the directors to a personal liability for damages, did not render them liable to a criminal prosecution. Again, in *United States* v. *Northway*, 120 U. S. 327 [30:664], it was held not to be necessary to charge that the moneys and funds alleged to have been misapplied had been previously entrusted to the defendant, since a willful and criminal misapplication of such funds might be made by its officer or agent without having previously received them into his manual possession. See also *Claassen* v. *United States*, 142 U. S. 140 [35:966].

The counts of this indictment may be divided into three general classes: First, those charging the defendant with procuring the surrender and delivery to himself of the funds of the bank, and which for convenience may be termed the "surrender and delivery" counts; second, those based upon the illegal discount of unsecured paper, and which may be termed the "unlawful discount" counts; and, third, those in which the defendant is accused of fraudulently overdrawing his own account at the bank, and which may be termed the "overdraft" counts.

1. The 8th, one of the "surrender and delivery" counts, charges in substance that on May 8, 1891, Evans did knowingly, willfully, unlawfully, and fraudulently aid and abet one Harry H. Kennedy, cashier of the bank, to willfully misapply certain moneys, funds, and credits belonging to the bank, for *the use, **[589** benefit, and advantage of the said Evans, with intent in him, the said Evans, to injure and defraud the bank: That is to say, that the said cashier did knowingly, unlawfully, fraudulently, and willfully, and with intent to injure and defraud the bank, misapply the sum of $7500, to wit, a promissory note dated November 10, 1890, made and drawn by A. B. Nettleton for this amount, due March 13, 1891, which had been theretofore discounted by the bank, was then overdue and unpaid, and was held by the bank as and for funds and credits, as aforesaid: Whereupon, the said cashier, with intent to injure and defraud the bank, did willfully, knowingly, and fraudulently misapply the same by surrendering and delivering the note to Evans, without receiving payment therefor for the bank, and the said Evans did there knowingly and unlawfully aid and abet the said cashier in such willful misapplication with intent in him, said Evans, to injure and defraud the bank.

The 9th and 10th counts did not differ from the 8th, except in describing other notes made by Nettleton, of different dates and amounts.

The same objection was taken to all of them, viz, that there was no averment that the defendant did not receive such notes as an agent for collection, or to secure their renewal, and subsequently failed to account for the same to the bank for proceeds or renewals; and further, that there was no averment that the bank did not, either at the time of the surrender, or at any subsequent time, receive security, value or renewal notes therefor, and no averment that the bank had been in any manner a loser thereby.

In answer to the first objection, that there was no averment that the defendant did not receive the notes as an agent for collection or to secure their renewal, it is sufficient to say that the count charges defendant with willfully misappropriating the money and credits of the bank for his own use, benefit, and advantage, and with intent to defraud the bank, and that the object of the subsequent language of the count is rather to identify the property misapplied than to charge a distinct offense, although the allegation of a willful misappropriation, *with intent to defraud, is repeated. **[590** The count charges, as ingredients of the crime, *first*, that the defendant knowingly, willfully, unlawfully, and fraudulently aided and abetted the cashier; *second*, in willfully misappropriating the funds and credits of the bank; *third*, that he did this for his own use and benefit; *fourth*, with intent to defraud the bank; *fifth*, the credit misapplied is then described as a note of one Nettleton, which was then overdue and unpaid; *sixth*, the manner of the misapplication is then set forth as consisting in the surrender and delivery of the same to the

defendant, without receiving any part of the sum represented by the note.

Every element of the offense being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied is described, nor of negativing every possible theory consistent with an innocent delivery of the note to the defendant. This requirement would have the effect of limiting the government to allegations it might be wholly unable to prove, and without subserving any useful purpose to the defendant. While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be born in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove. The note might have been delivered to the defendant for a score of honest purposes, which it would be utterly impossible to anticipate. Neither in criminal nor in civil pleading is it required to anticipate or negative a defense. "Where there is no question of variance . . . the indictment need not, by way of negative, introduce matter of defense when it is drawn on a statute any more than when it is at common law." 1 Bishop, Crim. Proc. § 638. "In general," says Chitty, "all matters of defense must come from the defendant, and need not be anticipated or stated by prosecutor."

1 Chitty, Crim. Law, 231; see also *United States* v. *Cook*, 84 U. S. 17 Wall. 173 [21: 539].

The general words of a fraudulent misapplication to the use and benefit of the defend- [591] ant, and of *an intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose. Indeed, the word "surrender" carries with it something more than a bare delivery, and indicates a transfer of title as well as of possession.

It was equally unnecessary to charge that the bank did not, either at the time of surrendering, or at any subsequent time, receive security, value, or renewals for the notes surrendered, or that it had been the loser by such surrender, since there was an allegation that the surrender was made without receiving therefor, for the bank, the sum represented by the notes, or any part thereof. If it did receive such value thereafter, it was clearly a matter of defense. The misdemeanor was complete when the note was fraudulently misapplied to the use of the defendant, with intent to defraud the bank, and, if the bank subsequently saved itself from loss, it was a matter to be proven by the accused, if, indeed, it were any defense at all. If, at the time of the surrender, the bank received security, value, or renewals, as a part of the same transaction, this would undoubtedly be a defense; but if the accused subsequently repented and indemnified the bank, or the latter was able to protect itself from loss, it is very doubtful whether this would inure to the benefit of the defendant, or purge him of the charge. 2 Bishop, Crim. Law, § 796; *Reg.* v. *Pietheon*, 9 Car. & P. 552; *Reg.* v. *Peters*, 1 Car. & K. 245; *State* v. *Scott*, 64 N. C. 586; Whart. Am. Crim. Law, § 1797.

2. The fourteenth count, which may be treated as a representative of all the "unlawful discount" counts, charged in substance that Evans knowingly, willfully, unlawfully, and fraudulently aided and abetted the cashier to willfully misapply the money, funds and credits of the bank, for the use, benefit and advantage of the defendant, with the intent on defendant's part to injure and defraud the bank, in that the said cashier knowingly, unlawfully, fraudulently, and willfully, with the intent to defraud the bank, and for the use, etc., of the said Evans, misapplied the sum of $15,000 by receiving and discounting, with the money and funds of the bank, a note made by Evans, for this amount (giving copy) which note, when so discounted, "was not then and there well secured," as the *cashier and [592] Evans both well knew, and which note was never paid, by reason of which the bank suffered loss in this amount, with intent, in the said Evans, to injure and defraud the bank.

While the mere discount of an unsecured note, even if the maker and the officer making the discount knew it was not secured, would not necessarily be a crime, if the maker believed that he would be able to provide for it at maturity; yet if his original intent was to procure the note to be discounted in order to defraud the bank, as charged in this count, every element of criminality is present. The case is not unlike that of purchasing goods or obtaining credit. If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states. In this particular of an intent to defraud, the case is distinguishable from that of *United States* v. *Britton*, 108 U. S. 193 [27: 701], in which the charge was that the defendant, being president and director of the association, and, being insolvent, procured his own note to be discounted, the same not being well secured, the payee and the indorser thereof being also insolvent, which he, defendant, well knew. The incriminating facts were that the note was not well secured, and that both the maker and indorser were, to the knowledge of the defendant, insolvent when the note was discounted. The question there presented was whether the procuring of the discount of such a note by an officer of the association was a willful misapplication of its moneys, within the meaning of the law. It was held that it was not. The criminality really depends upon the question whether there was, at the time of the discount, a deliberate purpose on the part of the defendant to defraud the bank of the amount.

It is objected, however, to this count that there was no averment that the cashier, in discounting the note, acted in excess of his powers or outside of his regular duties, nor was there *any averment that the cashier was [593

not the duly authorized officer of the bank to discount paper, nor was there any averment that the discount was procured by any fraudulent means, or that Evans was at the time of such discount insolvent, or knew himself to be so. It was held by this court in *Bank of United States* v. *Dunn*, 31 U. S. 6 Pet. 51 [8: 316], that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present day. Morse, Banks & Banking, § 117. If the directors of this bank had authorized their cashier, either generally or in this particular case, to discount paper, it was clearly matter of defense. But even if he did possess such power, and willfully abused it by discounting notes which he knew to be worthless, and did ths with deliberate intent to defraud the bank, it is not perceived that his criminality is any less than it would have been if he had acted beyond the scope of his authority.

No averment was necessary that such discount was procured by fraudulent means, since the offense consists not in the use of fraudulent means, but in the discount of a note which both parties know to be unsecured, with the intent thereby to defraud the bank. An averment that Evans was at the time insolvent, or knew himself to be so, was also unnecessary, in view of the allegation that Evans knew that the note was not secured, and procured the same to be discounted with intent to defraud the bank. The argument of the defendant in this connection assumes that under no circumstances is the discount of a note, which all parties know to be worthless, an offense under the statute, even though such discount be made for the deliberate purpose of defrauding the bank out of the proceeds of the note so discounted. We do not see how it is possible to give such an interpretation to the statute without a practical nullification of its provisions.

Defendant's entire criticism upon these counts seems to be founded upon the hypothesis that no weight whatever is to be given the words "knowingly, willfully, unlawfully, and fraudulently," or to the general allegation of an intent to defraud—in short, that these words are mere surplusage. Where, however, the stat-
594] ute uses words which are not* absolutely inconsistent with an honest purpose, such as was held by this court in Britton's case were the words "willfully misapplied," the allegation of an intent to defraud becomes material in the highest degree. In fact, the gravamen of the offense consists in the evil design with which the misapplication is made, and a count which should omit the words "willfully," etc., and "with intent to defraud," would be clearly bad. While it is entirely true that an allegation of fraud is insufficient, either in an indictment or in a bill in equity, without giving the particulars of the fraud, an intent to defraud is only to be gathered by the jury from all the facts and circumstances of the case. There is no greater need of setting out the evidence to prove such intent than there would be of averring in detail the evidence of a scienter, or of any other fact material to the offense. Where the intent is a material ingredient of the crime it is necessary to be averred; but it may always be averred in general terms, as in a case of assault with intent to kill. So in an indictment for murder, it is necessary to aver that the killing was done "willfully, feloniously, and of malice aforethought;" but the evidence that it was so done, though necessary to be given, is not necessary to be set forth. This subject, however, was so fully considered by this court in *United States* v. *Simmons*, 96 U. S. 360 [24: 819], that it is needless to dwell upon it more at length here. In that case the indictment averred that the defendant "did knowingly and unlawfully engage in and carry on the business of a distiller . . . with intent to defraud the United States of the tax on the spirits distilled by him." It was held not to be necessary to state the particular means by which the United States was to be defrauded of the tax. "The defendant," said the court, "is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice. The intent to defraud the United States is of the very essence of the offense; and its existence in connection with the business of distilling being distinctly charged, must be established by satisfactory evidence. Such intent may, however, be manifested by so many *acts [**595** upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred." "The means of affecting the criminal intent," says Mr. Wharton, "or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." 1 Whart. Am. Crim. Law, § 292.

A general verdict of guilty was rendered upon all the counts of this indictment upon which a *nolle prosequi* was not entered, and as such verdict should stand if any one of the counts is good, it will not be necessary to consider them in any further detail. *Claassen* v. *United States*, 142 U. S. 140 [35: 966].

The judgment of the court below is, therefore, affirmed.

Mr. Justice **Field** dissented from the judgment of the court (in this and the subsequent case of same title) as follows:

I am unable to concur in the judgment of the court in these cases, or in the opinion upon which it is founded. The two cases arise out of the same state of facts, are similar in essential particulars, and were argued together.

The defendant below, Nelson F. Evans, the plaintiff in error here, was for some years previously to May, 1891, a director of the Spring Garden National Bank, a national banking association doing business by that name at Philadelphia in the state of Pennsylvania. The bank failed on the 9th of May, 1891, and passed into the hands of a receiver. A year afterwards, in May, 1892, the defendant Evans was indicted for various acts in alleged violation of section 5209 of the Revised Statutes of the United States, which is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association

who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts 596] forth any *certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or who makes any false entry in any book, report or statement of the association with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years, nor more than ten."

The indictments originally contained several hundred counts, charging over one hundred and fifty different offenses, but as to a large number of the counts a *nolle prosequi* was entered. The number retained was still large, amounting to twenty three in one indictment and fifty-seven in the other. To them demurrers were filed and overruled. The defendant was then arraigned and pleaded not guilty, and, upon the issues, a jury was called and trials had, which resulted in conviction in both cases. A motion for a new trial in each case was overruled. Subsequently a motion in arrest of judgment, upon substantially the same grounds as those urged in support of the demurrers prior to the pleas, was made. This motion was also overruled, and the defendant was then sentenced, upon the conviction under one of the indictments, to imprisonment in the penitentiary for the term of five years, and upon the conviction under the other indictment to a like imprisonment for the term of two years following the expiration of the previous imprisonment. The cases are brought to this court upon writs of error to review these judgments.

The counsel of the defendant has given the court much assistance in the consideration of the cases by the careful analysis he has made of the different counts. These are so numerous, presenting in many of them the same charge with confusing variations, as to obscure rather than to render clear the real offenses intended.

In the indictment in case No. 923 the offense 597] charged* against the defendant in the first four counts is set forth in the most general way. In the first of these four the defendant is charged as a director with willfully misapplying the funds and credits of the bank. In the second he is charged with conspiring with officers of the bank to willfully misapply its money and credits. In the third he is charged with aiding and abetting the president of the bank to misapply its moneys, funds, and credits. In the fourth count he is charged with aiding and abetting the cashier of the bank in a similar misapplication. A demurrer was interposed to each of these four general counts on the ground that it did not specify the means whereby the alleged misapplication was made, and show that they were unlawful.

The remaining counts of the indictment are more specific, some of them charging the defendant as a director with misapplying moneys, funds, and credits by depositing checks and obtaining fictitious credits thereon; others charging him with aiding and abetting the president in misapplying funds and credits in the same manner; others with aiding and abetting the cashier in a like misapplication of the funds; others with aiding and abetting the president in misapplying funds by surrendering notes; others with aiding and abetting the president in misapplying the funds by discounting unsecured notes of the defendant; others with misapplying the funds through overdrafts; others with aiding and abetting the president to misapply the funds through overdrafts.

In the indictment in case No. 922 the defendant in some of the counts is charged with aiding and abetting the cashier in misapplying the funds of the bank by surrendering to the defendant unpaid notes, which the bank had discounted and still held, without receiving for them the amount thereof, or any part of it; in some also with aiding and abetting the cashier to misapply the funds by discounting unsecured notes; in some also with aiding and abetting the cashier to misapply the funds through overdrafts.

For the disposition of these cases it is not necessary to pass upon each count separately. In the first instance the general counts will be considered, and then an examination made as *to the sufficiency of the specific counts [598 upon which the government chiefly relies to sustain the prosecution. If they will not bear the scrutiny given to them, none will. The grounds of the demurrer to them will be designated when the counts are separately considered.

With reference to indictments for statutory offenses, there are certain rules which govern their construction. It is usually sufficient, in such cases, to set forth the offense in the language of the statute, if it be accompanied by a statement of such facts and circumstances as will inform the accused of the specific offense, coming under the general description of the statute, with which he is charged. He must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, in order that he may be able to prepare for his defense, and, also, in case of conviction or acquittal, that he may plead the judgment in bar of further proceedings. *United States* v. *Simmons*, 96 U. S. 360 [24:819]; *United States* v. *Hess*, 124 U. S. 483 [31:516].

A mere statement of the offense in the words of the statute, without a statement of the accompanying facts and circumstances essential to constitute a specific offense, will be insufficient. As said by this court in *United States* v. *Carll*, 105 U. S. 611 [26:1135], speaking through *Mr. Justice* Gray, "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambig-

uity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." Numerous authorities were cited in support of the views expressed.

There is a very general test applicable to all indictments. If the facts alleged be established or admitted to be true, and their truth is consistent with the defendant's innocence, the indictment is insufficient, however full the de-
599] scription in other *respects. Applying this well settled doctrine to the different counts of the indictments in these cases, there will be little difficulty in determining as to their sufficiency. Yet the doctrine appears to be entirely ignored by the majority of the court, or at least set aside in these cases.

The four general counts are manifestly insufficient, as they wholly fail to aver the means by which the alleged misapplication of the funds was made by the defendant, or attempted by him, in conspiracy with the president or cashier, or in aiding and abetting them.

Upon an allegation that one has misapplied the funds of a bank, the natural inquiry would be, how—in what manner? Until the manner in which the application was made and the purpose of it are shown, no misapplication can be established. There is no averment of facts in either of the counts of the indictment to show that the applications of the funds was an unlawful one, and unless it appear from the facts alleged that such was the case, the application will not constitute the offense charged. Nor is there any averment of facts to show that the bank suffered any loss or damage by the misapplication. From all that is alleged it may have been the exercise of an unwise judgment, for which the defendant could not be charged under the statute, and injury from which may have been avoided by a subsequent replacement of the moneys.

In *United States* v. *Britton*, 107 U. S. 655-669 [27: 520-525], the words "willfully misapplied," used in the section upon which the present indictments were found, were considered, and the court, speaking by *Mr. Justice* Wood, said: "The words 'willfully misapplied' are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle,' as used in the statutes, or the words, 'steal, take, and carry away,' as used at common law. They do not, therefore, of themselves, fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant willfully 'misapplied' the funds of the association. This is well settled by the authorities we have already cited. *There must be averments to*
600] **show how the application was made, and that it was an unlawful one.*" It follows that the demurrer to each of the four general counts was well taken and should have been sustained.

The two cases, as stated in the opinion of the court, were originally argued here upon the sufficiency of all the counts. A reargument having been ordered it was confined principally to the eighth, ninth, tenth, and fourteenth counts. And in the opinion a copy of the eighth count is given at length as a representative one of its class, and as in frame work and structure similar to all the counts to which the attention of the court was called.

This count stripped of its useless verbiage, and of its adjectives imputing supposed fraudulent motives to the conduct of the defendant, and of adverbs of objurgation, is substantially this and no more: That the defendant, Evans, did, on the 8th of May, 1891, in the district named, aid and abet the cashier of the bank to misapply an unpaid note of one Nettleton for seventy-five hundred (7500) dollars, formerly discounted and still held by the bank, by surrendering and delivering it to the defendant without receiving its amount or any part thereof, and that it was done by the defendant to injure and defraud the bank. The allegation of the motive of such surrender and delivery adds nothing to the character of the act unless its object is shown by stating the use to which the note was to be put, as that it was for cancellation or appropriation for the benefit of the defendant or of some one other than the bank, or to accomplish some object other than to obtain its payment, renewal, or security. Nor does the count aver that a valid consideration was not received for the note, or that the bank lost by the transaction. The mere charge of an intention to misapply the unpaid note is not sufficient without some allegation of the manner in which such application was made. This was held in *United States* v. *Britton*, 107 U. S. 655 [27:520]. It was there said that to constitute the offense of willful misapplication, there must be a conversion to the use of the offender or of some one else, of the moneys and funds of the association by the party charged. It would not be sufficient, the court added, simply *to [601 aver that the defendant willfully misapplied the funds of the association. "There must be averments to show how the misapplication was made and that it was an unlawful one."

It is an old doctrine, not to be forgotten in practice or in pleading, that an act lawful in itself cannot be made criminal by imputing wrong motives to the conduct of the party. Punishment is not in our days inflicted for the motives for which lawful acts are done. There is no force added to the allegation of "delivered" by the use of the word "surrendered" in this case, but rather its force is weakened. A surrender is usually made upon some right or claim, or upon coercion. The latter is not suggested here, and surrender is consistent with some useful purpose in the enforcement of a claim or right to the note.

Similar observations may be made of almost every count in both indictments. There is some fact which might be stated in connection with their allegations and which would obviate their criminality, but which is omitted, and the omission, in my judgment, makes the indictments invalid.

I do not claim that it is essential that the pleader should negative every conceivable lawful delivery, such as would be unusual

though possible under some circumstances, but I do insist that a lawful delivery should be met by a negative to the natural and ordinary conduct which would be adopted by innocent parties in such cases. A note discounted at a bank, when not paid in whole or in part, is not usually surrendered to a third party without a valuable consideration, unless it be for collection or to obtain its renewal or security for it, and such usual action should be negative by averment. No doctrine is more essential for the protection of a party accused of a criminal offense, and none should be more rigidly enforced than this—that the facts alleged by way of accusation, if admitted to be true, must be inconsistent with the inference of his innocence of the offense charged arising from the usual conduct of innocent parties in such cases.

I do not assent to the doctrine that the note might have been delivered to the defendant for a score of honest purposes which it would [602] be unnecessary to negative, and that *in criminal pleading it is not required to anticipate and negative a natural and obvious answer to the accusation. Such is not the law as I understand it.

The counts which are more specific in their allegations, and upon the sufficiency of which the prosecution chiefly relies, will now be considered. These specific counts are grouped by the prosecution into four sets. The first set consists of counts five, ten, and eleven of the indictment in case 923. These counts are substantially, that the defendant on the 8th of May, 1891, did knowingly, unlawfully, fraudulently, and willfully, and with intent to injure and defraud the bank, misapply certain of its moneys, funds, and credits for his own use and benefit, to wit, the sum of fifteen thousand three hundred and thirty-three and $\frac{85}{100}$ dollars, in the manner and by the means following, that is to say, the defendant, being a director, did deposit and place to his credit in the bank his check, drawn by himself on the Keystone Bank in favor of the Spring Garden Bank, the amount being in excess of all the sums which he was then entitled to draw from the moneys and funds of the Keystone Bank, and by means of which check, thus deposited, he obtained a false credit upon the books of the Spring Garden Bank, and was thereby enabled, and did thereafter, draw, out from that bank the sum mentioned for his own use, benefit, and advantage, as he then well knew, contrary to the Act of Congress.

The three counts differ from each other in this, that the tenth count charges the defendant with knowingly and fraudulently aiding and abetting the president of the bank to misapply its moneys, funds and credits, in the amount mentioned, by receiving on deposit and crediting to himself the check mentioned. The eleventh count differs only in alleging that the defendant aided and abetted the cashier of the bank in misapplying its moneys and credits in the manner mentioned. The charge is substantially the same in all three counts—that a false credit was secured by the defendant with the bank by depositing a check, drawn by him on the Keystone Bank in excess of what he knew to be his balance there, and which check was not paid. These counts are subject to the general *objection that, [603 admitting all their statements to be correct, they are still consistent with the innocence of the defendant. The counts nowhere allege that the check on the Keystone Bank was ever presented to that bank for payment. The defendant may have overdrawn his account in that bank; the check may have been in excess of all sums which he was entitled to draw, and yet it might have been paid upon presentation. There is not, in the mere fact that one overdraws his account at a bank, necessarily any evidence that the drawer intended to defraud the bank, or any other bank with which the check was deposited. It is a matter of every day practice for depositors in a bank to overdraw their accounts. Whether checks so overdrawn will be paid may depend upon other considerations than the amount of deposits of the drawer in the bank. It would be an extraordinary position to hold that because a man drew upon a bank for more than he knew he had on deposit he should be charged by the holder with the commission of a fraud, before the latter had presented the check to the bank for payment, and payment had been refused. Whether or not the Keystone Bank would have paid it, had it been thus presented, may have depended upon the confidence which the bank might have entertained in the drawer's ultimate ability to pay. Though not entitled, in the words of the indictment, to draw at the time any sums whatever, yet he may have had such credit with the bank, from its knowledge of his character and habits, as to induce it to honor his check. It is within the experience of every one that checks thus drawn are often honored, even with a knowledge of the drawer's inadequate deposit. Other facts beside such knowledge by the drawer must be shown to justify the imputation of criminal intent to him. A demurrer was interposed to the counts mentioned, on the ground that it did not aver that the checks in question were presented to the Keystone Bank for payment and that payment was refused, and that the bank thereby became a loser. In my opinion the counts were, for that reason, insufficient, and that the demurrer was well taken and should have been sustained.

*The second set of counts upon which [604 the prosecution relies are numbers six, seven, eight, nine, twelve, and thirteen of the same indictment. These also allege that the defendant, being a director of the Spring Garden Bank, caused certain checks drawn by him upon the Keystone Bank and the Fourth Street National Bank of Philadelphia for sums greater than he was entitled to draw or obtain from them, to be deposited with the Spring Garden Bank, and placed to his credit on its books, and thereby obtained a false credit and received from that bank, for his own use and benefit, the amount of such checks. But these counts also show that each of such checks was indorsed in this way: "For deposit to the credit of Nelson F. Evans. Received payment through the clearing house." The purport of this indorsement is that the checks were passed by the bank through the clearing house and paid there, a not unusual way of collecting checks in our large cities. The same objections that were made to counts five,

ten, and eleven can be made to these counts; and also the further objection that there is an inconsistency in the allegation that thereby any false credit was obtained, the checks having indorsed on their face the statement that payment was received on them through the clearing house.

These checks are set forth in the indictment with this indorsement, and there is no allegation that the indorsement was false or was made, or permitted to be made, by the defendant, with any intent to defraud the bank. The very face, therefore, of the checks negatives the charge of crime, and contradicts the idea of loss to the bank. If in answer to this view it be said that it is alleged that the checks were not paid, it must be observed that no averment is made of their presentation for payment or of anything to exclude the idea of negligence on the part of the bank receiving them, or that the money was not lost through the failure of the bank upon which they were drawn. The six counts differ from each other in this, that in some of them the checks are alleged to have been drawn on the Keystone Bank and in others on the Fourth Street National Bank; and in some of the counts the misapplication is charged directly upon the [605] defendant, and in *others by his aiding and abetting the president or the cashier. On the several grounds stated a demurrer was interposed to these counts, and in my judgment it was well taken and should have been sustained.

The third set of counts upon which the prosecution relies are number fourteen, in the indictment in case 922, and number twenty, in the indictment in case 923. These counts charge the defendant with aiding and abetting the president and cashier of the bank in fraudulently misapplying its funds for the use and benefit of the defendant, by receiving and discounting his note for fifteen thousand dollars, payable in three months, knowing that that note was not secured; and it was not paid at maturity, or at any other time. But these counts are defective in not alleging that the discounting of the note was in excess of the power of the president or cashier or outside of their regular duties, or that the president or cashier was not the authorized officer of the bank to discount paper. Nor is it averred that the discount was procured by any fraudulent means, or even that the defendant was, at the time, insolvent or knew himself to be so. On these grounds a demurrer was interposed, and in our judgment should have been sustained.

The only remaining counts upon which the prosecution relies are numbers fourteen, fifteen, and sixteen of the indictment in case 923, and numbers eight, nine, and ten of the indictment in case 922. These counts charge in substance that the defendant aided and abetted the president or the cashier of the bank to fraudulently misapply a large amount of its funds by surrendering to him for his use and benefit certain notes of one Nettleton, discounted by the bank and held as part of its assets, without receiving for the bank the amount thereof, or any part thereof, and that such surrender was fraudulently made to injure the bank. The counts in the indictment in case 923 charge that the defendant aided and abetted the president of the bank in the fraudulent misapplication. The counts in the other indictment charge that the defendant aided and abetted the cashier in such misapplication of the funds. These counts do not show, in either case, *any *application of* [606 *the surrendered notes to the use and benefit of the defendant as charged*, nor do they contain any averment that the defendant did not receive the notes as agent, for collection, or to obtain their renewal, which would readily suggest themselves as an answer to the alleged unlawful surrender, or that the bank was in any way the loser thereby. The defect in these counts is substantially the same pointed out in considering the eighth count of No. 922, a copy of which is set forth in the opinion of the court.

The allegations of fraudulent conduct and motive in the transactions, for which the indictments were found, are repeated with wearisome frequency, yet they are of no avail unless accompanied by a statement of facts from which such fraud must necessarily be inferred. A party is not to be condemned by multitude or opprobriousness of the adjectives applied to his conduct or motives, unsupported by the facts, or, as said by *Lord Chief Justice* Holt, "a fact that appears to be innocent cannot be made a crime by adverbs of aggravation." Fraud is a conclusion of law from facts respecting the transactions designated, and if they do not necessarily tend to such conclusion, the allegation falls to the ground, however often repeated or with whatever amount of earnest asseveration.

Similar views are announced with great clearness and force in *United States* v. *Watkins*, decided by the circuit court for this district over sixty years. 3 Cranch, C. C. 443. The defendant, who was the fourth auditor of the Treasury of the United States, was indicted for devising and intending fraudulently to obtain for his private use moneys of the United States, by means of letters to and drafts on the navy agent at New York and the navy agent at Boston, and certain requisitions on the Treasury of the United States, also sent by him to them, said letters, drafts, and requisitions being used as false pretenses to enable him to obtain the moneys. There were three indictments found against him, and objections were taken to the sufficiency of their allegations of fraud. In considering the objections the court said: "Fraud is an inference of law from certain facts. A fraud, therefore, is not *sufficiently set forth in an indict- [607 ment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is, therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. Starkie, in his late treatise

on Criminal Pleadings, says: 'Whether particular circumstances constitute an indictable fraud is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out in order to show that the facts amount to an indictable offense.' And he quotes Archbold on Criminal Pleadings as follows: 'An indictment for an offense against the statute must with certainty and precision charge the defendant to have committed acts under the circumstances, and with the intent mentioned in the statute; and if any of these ingredients in the offense be omitted the defendant may demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict, nor will conclusion, *contra formam statuti*, cure it.'"

The charges in the two indictments, by their very number, setting forth over seventy-five distinct offenses, after dismissing counts for over one hundred other offenses—those retained varying from each other by confusing differences — were calculated to embarrass and oppress the defendant in his defense. The allegations of fraud in conduct and motive not being supported by any averment of facts from which such fraud is necessarily inferable, the other allegations as to the transactions charged are, upon a reasonable construction, consistent with the innocence of the defendant. And indictments, in my opinion, ought not to be viewed with favor which by the very multitude of their counts, serve to embarrass and confuse the accused. If an **608**] offense cannot be stated in less *than one hundred counts of an indictment, I do not think that public justice will suffer if the indictment be dismissed.

My conclusion is that the indictments on all the counts retained are insufficient to hold the defendant, and that the judgment below thereon should be reversed in both cases and judgment entered upon the demurrers in each case for the defendant, and that he be discharged therefrom.

NELSON F. EVANS, *Plff. in Err.*,
v.
UNITED STATES.

Sentence on conviction, when valid—case followed.

(See S. C. Reporter's ed. 608-609.)

1. Where the verdict of guilty was rendered upon all the counts of an indictment and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is sufficient.
2. *Evans* v. *United States*, *ante*, p. 830, followed.

[No. 923.]

Argued Oct. 20, 1893. Reargued April 17, 18, 1894. Decided May 14, 1894.

IN ERROR to the District Court of the United States for the Eastern District of Pennsylvania, to review a judgment of conviction and sentence of Nelson F. Evans for a willful misapplication of the funds of the Spring Garden National Bank. *Affirmed.*

Statement by *Mr. Justice* **Brown**:

This also was an indictment against Evans for a willful misapplication of the funds of the Spring Garden National Bank. The indictment originally contained 152 counts, upon all of which, except 57, a *nolle pros.* was entered. The same proceedings were had as in the former case. The defendant was convicted upon all the counts, and sentenced to imprisonment for two years at and from the expiration of such imprisonment as he might undergo by reason of the sentence in the prior case. He subsequently sued out this writ of error. A reargument was ordered upon the 5th to the 11th counts inclusive, and upon the 14th, 15th, 16th, and 20th counts.

Messrs. **Hampton L. Carson**, *J. Levering Jones* and *Rufus E. Shapley* for plaintiff in error.

Mr. **Holmes Conrad**, *Assistant Atty. Gen.*, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

*As the verdict of guilty was rendered [**609** upon all the counts, and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient. As the 14th, 15th, and 16th counts of this indictment are the same as the 8th, 9th, and 10th of the other indictment, which were held to be good, except that the defendant is charged with aiding and abetting the president instead of the cashier in the fraudulent misapplication of the Nettleton notes, and the 20th bears the same resemblance to the 14th of the other, it follows that these counts are also good, and the judgment of the court below is, therefore, affirmed.

Mr. Justice **Field** dissenting. The dissenting opinion is given in the case of *Evans* v. *United States*, *ante*, p. 830, the two cases having been argued together.

ANTHONY F. SEEBERGER, Collector of Customs for the Port and District of Chicago, *Plff. in Err.*,
v.
JOHN SCHWEYER.

(See S. C. Reporter's ed. 609-614.)

Time for withdrawal of imported goods—exterior port.

1. The period of one year, within which the importer is entitled to withdraw imported goods upon paying the duties and charges, runs from the date of their arrival at the exterior port and

NOTE.—*As to criminal law; correction of sentence of one convicted; resentence*, see note to Ex parte Cross, 36: 969.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect, see note to Greely v. Thompson, 12: 397.

not from the date of their arrival at the interior port of destination.

2. The words "date of original importation" as used in U. S. Rev. Stat. § 2970, refer to the exterior port of first arrival, and not to the interior port of destination.

[No. 295.]

Submitted March 19, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment in favor of the plaintiff, John Schweyer, against Anthony F. Seeberger, Collector for duties paid under protest, upon goods imported and placed in a bonded warehouse, and afterwards withdrawn for consumption. *Reversed, with directions to enter judgment for defendant.*

The facts are stated in the opinion.

Mr. **Edward B. Whitney,** *Assistant Atty. Gen.*, for plaintiff in error.

No brief filed for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

This was an action brought in the Circuit Court of the United States for the Northern Dis 610 [trict of Illinois by John *Schweyer, an importer of goods, against Anthony F. Seeberger, the collector of customs for the port of Chicago, to recover duties paid under protest in 1888, upon goods imported in 1886 and placed in a bonded warehouse

A jury was waived, and the case was tried by the court, which found the facts as follows:

"That on the 26th day of October, 1886, the plaintiff imported, *via* the port and district of New York, certain merchandise, and from thence transported the same to the port and district of Chicago, under the immediate transportation act, where it was duly entered for warehouse on the 11th day of December, 1886. That within a year after their arrival in Chicago, but more than a year after their arrival at the port of New York aforesaid, the plaintiff offered to pay the duties and charges assessed against said merchandise, but the customs officer at the port of Chicago assessed an additional duty of 10 per cent on the amount of duties and charges due thereon, under section 2970, Revised Statutes, for the reason, as he claimed, that the merchandise had not been withdrawn for consumption within one year from the date of the original importation, claiming that the date of original importation was the date when the merchandise arrived at the port of New York aforesaid."

The court further found that the plaintiff paid the additional duty under protest, and duly appealed, and the last finding of the court was as follows:

"The court further finds that the merchandise was withdrawn for consumption at Chicago, November 2, 1887, which said withdrawal was at the port of original importation, in accordance with the law."

From the judgment of the court in favor of the plaintiff the case has been brought here on error. The question presented by the record is the single one whether the period of one year, within which the plaintiff was entitled to withdraw the goods upon paying the duties and charges runs from the date of the arrival at the port of New York, or from the date of the arrival at the port of Chicago.

Section 2970 of the Revised Statutes reads as follows:

*"Any merchandise deposited in bond [611 in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from said date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

In connection with that section must be read the first section of the Act of June 10, 1880, chap. 190 (21 Stat. at L. 173), as follows:

"That when any merchandise . . . imported at the port of New York . . . shall appear by the invoice or bill of lading and manifest of the importing vessel to be consigned to and destined for either of the ports specified in the seventh section of this Act, the collector at the port of arrival shall allow the said merchandise to be shipped immediately after the entry prescribed in section 2 of this Act has been made."

Section 2 provides that the merchandise shall be examined as far as necessary, but shall not be subject to appraisement and liquidation of duties at the port of first arrival, but shall be appraised "at the port of destination."

Section 7 provides "that the privilege of immediate transportation shall extend to the port of . . . Chicago," etc.

Do, then, the words "date of original importation, as used in section 2970, refer to the exterior port of first arrival or to the interior port of destination? It is urged on behalf of the government that Congress cannot have intended that the period for warehousing should be indefinitely extended beyond a year after actual importation, and that this would be the result of fixing the date of importation at the arrival at the interior port, owing to the delays, sometimes considerable, in transportation.

The case of *Hartranft* v. *Oliver*, 125 U. S. 525 [31:813] is cited, *as holding that goods in [612 process of transportation, under charge of the customs officers, are in effect already warehoused, within the meaning of the customs laws. That was where the imported article, salad oil, arrived in a vessel at the port of Philadelphia on Saturday, June 30, 1883, and was entered at the custom house at two o'clock in the afternoon. It was not practicable to remove the goods on that day, and the next day was Sunday. On July 7 the cases were entered in bond at the custom house, and on the same day the importer made a withdrawal entry for the goods, and offered to pay the collector duty thereon at the rate of 25 per cent ad valorem, but the collector exacted a specific duty of 25 cents per gallon, a change of rate of duty having gone into effect on July 1, and the court held, per *Mr. Justice* Field, that "goods on board of a ship, in charge of a custom house officer, preliminary to their removal to a pub-

lic store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are within the spirit and intent of the law subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of these places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom house inspector, they are in the same condition, and cannot be removed, without a like permit. . . . The Act of Congress of March 28, 1854, which is now embraced in section 2971 of the Revised Statutes, in providing for the deposit of goods in public stores and bonded warehouses, declares that 'any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the government;' and in the construction of this clause the Treasury Department has decided that the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard, after the arrival of the ship in port. Treasury Regulations of 1857, art. 483."

If, then, goods remaining on a vessel after arrival at the port of New York, and when the vessel is in charge of a custom house officer, are to [613] be regarded, within the custom laws, *as within the custody of the government in the same sense as if they had been actually discharged into a custom house or bonded warehouse, it would seem to follow that when goods have arrived at the port of New York, and the arrival of the vessel has been reported at the custom house, and then the goods, with the consent and allowance of the collector, under the provisions of the 1st and 2d sections of the Act of June 10, 1880, have been shipped to Chicago, such goods must be deemed to have been warehoused from the time of the arrival of the ship.

As the language of section 2970 is express and free from ambiguity in specifying that, on payment of the duties and charges, merchandise may be withdrawn within one year from the date of original importation, and that an additional duty of ten per centum shall be assessed against goods after the expiration of one year from the date of original importation, and as the argument that the port of destination is to be regarded as the port of original importation is not based on the language of the Act of June 10, 1880, but is inferential only, we think that the natural and safe course is to abide by the words of the statute. In the first section the language is "any merchandise imported at the port of New York," etc., which naturally means that such importation is the original importation. This conclusion is strengthened by the contents of the third section, which provides that the merchandise shall be delivered to and transported by common carriers, to be designated for this purpose by the Secretary of the Treasury, and to and by none others; that such carriers shall be responsible to the United States for the safe delivery of such merchandise to the collector at the port of its destination; and that before they shall be permitted to receive and transport any such merchandise such carriers shall become bound to the United States in bonds in such form, amount, and condition as the Secretary of the Treasury shall require. This would seem to bring such carriers within the meaning of the case heretofore cited (*Hartranft* v. *Oliver*) and the goods in their charge may well be regarded as in like condition with goods in a custom house or bonded warehouse.

*Upon the whole, we conclude that the [614 court below erred in refusing the defendant's request to hold the law to be that the port of New York was the port of original importation, and not the port of Chicago; and as this was a case of a special finding which ascertained all the facts of the case, there is no reason for awarding a new trial. *Allen* v. *St. Louis Nat. Bank*, 120 U. S. 40 [30:578].

Judgment reversed and case remanded to the circuit court, with directions to enter judgment for the original defendant.

Mr. Justice **Harlan** dissenting.

HENRY STARR, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 614-623.)

Warrant good without seal—instruction to jury—criminal case—expressions of opinion—indignation.

1. A warrant of a commissioner of the United States not having a seal of office, and not being required to affix a seal thereto, is not void for the omission of a seal.
2. Where the court instructs the jury that if the defendant, being placed in a position in which his life is imperiled, slay an officer of whose official character he has no notice, this is homicide in self-defense, if the killing was apparently necessary to save the defendant's life, it is error to qualify the instructions by the words "provided the defendant did not by his threatening and violent conduct prevent the officer from making his character and mission known."
3. The possession of a conscience void of offense is not an indispensable prerequisite to justification of self-defense in the face of imminent and deadly peril, and the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, does not impose a limitation on the right to repel it.
4. Under the circumstances of this case, the motive of the accused in being where he was, had nothing to do with the question of his right of self-defense in itself, and the unlawfulness of his

NOTE.—*For what purposes evidence of intoxication may be given by one accused of crime*, see note to Hopt v. Utah, 26: 873.

As to when confessions of accused are evidence against him, see note to Hopt v. Utah, 28: 262.

As to homicide by officers in making an arrest; when justifiable, see note to Tennessee v. Davis, 25: 648.

As to threats by deceased in cases of homicide; when admissible in evidence, see note to Wiggins v. Utah, 23: 941.

As to officers de facto; indictment for murder; sufficiency of statement of time and place of death, see note to Ball v. United States, 35: 377.

As to homicide, when justifiable in self-defense, see note to Gourko v. United States, *ante*, p. 680.

previous conduct formed in itself no element in the solution of that question.

3. The presiding judge in a criminal case may, if in his discretion he thinks proper, sum up the facts to the jury, but he should take care to separate the law from the facts and leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province.

4. Expressions of opinion by the court to the jury should be so guarded as to leave the jury free in the exercise of their own judgments.

5. A judge in charging a jury in a criminal case should not express his indignation in terms which are inconsistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances.

[No. 1080.]

Submitted March 5, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment of conviction and sentence of Henry Starr, for the murder of Floyd Wilson, in the Indian territory. *Reversed, with directions for a new trial.*

Statement by *Mr. Chief Justice* **Fuller:**

Henry Starr was convicted of the murder of Floyd Wilson, a white man and not an Indian, on December 18, 1892, at the Cherokee Nation in the Indian territory, and, November 4, 1893, sentenced to be hanged on February 20, 1894, and thereupon sued out this writ of error.

It appeared on the trial that on November 18, 1892, a warrant was issued by a United States commissioner for the western district of Arkansas for the arrest of Starr and others on a charge of larceny, which was delivered for execution to Henry E. Dickey, a deputy United States marshal; and that the marshal summoned Floyd Wilson, the deceased, as his posse to aid in the execution of the warrant. The evidence tended to show that they proceeded on horseback to the neighborhood of the place where Starr was to be found, and, after visiting several points, came to the house of one Dodge, where they concealed themselves to await his coming; that Starr passed Dodge's house on horseback, whereupon Wilson mounted his horse and pursued him; that the two jumped from their horses and stood facing each other a short time, apparently talking: that it looked as if Starr "was trying to work off away from Wilson," when Wilson mounted his horse again and rode up to within twenty-five or thirty feet of Starr, who made no effort to flee; that Wilson then sprang from his horse, threw his gun to his shoulder and fired at Starr, who was then standing with his gun in both hands holding it down, 616] but upon Wilson's shooting, *returned the fire and continued to fire rapidly; that Wilson fell, raised himself in a sitting position, jerked his six shooter out and fired four times, when Starr ran up to him and fired point blank into him; Wilson died immediately afterwards. The evidence further tended to show that during the affray Starr fired one shot at the marshal: that he picked up Wilson's gun, found the lever out of order, could not fire it, and turned to go away, and, as he turned the marshal fired at him; that the marshal's and Starr's horses ran away, but Starr caught Wilson's horse, and, mounting it, rode off. The marshal testified that at the time of this occurrence he had the writ in his possession, and had instructed Wilson as to his duties, and had told him, "Now, don't kill this boy if possible to get along without it. We will call on him to surrender."

One Mrs. Padget testified that she saw the transaction from a distance, called a quarter of a mile, and understood Wilson to say: "Hold up; I have a warrant for you;" and that Starr said: "You hold up." She, also, in answer to a question put by the district attorney, stated that three or four weeks before the shooting Starr had told her that he guessed a marshal named Cowden was hunting for him, "for jumping his bond." And Dickey said in the course of his testimony that he went up in Starr's neighborhood to see a person "shortly after Henry started, got out and jumped his bond."

The witnesses agreed that Wilson fired the first shot, and also that during the time he was riding up to Starr, Starr did not raise his gun or make any effort to stop Wilson. Starr was a Cherokee Indian, and at that time between eighteen and nineteen years of age.

The warrant was signed by Stephen Wheeler, "Commissioner U. S. Court, Western District of Arkansas," and tested as under seal, but no seal was affixed, and counsel for defendant objected to the warrant for the want of a seal, and took exception to its admission on that ground, though in answer to questions by the court they admitted that Wheeler was a United States Commissioner for the western district of Arkansas at the time the writ issued, and that the signature thereto was genuine.

Mr. **A. H. Garland** for plaintiff in error.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error.

Mr. Chief Justice* **Fuller delivered [617 the opinion of the court:

1. Exception was taken to the admission of the warrant in evidence, and also to the reference thereto as valid process in the charge of the court, upon the single ground that it bore no seal.

It is not contended that a seal is required to such a warrant by any Act of Congress or any statute of the state of Arkansas, but the argument is that a warrant of arrest at common law was void if it were without a seal, and that the common law rule so asserted was applicable.

In *Padfield* v. *Cabell*, Willes, 411, it was held that a warrant need not be under seal unless required by statute, and Willes, *Ch. J.*, said: "A warrant does not *ex vi termini* apply to an instrument under seal; it signifies no more than authority. All the books in which it said that a warrant must be under seal are founded on a case in the Year Books, 14 Hen. VIII., 16, a, where it is said that a justice of the peace is a judge of record, and hath a seal of office; and that the inferior officer when he sees the seal must give credit thereto." In

Aylesbury v. *Harvey*, 3 Lev. 204, the defendant seized a cup under a warrant by justices of the peace, on a conviction under the excise law, to levy twenty shillings; and in answer to an objection taken to the plea, that the warrant was not pleaded with a profert, the court said: "The statute does not require that the warrant be under hand and seal, but only in writing; and no writing is to be so pleaded, except it be a deed, etc."

Hawkins (2 P. C. chap. 13, § 21) follows Lord Hale in stating the necessity of the seal to a warrant of a justice of the peace, but what Lord Hale says is this (1 Hale, P. C. 577): "It must be under seal, though some have thought [618] *it sufficient if it be in writing, subscribed by the justice;" and he refers to Dalton's Justice, wherein it is laid down that "their warrant or precept in writing, should be under their hand and seal, or under their hand at least." 1st ed. 1618, 287. In the third edition (1630) this is repeated, and it is further said: "Also the warrant of the justice of the peace should be under the seal of the said justice; for every justice of the peace (being a judge of record) hath a seal of his office; and when he maketh a warrant under his seal to the officer, then the officer ought to give credence to the seal, for that is his authority. Per Brudnel, *Ch. J.*, 14 H. VIII. 16."

This was the ground of Lord Coke's statement (2 Inst. 590) that a mittimus "must be in writing, in the name and under the seal of him that makes the same, expressing his office, place and authority, by force whereof he maketh the mittimus."

Lord Chief Justice Willes, in *Padfield* v. *Cabell*, thus explains the language of Coke, and points out that Dalton "puts two instances of warrants only under hands; one by Lord Chancellor Ellesmere for a contempt, A. D. 1607; the other by *Chief Justice* Popham, 3 Jac. I. There is also reference in Dalton to two precepts or warrants by justices only under their hands."

Blackstone states that the "warrant ought to be under the hand and seal of the justice" (4 Bl. 290) but Chitty's note on that passage is that "it seems sufficient if it be in writing and signed by him, unless a seal is expressly required by a particular Act of Parliament," citing Willes, 411; Bull. N. P. 83. And this is repeated in 1 Chitty, Crim. Law, 38.

In *Davis* v. *Clements*, 2 N. H. 390, it was thought to be well settled on the authority of the cases in Willes and Levinz, and Buller's N. P., that a seal was not essential when not specifically required or provided for; and in *State* v. *Vaughn*, 1 Harp. L. 313, the supreme court of South Carolina announced a similar conclusion in relation to a warrant of arrest, the court saying: "There appears to be no reason why the official act of a magistrate should be under seal, as it derives its character from [619] the law which prescribes it." The *authorities were reviewed by Foster, *J.*, in the carefully considered case of *Millett* v. *Baker*, 42 Barb. 215, and it was held that at common law a seal was not necessary, even in criminal cases, unless required by statute.

We are of opinion that there was no settled rule at common law invalidating warrants not under seal unless the magistrate issuing the warrant had a seal of office or a seal was required by statute, and that the warrant of a commissioner of the United States not having a seal of office, and not being required to affix a seal thereto, cannot be held void for its omission. The same result is reached under the laws of Arkansas, by section 1993 of which the requisites and form of warrant, where the offense charged is felony, are given, the form being attested "under hand" but not "under seal." Ark. Dig. Stat. 1884, 505, chap. 46, sub. iv, § 1993; 26 Stat. at L. 81, 96, chap. 182, § 33.

2. Counsel for defendant asked the court to give to the jury four instructions. Of these, the first does not appear to have been given, but no exception was taken to its refusal, except as involved in an exception to the action of the court in refusing the request as to all. The court modified the last three and gave them, and the defendant excepted to the modifications and the giving of the instructions as modified in each instance. As the case will be sent back for a new trial on other grounds, we will not further review the action of the court in respect of these instructions further than to indicate our views as to a particular modification of instruction numbered 3.

That instruction was as follows, the additions and modifications by the court being italicized:

"The court instructs the jury that if the defendant, being placed in a position in which his life is imperiled, slay an officer of whose official character he has no notice, *or had no reasonable ground to know his character*, this is homicide in self-defense, if the killing was apparently necessary to save the defendant's life, nor does it matter that the officer was legally seeking to arrest the defendant, the defendant having no notice [of that fact] *of the facts or no reason to know what the purpose of the party was: Provided the defendant did not* *by his [620] *threatening and violent conduct prevent the officer from making his character and mission known. This is given in connection with the principle I have given you, that if a man stands up and obstructs arrest, prevents arrest, armed with deadly weapons, and using them in a way that is threatening, then the officer has no time, nor is he called upon to make proclamation. The officer can stand on the defensive and overcome the danger and take his man or overcome him by violence, if necessary.*

"If the jury believe from the evidence that the defendant was placed in a position at the time of the killing in which his life was imperiled by the deceased, and he slew him without having any notice of his official character, and the killing was apparently necessary to save his own life, then the killing of the deceased was homicide in self-defense; nor does it matter that the deceased was legally seeking to arrest the defendant, if the defendant had no notice of the fact, *or no reasonable grounds to know that he was an officer.*

"*It is not necessary to know that it is Floyd Wilson, but an officer. But if the defendant prevented Floyd Wilson from giving notice of his character or mission by threatening or violent conduct, then of course, he would not be required to give notice. He can stand, as upon the other proposition, on the defensive. There*

propositions are given on the theory that if you believe that no proclamation was made. If a proclamation was made, then the defendant had express notice, he had positive notice, of it."

The doctrine expressed in this instruction as originally drawn, was taken from section 419 of Wharton's Criminal Law, vol. I. p. 419, where many authorities are cited in its support, and was accepted as correct by the learned trial judge. But he felt called upon to qualify it, not only in the direction whether the defendant had reasonable ground to know that Wilson was an officer, but also to the effect that if the accused prevented Wilson from giving notice that he was acting officially, then the rule invoked will not apply. The text-books lay it down as a general proposition that where a person, having authority to arrest and 621] using the *proper means for that purpose, is resisted in so doing, he can repel force with force and need not give back; and if the party making the resistance is unavoidably killed in the struggle, the homicide is justifiable. 1 Russell, Crimes (9th Am. ed.) 892, and Hale, Hawkins, East, and Foster as there cited; 2 Bishop, Crim. Law, § 647; 1 Whart. Am. Crim. Law, § 415, and cases referred to. But the question did not arise here in respect of homicide by the officer, but by the person whom he was trying to arrest, and if defendant had no knowledge, was not informed, and was not chargeable with notice of Wilson's mission or official character, the fact, if there was evidence tending to show it, that defendant prevented the giving of notice had no such relation to defendant's claim of exemption from liability founded on his ignorance and the appearance of the facts to him as to justify the modification.

His conduct was part of the *res gestæ* and important in other aspects of the case, but the qualification went too far as applied to the instruction under consideration.

3. In the case of *Com.* v. *Selfridge*, the following propositions were laid down by *Mr. Justice* Parker, afterwards chief justice of Massachusetts: "*First.* A man, who, in the lawful pursuit of his business, is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant, provided he uses all the means in his power, otherwise, to save his own life or prevent the intended harm—such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power. *Secondly.* When the attack upon him is so sudden, fierce and violent, that a retreat would not diminish, but increase his danger, he may instantly kill his adversary without retreating at all. *Thirdly.* When from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." Selfridge's Trial, p. 160.

The learned judge in his charge in the present 622] case, referring *to the law as thus declared, said: "Now, what is the first proposition? Before I read it I say to you it contemplates a state of actual danger, real danger, in this case to this defendant at the time of the killing, springing from the hands of Floyd Wilson, and danger that he did not create, or bring into existence by a wrongful act of his, because when we undertake to enter upon the execution of as grave a design as the taking of the life of individuals, we must enter upon it with clean hands and a pure heart. If we have created a condition that leads to a deadly result, the law of self defense does not apply to it; if we create that condition by doing a wrongful thing upon our part which would naturally or reasonably or probably produce a deadly result, the law says there is no self-defense for us, because we are in the wrong in the first place; and especially does that principle apply to a case when we are doing an act which from its nature and the way we are doing it death would be naturally produced in the conflict that may ensue, because of the act that we do. I say, then, we must enter upon the execution of this grave act upon our part with clean hands and a pure heart, or, as this law expresses it, we must be in the lawful pursuit of our business. It says that a man who is in the lawful pursuit of his business—that means doing what he had a right to do—in the right at the time—is attacked by another under circumstances which denote an intention to take away his life, or, it may be, to do some enormous bodily harm, may lawfully kill the assailant—when?—provided he use all the means in his power, otherwise, to save his own life, or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power. Now, that is the first proposition of the law of self-defense. Now, let us see again, by enumerating each condition that must enter into it, what they are. First, we must be in the right; we must be doing what we had a right to do at the time of the killing, and when we are so situated we are attacked by another. How? What sort of attack? . . . Now, in this case, this contemplates as far as this case is concerned, that at the time that Floyd Wilson was killed that this defendant was in the right; that he *was doing [623 exactly what he had a right to do, and when so situated he was attacked by Wilson in such a way as to indicate a deadly purpose upon his part."

We presume that the learned judge intended to express the view that the existence of a state of facts which might render the homicide excusable was subject to the qualification that wrongful action on defendant's part towards Wilson did not occasion the attack. But we are of opinion that the language just quoted was open to a different construction and tended fatally to mislead. Whether the right of self-defense is legitimately exercised, depends upon the circumstances of the particular transaction and we take it that the possession of a conscience void of offense toward God and men is not an indispensable prerequisite to justification of action in the face of imminent and deadly peril, nor does the intrinsic rightfulness of the occupation or situation of a party, having in itself no bearing upon or connection with an assault, impose a limitation on the right to repel it.

This Cherokee, when riding across the

country, was entitled to protect his life, although he may have forfeited a bail bond and been seeking to avoid arrest on that account, of which there was some slight evidence incidentally given. But if such were the fact, he could not be considered as doing exactly what he had a right to do, or as having an especially pure heart and clean hands. In a subsequent part of the charge the learned judge said, referring to the defendant: "He was a fugitive from justice if he had jumped the bond he had in this court, as they say; if he had forfeited his bond, and was up in that country hiding out from his usual place of abode to avoid arrest, he was then a fugitive from justice, and you have a right to take that condition into consideration; and in passing upon the question as to what was the probable action of these parties at that time, as to what would be the rights of the officer and of this defendant, you have a right to see this transaction in the condition that surrounded it, and as it was characterized by the position of the parties towards it. You have a right to look at that condition, and see if he was expecting officers to pursue him, if he was hiding away [624] from them, *he was then a fugitive from justice, and if that was true it is a fact that becomes pertinent for you to take into consideration, and the question whether he had reasonable ground from what transpired to know that Floyd Wilson was an officer and was seeking to arrest him." This was duly excepted to, but, apart from the exception, and assuming that the circumstance that he may have anticipated arrest for the reason suggested tended to show that he knew or believed that such was the mission of Wilson, these comments put it beyond question that the defendant was not doing what he had a right to do, and if the jury understood that the scope of what had previously been said embraced the rightfulness of his conduct generally, rather than his conduct in respect of the immediate transaction, they could not but have been materially influenced to his prejudice.

In Selfridge's case, the defendant was walking up State street in Boston on an errand to the bank, and undoubtedly was in the lawful pursuit of his business when he was attacked, and it was in reference to that fact that the first proposition in the charge in that case was laid down: but here the particular words were inapplicable, and their use calculated to create an erroneous impression.

The motive of the accused in being where he was had nothing to do with the question of his right of self defense in itself, and the unlawfulness of his previous conduct formed in itself no element in the solution of that question, but was to be considered only in so far as it threw light on his belief that his arrest was sought by the officer.

We are not insensible to the consideration that the learned judge probably did not intend that his words should bear so sweeping a signification, but they were used more than once, and were not withdrawn or so qualified that it can be fairly held that they were not substantially prejudicial.

4. We are compelled to add some further observations in relation to the charge before us.

It is true that in the Federal courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to *the jury: and if no rule of law is incorrectly stated, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. [625] *Rucker* v. *Wheeler*, 127 U. S. 85, 93 [32:102, 105]; *Lovejoy* v. *United States*, 128 U. S. 171, 173 [32:389, 390]. But he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *M'Lanahan* v. *Universal Ins. Co.* 26 U. S. 1 Pet. 170, 182 [7:98, 104]. As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of law by which they are to be governed, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to. *Tracy* v. *Swartwout*, 35 U. S. 10 Pet. 80, 96 [9:354, 359]; *Games* v. *Stiles*, 38 U. S. 14 Pet. 322 [10:476]. The same rule prevails in the courts of many of the states, and in the charge in *Com.* v. *Selfridge*, referred to by the court below, these views were expressed upon the subject: "As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold it the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere, with my opinion, with the testimony in order to influence your minds to incline either way, I should certainly step out of the province of the judge into that of an advocate. All that I can see necessary and proper for me to do in this part of the cause, is to call your attention to the points or facts on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove these points, give you some rules by which you are to weigh the testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand if it can be avoided, what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and law can be clearly discriminated, I should always wish the jury to leave the stand without being able to ascertain what the *opinion of the court as to [626] those facts may be, that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the case."

So the supreme court of Pennsylvania says: "When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor

of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice." *Burke* v. *Maxwell*, 81 Pa. 139, 153. See also 2 Thomp. Trials, §§ 2293, 2294, and cases cited.

It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. *Hicks* v. *United States*, 150 U. S. 442, 452 [37:1137, 1141]. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances.

In addition to what has already been quoted, the following remarks, among others, were made:

"How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and to say to them, Men may defy you; men may arm themselves and hold you at bay; they may obstruct your process; they may intimidate your execution of it; they may **627**] hinder you in making *the arrest; they may delay you in doing it by threats of armed violence upon you, and yet I am unable as chief executive of this government to assure you that you have any protection whatever." . .

. "What was this posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him that on a certain day the judge of the Federal court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horsestealing, and you will be kind enough, sir, to put in your attendance on that day; and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court that is to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do? No. This court did not have anything to do with that command; it does not go in the name of this court; it goes in the name of the chief executive officer, the President of the United States. What does he say, of course acting for the people?" . .

. "Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is no protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by this defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you are to stand by the nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated."

These expressions are qualified to some extent by other parts of the charge, which we cannot give at length, but we are constrained to express our disapprobation of this mode of instructing and advising a jury.

Whatever special necessity for enforcing the law in all its *rigor there may be in a [**628** particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them.

The judgment is reversed and the cause remanded with a direction to grant a new trial.

NEW YORK, LAKE ERIE & WESTERN RAILROAD COMPANY, *Plff. in Err.*, *v.* THE COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 628-649.)

Tax upon a railroad company, when invalid—state law—Pennsylvania act—right of company—power to tax.

1. The state of Pennsylvania cannot constitutionally impose upon the New York, Lake Erie & Western Railroad Company the duty—when paying in the city of New York the interest due upon scrip, bonds, or certificates of indebtedness of that company held by residents of that state—of deducting from the interest so paid the amount assessed upon bonds and moneyed capital in the hands of such residents.
2. It is not enough to justify the overthrow, by judicial decision, of a state law imposing taxation, simply to show that such law operates unjustly.
3. The 4th section of the Pennsylvania act of 1885, in its application to the N. Y. L. E. & W. R. Co., impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company upon the faith of those acts.
4. Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the N. Y. L. E. & W.

NOTE.—*As to mandamus to compel city, town, or county to levy tax to pay bonds or interest on bonds*, see note to Davenport v. United States, 19: 704.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to Providence Bank v. Billings, 9 :39.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to exemption from taxation; whether a contract or not; not implied, see note to Tucker v. Ferguson, 22: 805.

Railroad within its limits, nor burden that right with conditions not prescribed in the acts of 1841 and 1846, except such as the state, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situate within its limits.

5. The power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.

[No. 591.]

Argued Nov. 10, 1893. Reargued Apr. 23, 1894. Decided May 14, 1894.

IN ERROR to the Supreme Court of the state of Pennsylvania, to review a judgment of the Supreme Court of Pennsylvania, affirming a judgment of the Court of Common Pleas of Dauphin County in that state, against the New York, Lake Erie & Western Railroad Company, a New York corporation, for the amount of certain taxes assessed by and alleged to be due to Pennsylvania for the year 1888 in respect to certain bonds and evidences of indebtedness issued by that company, and which were ascertained by the court to have been held and owned by residents of that state. *Reversed, and cause remanded for further proceeding.*

The facts are stated in the opinion.

Messrs. **E. J. Phelps** and **M. E. Olmsted,** for plaintiff in error:

Where a cause is submitted to the decision of the court below without a jury, under the act of April 22, 1874, the findings of fact under such a submission are no more reviewable by the supreme court than is the verdict of a jury.

Com. v. *Westinghouse Electric & Mfg. Co.* 151 Pa. 265; *Jamison* v. *Collins*, 83 Pa. 359; *Lee* v. *Keys*, 88 Pa. 175; *Brown* v. *Dempsey*, 95 Pa. 243; *Com.* v. *Lehigh Valley R. Co.* 104 Pa. 89; *Bradlee* v. *Whitney*, 108 Pa. 362; *Southern Maryland R. Co.* v. *Moyer*, 125 Pa. 506; *Com.* v. *Hulings*, 129 Pa. 317.

Pennsylvania has no authority to tax bonds, in the hands of non-resident owners, even though issued by her own corporations.

Cleveland, P. & A. R. Co. v. *Pennsylvania*, ("*State Tax on Foreign-Held Bonds*") 82 U. S. 15 Wall. 300 (21: 179).

It is not within the constitutional authority of the state of Pennsylvania to impose upon a corporation of the state of New York, or upon its treasurer being a resident of the state of New York, the duty of assessing in the state of New York a tax upon bonds and mortgages issued and sold in the state of New York upon the payment of interest made in the city of New York, nor to hold the said company or its treasurer responsible for failure so to assess and deduct the same from interest paid upon said bonds and mortgages in the city and state of New York.

Northern Cent. R. Co. v. *Jackson*, 74 U. S. 7 Wall. 262 (19: 88); *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 (20: 192); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U.S. 18 Wall. 206 (21: 888); *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 213 (6: 606); *Baldwin* v. *Hale*, 68 U. S. 1 Wall. 223 (17: 531).

The domicil of a corporation is in the state of its creation and it cannot migrate therefrom.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519 (10: 274).

The act of June 30, 1885, impairs the obligation of the contract contained in the legislation of the state of Pennsylvania, in pursuance of which the railroad of said company was constructed through a portion of said state, and is therefore void because in conflict with section 10 of article 1 of the Constitution of the United States.

Com. v. *Erie & W. Transp. Co.* 107 Pa. 112.

The act of June 30, 1885, is unconstitutional and void because in conflict with that provision of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states."

Norfolk & W. R. Co. v. *Pennsylvania*, 136 U. S. 114 (34: 394), 8 Inters. Com. Rep. 178; *McCall* v. *California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181; *Leloup* v. *Mobile*, 127 U. S. 640 (32: 311), 2 Inters. Com. Rep. 134; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 785); *Pennsylvania* v. *Gloucester Ferry Co.* 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382; *Philadelphia & S. M. SS. Co.* v. *Pennsylvania*, 122 U. S. 326 (30: 1200), 1 Inters. Com. Rep. 308; *Fargo* v. *Stevens*, 121 U. S. 230 (30: 888), 1 Inters. Com. Rep. 51; *Western U. Teleg. Co.* v. *Pennsylvania*, 128 U. S. 39 (32: 345), 2 Inters. Com. Rep. 241; *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*The State Freight Tax*") 82 U. S. 15 Wall. 232 (21: 146); *Hall* v. *DeCuir*, 95 U. S. 485 (24: 547); *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 (35: 1035), 3 Inters. Com. Rep. 810; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 31; *Coe* v. *Errol*, 116 U. S. 517 (29: 715).

The act of June 30, 1885, is in conflict with section 10 of article 1 of the Constitution of the United States because, if valid, it would impair the charter contract between the company and the state in pursuance of which its bonds and mortgages were issued, and also the contract between the company and the holders of its bonds.

United States v. *Quincy*, 71 U. S. 4 Wall. 535 (18: 403); *Cleveland, P. & A. R. Co.* v. *Pennsylvania*, ("*State Tax on Foreign Held Bonds*") 82 U. S. 15 Wall. 300 (21: 179).

The requirement that the company shall deduct from the amount due upon a coupon owned or presented by one person the tax due upon the bond from which said coupon has been detached, said bond belonging to a different person, impairs the obligation between the company and the owner of the coupon.

Clark v. *Iowa City*, 87 U. S. 20 Wall. 583 (22: 427); *Beaver County* v. *Armstrong*, 44 Pa. 63; *Hartman* v. *Greenhow*, 102 U. S. 672 (26: 271); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 (33: 892); *Jennings* v. *Coal Ridge Imp. & C. Co.* 147 U. S. 147 (37: 116).

Messrs. **W. U. Hensel,** Atty. Gen. of Pennsylvania, and *James A. Stranahan*, for defendant in error:

The fourth section of the Act of June 30, 1885, imposing this condition upon the defendant company, is a reasonable one, and it applies to foreign corporations doing business in this state as well as to domestic corporations. For the purposes of taxation, the relation of a foreign corporation doing business in the state

of Pennsylvania is that of a *quasi* domestic corporation and not foreign, and this company having complied with the act of assembly to do business in this state, is subject to the jurisdiction of Pennsylvania for purposes of taxation and judicial proceedings.

This act of assembly applies to all corporations, domestic or foreign, and asks them only to retain the tax from such as they can ascertain to be residents of the state. This is surely a reasonable requirement and this corporation should yield obedience to it in common with all others.

Pennsylvania v. *Bell's Gap R. Co.* 134 U. S. 232 (33: 895).

This company is not in all respects a foreign corporation. It has no right to do business in the state without permission. It gets this permission by statutory authority, and therefore it comes under the laws of the state, is amenable to them, and should consent to their reasonable requirements.

Wood, Railway Law, 27, 28; *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492 (22: 595); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Philadelphia Fire Asso.* v. *New York*, 119 U. S. 110 (30: 342). 2 Hare, Am. Const. Law, 666, 667.

This company having voluntarily obtained a right to do business in the state of Pennsylvania, and actually doing the same to a very large amount, places itself under the revenue laws of the commonwealth of Pennsylvania, and it should bear its proportionate share of the burdens imposed upon it in common with all other corporations domestic or foreign within the state.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review a judgment of the supreme court of Pennsylvania, affirming a judgment of the court of common pleas of Dauphin county in that state, against the New York, Lake Erie & Western Railroad Company, a New York corporation, for the amount of certain taxes assessed by and alleged to be due to Pennsylvania for the year 1888 in respect to certain bonds and evidences of indebtedness issued by that company, and which were ascertained by the court to have been held and owned by residents of that state.

The judgment of the court of common pleas was affirmed upon the authority of *Com.* v. *New York, L. E. & W. R. Co.* 129 Pa. 463, and *Com.* v. *Lehigh Valley R. Co.* 129 Pa. 429.

The state based its claim against the railroad company upon a statute enacted on the 30th day [630] of June, 1885. The *company insisted that that statute, if applied to it in respect to taxes due and payable in Pennsylvania by residents of that state, was repugnant to the Constitution of the United States.

The relations existing between the plaintiff in error, as the successor of the New York & Erie Railroad Company, and the commonwealth of Pennsylvania, at the time of the passage of the statute of 1885, are shown by legislative enactments to which some reference should be made.

From the preamble of a statute approved February 16, 1841, it appears to have been represented to the general assembly of Pennsylvania that the New York & Erie Railroad Company, having authority to construct a railroad from the city of New York to Lake Erie through the southern tier of counties in the state of New York, was hindered in building its road through Broome county bordering on Pennsylvania by a mountain of such magnitude as to require tunneling or to be surmounted by stationary power at immense expense, and that a level and easy route could be established if the proposed road followed the valley of the Susquehanna river in Pennsylvania, a distance of about fifteen miles, and near to Broome county, New York. In consequence of these representations, and to maintain "amity between adjoining states in respect to their internal improvement operations," it was provided that the railroad company "shall have full power to extend their road through such portion of the county of Susquehanna as in the proper construction of their road they may find it necessary." This statute contained numerous provisions for the protection of both the railroad company as well as the public, one of which provided that, if any buildings, fences, timber or other property, situated in Susquehanna county, should be destroyed by fire occasioned by sparks falling from locomotive engines upon the road, the company should be liable to make full compensation for all damages sustained in consequence of such fire, § 11,—a liability which, according to the statement of counsel, Pennsylvania does not impose upon its own corporations. As these provisions do not affect the particular questions now before us, they need not be here set out.

By an act of the general assembly of Pennsylvania, approved March 26th, 1846, and [631] supplementary to that of 1841, authority was given the New York & Erie Railroad Company to construct its road through a portion of Susquehanna and Pike counties. That act, among other things, required the company to so regulate its tolls that the charge on anthracite coal should not exceed one and one half cents per ton per mile. § 3. It also made it the duty of the president and managers of the company, as soon as its railroad was completed through Susquehanna and Pike counties, to prepare a full and accurate account of the costs of that portion of the road within Pennsylvania and communicate the same to the auditor general of the commonwealth; and after the road was completed and in operation to Dunkirk, or became connected at the western end with any other improvement extending to Lake Erie, the company should pay into the treasury of this state, annually, in the month of January, ten thousand dollars—any neglect or refusal to make such payment to work a forfeiture of the rights and privileges granted by the act. § 5.

That act also provided that the stock of the company to an amount equal to the costs of the construction of that part of its road situated in Pennsylvania should be subject to taxation by that state, in the same manner, at the same rate as other similar property; and the company should pay into the treasury of the commonwealth any tax to which that proportion of stock was liable, and make, annually, a statement to the legislature, under oath, of its

affairs and of the business done on said road during the previous year—such statement to contain a full and accurate account of the number of passengers, amount and weight of produce, merchandise, lumber, coal, and minerals transported on its said road, east of Dunkirk and west of Piermont. § 6.

Under the authority of these statutes the railroad company constructed, and has ever since maintained its road through parts of Pennsylvania. Of the company's road, extending from Jersey City to Dunkirk and Buffalo, a distance of 446 miles, about 42 miles are within the counties of Pike and Susquehanna.

632] *The taxes in question were imposed under the above statute of 1885, which assessed an annual tax of three mills on the dollar for state purposes, on all mortgages, money owing by solvent debtors, whether by promissory note, or penal or single bill, bond, or judgment, also on all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done, and obligations given to banks for money loaned and bank notes) on all public loans or stocks (except those issued by Pennsylvania or the United States) on all moneys loaned or invested in any other state, and on all other moneyed capital in the hands of individual citizens of Pennsylvania—the property and interests so taxed being exempted from all taxation, except for state purposes, and the act not to apply to building and loan associations. Pub. Laws, 193, § 1.

By the 4th section of the act it was provided that "hereafter it shall be the duty of the treasurer of each private corporation, incorporated by or under the laws of this commonwealth, or the laws of any other state, or of the United States, and doing business in this commonwealth, upon the payment of any interest on any scrip, bond, or certificate of indebtedness, issued by said corporation to residents of this commonwealth, and held by them, to assess the tax imposed and provided for state purposes upon the nominal value of each and every said evidence of debt, and to report on oath, annually on the first Monday in November to the auditor general the amount of indebtedness of the corporation owned by residents of this commonwealth, as nearly as the same can be ascertained; and it shall be his further duty to deduct three mills on every dollar of the interest paid as aforesaid, and return the same into the state treasury within fifteen days after the thirty-first day of December in each year; and his compensation for his services shall be the same that city and borough treasurers receive for similar services; and for every failure to assess and pay said tax and make report as aforesaid the auditor-general shall add ten per centum as a penalty to the amount of the tax; in payment of said tax 633] by *a corporation the bonds, certificates or other evidences of indebtedness issued by it shall be exempt from all other taxation in the hands of the holders of the same."

In November, 1888, the treasurer of the railroad company made the following report under oath to the auditor general of Pennsylvania:

"In accordance with the provisions of the 4th section of the act of June 30, 1885, and the requirements of your department, as treasurer of the New York, Lake Erie & Western Railroad Company I make the following report of the indebtedness of said company for the year ending first Monday of November, 1888:

"Nominal value of all scrip, bonds, and evidences of indebtedness....	$78,573,485 10
"Nominal value of all scrip, bonds, and evidences of indebtedness known to be owned by residents of Pennsylvania.....	None.
"Nominal value of all scrip, bonds, and evidences of indebtedness none of which are known to be owned by residents of Pennsylvania.....	$78,573,485 10"

This report was accompanied by a communication from the treasurer of the railroad company, stating that it was made in deference to the wishes of the auditor general but under protest and not in admission of any authority contained in the 4th section of the act of 1885.

In 1890 the commonwealth, by its attorney general, proceeded against the railroad company in the court of common pleas of Dauphin county to recover the amount claimed from it under section four of the act of 1885 for the year ending first Monday of November, 1888 for taxes on its scrip, Bonds, and certificates of indebtedness held by residents of Pennsylvania. The amount so claimed was $234,490.86 with 12 per centum interest from 60 days after the settlement of the tax account by the auditor general. That officer settled the account upon the basis that the railroad company was subject *to taxes in Pennsylvania [634 on the nominal value of all the scrip, bonds, and certificates of indebtedness issued by the company, and then outstanding, to wit, $78,573,485.10. Having no information whatever as to ownership, the auditor general arbitrarily assumed in the settlement that all the company's outstanding scrip, bonds, and certificates of indebtedness were owned by residents of Pennsylvania.

A trial by jury was dispensed with by the parties, and the case was heard by the court. From the evidence in the cause the court found the following facts:

"1. Defendant is a corporation chartered by the state of New York, and having its principal office and place of business in the city of New York. It has and exercises the right of way, under a special act of the legislature of the state of Pennsylvania, to run its railroad for somewhat more than thirty miles through the state of Pennsylvania, for which it pays annually to the state the sum of ten thousand dollars. 2. The settlement appealed from is based upon a report made by the treasurer of defendant to the auditor general of Pennsylvania for the year 1888, which contains a detailed statement of the several issues of bonds, scrip, and certificates of indebtedness by defendant and the corporation whose successor it is, amounting in all to $78,573,485.10, in which it is stated that none of the indebtedness is known to be owned by residents of Pennsylvania, and that it is believed by officers of the company that nearly all is

owned by non-residents of Pennsylvania. 3. In the settlement appealed from defendant is charged with tax upon the nominal value of all scrip, bonds, and certificates of indebtedness issued by it, and the corporation whose successor it is, and owing by it, amounting to the sum of $78,573,485.10, as stated in said report. 4. All the evidences of indebtedness owing by defendant were created and issued under authority granted by the legislature of the state of New York, and were issued, sold, and delivered in the city of New York, in said state, or in London, England, and the interest accruing from time to time thereon is payable and paid in the said city of New York and in London. The right to the interest is [635] *evidenced by coupons payable to the bearer, which, when due, are separated from the bonds and are presented for payment at the office of defendant in the city of New York by banks, bankers, and their messengers on behalf of themselves and their correspondents in other places, by whom the coupons have been transmitted, either as cash or for collection; and it is practically impossible for the treasurer or other officers of defendant, at the time the coupons are presented, to ascertain the residence of the owner of the bonds from which they have been separated, because of the large number of coupons presented at the dates when they become due, the whole number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and as many as twenty thousand being presented in a single day; and for the further reason, that the bankers and their messengers, when they present the coupons in very many instances do not know who are the owners of the bonds from which they have been detached, and could not be compelled to disclose if they did know, as the coupons are payable to bearer, and a refusal of the treasurer of the company to pay the coupons on presentation, except upon condition of the ownership being disclosed, would subject it to the risk and expense and loss of credit of having the coupons protested for non-payment. Some of the evidences of indebtedness are coupon bonds issued and payable to bearer, and others are coupon bonds which may be registered or not at the option of the holders or owners. 5. Holders of the evidence of indebtedness of defendant are entitled to vote for directors of this company, and a register is kept in the office of defendant, in which all holders of such evidences of indebtedness are required to register between sixty and thirty days prior to any election for directors at which they desire to vote. The register for the year 1888 shows an ownership of bonds to the amount of $28,562,700, of which we find that $338,000 were owned by residents of Pennsylvania, but this ownership does not appear on the register. 6. A record of registered bonds is also kept in the office of defendant, and in 1888 there were registered $11,124,300 in value of bonds. Of this amount $2,054,000 were owned by residents of Pennsylvania, $1,551,000 of which were owned by [636] Pennsylvania *corporations, leaving $503,000 which were owned by individual residents of Pennsylvania. 7. There is no evidence in this case from which we could find that any particular bonds, other than those which make up the two amounts of $338,000 and $503,000 as above stated, were held or owned during the year 1888, in Pennsylvania; nor is there any evidence tending to show that the treasurer of defendant, at the time the coupons were paid, could know that any, and if any which, of the coupons, other than those which belonged to the bonds above specified, belonged to the bonds held or owned in this state; and we therefore, do not find that there were any other bonds, or any greater amount of bonds, held in Pennsylvania, during the year for which the tax is claimed in this settlement, than the bonds specified in findings of fact numbers five and six."

Subsequently, the court found the following additional facts: "1. The treasurer of defendant is, and was, in 1888, a resident of the state of New York. 2. The legislation of the state of New York constituting the charter of the company, and in pursuance of which the bonds and mortgages were issued, is silent upon the subject of their taxation by the state of Pennsylvania, or the assessment or collection of a tax thereon by the company or its officers, and that the legislation of the state of Pennsylvania authorizing the construction of a portion of its road through a portion of said state is silent upon the subject of the taxation of the bonds and mortgages of the company, or of the collection of a tax thereon by the company or its officers. 3. The railroad of defendant extends from New York city to Buffalo, a distance of 446 miles, and that, so far as the state of Pennsylvania is concerned, the business of the company consists chiefly in the transportation of freight and passengers from or to, or from and to, other states, into, out of, or through the state of Pennsylvania."

It was adjudged that the defendant was liable for the tax in respect of the bonds held and owned in 1888 by residents of Pennsylvania, represented by the two items of $338,000 and $503,000—aggregating $841,000—and not on any other or greater amount of bonds. And that view was approved by the supreme court of Pennsylvania.

The principal question in the case is whether the commonwealth of Pennsylvania may, consistently with the Constitution of the United States, impose upon the New York, Lake Erie & Western Railroad Company the duty —when paying *in the city of New York* the interest due upon scrip, bonds, or *certifi- [640] cates of indebtedness held by residents of Pennsylvania—of deducting from the interest so paid the amount assessed upon bonds and moneyed capital in the hands of such residents of Pennsylvania.

The court recognizes the far reaching consequences of its determination of this question, and has, therefore, bestowed upon it the careful consideration which its importance demands.

It is contended that, in our examination of this question, there are certain principal facts found by the court of common pleas which, so far as they are pertinent, must be accepted as the basis of any decision that may be rendered. *Com.* v. *Westinghouse Electric & Mfg. Co.* 151 Pa. 265, and authorities there cited. These facts are: That all the evidences of debt owing

by the railroad company were created and issued under the authority of the state of New York, and were sold and delivered in that state or in London; that the interest on such indebtedness is payable and paid in the cities of New York and London; that the interest coupons are payable to bearer, and when due are separated from the bonds and presented for payment at the company's office in New York, by banks, and their messengers, on their own behalf or on behalf of their correspondents in other places, by whom the coupons have been sent either as cash or for collection; and that it is practically impossible for the company's officers, at the time the coupons are presented, to ascertain the residence of the owners of the bonds from which the coupons were detached—the number of coupons due semi-annually amounting to more than one hundred and fifty thousand, and those presented in a single day often amounting to twenty thousand, and the bankers and their messengers, at the time of presenting their coupons, not knowing, in very many instances, who own the bonds, and, as the coupons are payable to bearer, could not be compelled to disclose the ownership of either bonds or coupons.

In our judgment,' however strongly those facts may indicate the injustice that would be done to the railroad company by subjecting it to the provisions of the fourth section of the 641] *statute of 1885, and although such facts are important in some aspects of this case to be presently examined, they are not, in themselves, decisive of the question to be here determined. It is not enough to justify the overthrow, by judicial decision, of a state law imposing taxation, simply to show that such law operates unjustly. So far as the courts of the Union are concerned, they must recognize and, when necessary to do so in cases within their jurisdiction, enforce the statutes of the several states, unless those statutes encroach upon legitimate national authority, or violate some right granted or secured by the Constitution of the United States. *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498 [25: 558, 562]. The question here is not one of mere injustice done to the railroad company, but one of power or authority in Pennsylvania to compel that corporation to do what the act of 1885 is held by the state court to require at its hands in respect to taxes upon bonds and moneyed capital in the hands of individual citizens of Pennsylvania.

The fundamental propositions upon which the argument of counsel for the state is based is that the New York, Lake Erie & Western Railroad Company is a private corporation of another state; that it has no right to do business in Pennsylvania without the permission of that state, and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that commonwealth. This view was expressed by the supreme court of Pennsylvania in *Com.* v. *New York, L. E. & W. R. Co.*, 129 Pa. 463, in the following language: "It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this state that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this state, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon *which corporations may do[642 business within the state, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition, implied even in the case of domestic corporations, that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted. *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574 [28: 1084]. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this state as a matter of grace and not of right."

It is found, as a fact in this case, that so far as Pennsylvania is concerned, the business of the railroad company consists chiefly in the transportation of freight and passengers from or to other states, into, out of, or through that state. We are not sure that the court below, or counsel here, intended to be understood as claiming that it was competent for Pennsylvania to make compliance with the 4th section of the act of 1885 a condition of the right of the railroad company to continue the use of its track in Pennsylvania for purposes of interstate commerce. Some of the considerations necessary to be borne in mind, when any such question arises for determination, are adverted to in the recent decision of this court in *Crutcher* v. *Kentucky*, 141 U. S. 47, 59 [35: 649, 653]. But no such question is here presented. The commonwealth of Pennsylvania has not attempted to impose any such condition upon the corporation embraced by the statute of 1885.

Assuming, for the purposes of this case, the correctness of the position taken by the learned attorney general of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company *upon the faith of those acts. Those acts[643 prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. Those terms have been fully indicated in the statement of this case, and need not to be repeated. When the state, by the acts of 1841 and 1846, gave this assent the possibility that the company might misuse or abuse the privileges granted to it, or violate the provisions of those acts,

was not overlooked; for, by the seventh section of the act of 1846, into which, by its second section, all the restrictions, prohibitions, privileges, and provisions contained in the act of 1841 were imported, it was declared that the right of the legislature to repeal it was reserved, "if the said company shall misuse or abuse the privileges hereby granted, or shall violate any of the privileges [provisions] of this act." And the question whether the privileges granted had been misused or abused, or the provisions of the act violated, was to be determined by *scire facias* issued out of the supreme court of Pennsylvania. § 7. There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of that commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the state, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situate within its limits.

The argument in behalf of the state leads, logically, to the conclusion that notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of construct-[644] ing and operating its road *in that state, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the state amended those acts so as to increase the sum to be paid annually into the state treasury, as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its attorney general would sustain such legislation upon the ground that the state, at the outset, could have exacted the larger amount from the company as a condition of its entering the state with its road. To any view which assumes that the state could—so long, at least, as the railroad company performed the conditions of the acts of 1841 and 1846—burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent. No such terms as those named in the act of 1885 were imposed prior to the building of the road in Pennsylvania, and the road having been constructed in that state upon the faith of the legislation of 1841 and 1846, and with the assent of the state given for a valuable consideration paid by the company, its maintenance in Pennsylvania cannot be made the pretext for imposing such conditions as those prescribed in the act of 1885.

But it is said that regulations prescribed after the construction of the road, applicable to railroad companies doing business in the state—such regulations being reasonable in their character—should be deemed to have been within the contemplation of the parties when those acts were passed, and, therefore, not in violation of the agreement under which the company entered the state for the purpose of transacting business there; and that it should not be assumed that the state intended to surrender or bargain away its authority to establish such regulations.

Of the soundness of this general proposition, there can be no doubt, in view of the settled doctrines of this court. The contract in question left unimpaired the power of the state to establish such reasonable regulations as it deemed proper touching the management of the business done and the property owned by the railroad company in Pennsylvania, which *did not materially interfere with [645] or obstruct the substantial enjoyment of the rights previously granted. But the 4th section of the act of 1885 is not within that category. It assumes to do what the state has no authority to do, to compel a foreign corporation to act, *in the state of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. Under the sanction of the laws of New York, the defendant corporation executed prior to the passage of the act of 1885 bonds, with interest coupons attached, payable in that state and not elsewhere. It gave mortgages to secure the payment of those bonds and coupons, according to their tenor. Neither the bonds, nor the coupons, nor the mortgages, contain anything that would, in law, justify the company in refusing to meet its obligations, according to their terms and without deduction on account of taxes due from the holders of such bonds or coupons residing in another state. We have seen that the bonds and coupons in question were payable to bearer, and that it was practically impossible for the company, when the coupons were presented for payment, to ascertain who, at that time, really owned them or the bonds from which they were detached, or whether the coupons were owned by the same person or corporation that owned the bonds. This fact is quite sufficient to show the unreasonable character of the regulations attempted to be applied to this company under the act of 1885. This view is strengthened by the fact that the coupons were negotiable instruments, and, being detached from the bonds, were separate obligations, passing by delivery, upon which an action could have been maintained by the holder, independently of the ownership of the bonds. Such is the settled doctrine of commercial law as declared by this court. *Clark* v. *Iowa City*, 87 U. S. 20 Wall. 583 [22: 427]; *Hartman* v. *Greenhow*, 102 U. S. 672, 684 [26: 271, 276]; *Koshkonong* v. *Burton*, 104 U. S. 668 [26: 886]. And it is the doctrine of the supreme court of Pennsylvania, which has declared that "the coupons of railroad bonds are negotiable instruments, and may be sued on by the holder separately from the bonds, and interest from the date of demand and refusal of payment may be recovered." *Beaver County* v. *Armstrong*, 44 Pa. 63.

*If Pennsylvania, in order to collect tax-[646] es assessed upon bonds issued by its own corpora-

tions and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known at the time by the corporation paying the interest to be residents of that state—and it may be admitted, in this case, that the state, if not restrained by a valid contract to which it was a party, could establish such a regulation—it does not follow that the state may impose upon foreign corporations, because of their doing business in that state with its permission given for a valuable consideration, any duty in respect to the mode in which they shall perform their obligations in other states.

The New York, Lake Erie & Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the state of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another state, shall apply it and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, directly or indirectly, interpose between the corporation and its creditors, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *Cleveland, P. & A. R. Co.* v. *Pennsylvania* ("*State Tax on Foreign Held Bonds*") 82 U. S. 15 Wall. 300, 319 [21: 179, 186]; *Northern Cent. R. Co.* v. *Jackson*, 74 U. S. 7 Wall. 262 [19: 88]; *St. Louis* v. *Wiggins Ferry Co.* 78 U. S. 11 Wall. 423 [20: 192]; *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21: 888].

The fallacy of the contrary view is in the assumption that this railroad company, by purchasing from Pennsylvania the privilege of constructing and operating a part of its road through the territory of that state, thereby impliedly 647] agreed *to submit to such regulations as that state should, at any subsequent period, adopt in respect to the mode in which it should, in the state of New York, apply money in its hands in discharge of the obligation to pay interest to the holders of its bonds residing in Pennsylvania. But, for the reason stated, this assumption is unwarranted by any sound principle of law, or by the circumstances under which the railroad company obtained the assent of Pennsylvania to build and maintain its road through that state.

It is due to learned counsel who argued this case that something be said, before concluding this opinion, about certain authorities upon which great reliance was placed.

Reference was made by counsel for the company to the decision of this court in the case of *Cleveland, P. & A. R. Co.* v. *Pennsylvania* ("*State Tax on Foreign Held Bonds*") 82 U. S. 15 Wall. 300, 320 [21: 179, 187], which case involved the validity of a Pennsylvania statute of 1868, requiring corporations, created by and doing business in that state, to deduct from the interest paid on its obligations the tax assessed on such interest by the state. It was attempted to make that statute applicable to interest payable on bonds held by non-residents of Pennsylvania. This court said: "The tax laws of a state can have no extraterritorial operation, nor can any law of a state inconsistent with the terms of a contract made with, or payable to, parties out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non residents of the state. . . . It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the laws in existence at the time afford for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their *legal enforcement. The [648 act of Pennsylvania of May 1, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent upon every dollar and pay it into the treasury of the commonwealth. It thus sanctions and commends a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property."

If the present case involved any question as to the authority or duty of the railroad company to deduct anything from the interest paid on its scrip, bonds, or certificates of indebtedness, when held by non-residents of Pennsylvania, the case of *State Tax on Foreign-Held Bonds* would be decisive against the state.

But no such question is here presented. The statute of 1885 only applies to scrip, bonds, or certificates of indebtedness issued to and held by residents of Pennsylvania.

Counsel for the state insisted that the present case is controlled by *Bell's Gap. R. Co.* v. *Pennsylvania*, 134 U. S. 232 [33: 892], reaffirmed in *Jennings* v. *Coal Ridge Imp. & C. Co.* 147 U. S. 147 [37: 116]. It is only necessary to observe that the corporations which complained in those cases of the tax assessed, under a Pennsylvania statute, upon their loans held by residents of Pennsylvania, were Pennsylvania corporations. No question arose in either of those cases as to the authority of Pennsylvania to make a corporation of another state an assessor or collector of taxes assessed by or under the authority of Pennsylvania against residents of Pennsylvania. Nor does the case now before us involve any question as to the extent to which the state may tax property within its limits belonging to the railroad company.

The views we have expressed are sufficient for the disposition of the case, without considering other grounds upon which, it is contended, the judgment below was erroneous.

The judgment of the supreme court of Pennsylvania is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

649] *The case of *New York, Lake Erie & Western Railroad Company* v. *Commonwealth of Pennsylvania*, No. 75, and that of *New York, Lake Erie & Western Railroad Company* v. *Commonwealth of Pennsylvania*, No. 79, each upon writ of error to the supreme court of Pennsylvania, involved the same questions as were presented and have been determined in the above case. For the reason stated, the judgment in No. 75 and the judgment in No. 79 are each reversed, and those cases are remanded for further proceedings not inconsistent with the opinion in case No. 591.

JAMES LYONS ET AL., *Appts.*, v. JAMES B. WOODS ET AL.

(See S. C. Reporter's ed. 649-670.)

Territorial laws, when valid.

The territorial courts of New Mexico cannot go behind enrolled bills whose passage is duly attested, and which were duly approved, placed in the proper depository, and duly certified to and published as laws, and hold them void upon the ground that certain members of the quorum of one of the two bodies by which they were passed were seated without having certificates of election, especially as it must be assumed that such territorial laws were duly submitted to Congress under the power reserved by the territorial Organic Act and not disapproved.

[No. 267.]

Submitted March 13, 1894. Decided May 14, 1894.

APPEAL from a decree of the Supreme Court of the Territory of New Mexico, affirming the decree of the District Court of the Third Judicial District of that Territory for the County of Grant, dismissing a suit in equity brought by James Lyons *et al.*, plaintiffs against James B. Woods *et al.*, defendants, being the Sheriff, who was the Collector of Taxes, the Assessor and the County Commissioners for that County, to obtain a decree for an injunction prohibiting defendants from collecting certain taxes known as penitentiary taxes and capitol building taxes, levied upon plaintiffs, upon the grounds that the acts of the territorial legislature authorizing such taxes were never legally passed and are void, and for other relief. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill filed by James Lyons and others in the District Court of the Third Judicial District of the Territory of New Mexico for the county of Grant, August 27, 1885, against Woods and others, being the collector of taxes, the assessor, and the county commissioners for *that county, averring that complain- [650 ants were taxpayers within said county, whose property was referred to and described in the tax list and assessment roll in the hands of defendant Woods, collector, which list and roll were prepared from assessments made by the assessor of Grant county, compiled under the direction of the board of county commissioners, and approved by that board, and received by Woods, as collector, August 13, 1885, said list and roll being, under the laws of the territory, the warrant under and by virtue of which the collector was about to collect and was collecting the various sums of money making up the several items of taxation as therein set forth. That among the items of taxation in said tax list and assessment roll for 1885, and upon which each of the complainants was therein noted as being taxed, were two items respectively described in said list as penitentiary taxes and capitol building taxes, set down in columns, headed "penitentiary bonds" and "capitol building bonds," and levied as taxes upon complainants, and each of them, for the purpose described by said column heading.

The bill then set forth the several assessments of complainants' property respectively and the amounts severally taxed thereon, and alleged that the items described went to make up the sums total which the collector was about to collect from complainants respectively as the amount of taxes due "from each for various purposes pretended to be warranted by law and pretended to be due and payable for and during the year 1885; that the amounts of money thus in said list pretended to be due and payable upon account of penitentiary bonds and upon account of capitol building bonds and as taxation so levied for and on account of said items are so claimed and levied and included in said list by virtue and under authority of pretended acts of the legislative assembly of said territory pretended to have been approved by the governor of said territory, which said pretended acts so pretended to have been approved are entitled and described respectively as follows: 'An act authorizing the building of a penitentiary in the territory of New Mexico, and regulating its management,' approved March 14, 1884, and 'An act to provide for the erection *of a [651 capitol building in the city of Santa Fé,' approved March 29, 1884."

The bill thus continued: "Your orators further represent that said pretended taxes under the pretended acts of the said legislative assembly aforesaid, and by the terms thereof, are to be assessed and levied in the same manner as other territorial taxes are levied and collected. Your orators further represent that the said pretended special taxes provided for under said pretended acts of the legislative

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NOTE—*As to review by United States Supreme Court, of territorial decisions; extent and manner of; distinction between an appeal and a writ of error*, see note to Miners' Bank of Dubuque v. Iowa, 13: 867.

As to power of Congress over territories, see note to First Nat. Bank of Brunswick v. Yankton County, 25: 1046.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

assembly have been assessed by the tax assessor of the said county of Grant, passed upon by the board of county commissioners of said county sitting as a board of equalization as required by law, and are now on the tax lists in the hands of said defendant Woods, as collector of county of Grant, which said tax lists in the hands of said collector have attached to them the warrant provided by law requiring said collector to collect the taxes by said lists or rolls shown to have been levied, and that copies of said lists or rolls are now on file in the probate clerk's office of said county of Grant, and that all the steps required by law for the proper levy of taxes with reference thereto have been taken, so that the said lists and rolls in the hands of said defendant, the collector as aforesaid of said county of Grant, and the copies thereof in the said probate clerk's office on their face and by virtue of said pretended acts of the said legislative assembly aforesaid and the general revenue law of the territory are a lien upon the real and personal property of your orators in said county of Grant, and are a cloud upon the title of your orators to their property, and that said taxation pretended to have been assessed under invalid and pretended laws of said territory, as hereinafter alleged, have the force and effect of personal judgment against your orators and are liens upon their property as aforesaid, and said lists or rolls are by law given the effect of executions against the property of your orators so assessed.

"Your orators further represent that said pretended acts of the legislative assembly entitled, as aforesaid, 'An act authorizing the building of a penitentiary in the territory of New Mexico and regulating its management,' [652] approved *March 14, 1884, and 'An act to provide for the erection of a capitol building in the city of Santa Fé,' approved March 29, 1884, under which said assessment of taxation is made, and by virtue of which said pretended liens against your orators' property are asserted, and by virtue of which said pretended assessment rolls are claimed to have the effect of executions in the hands of the said defendant as sheriff and *ex officio* collector of said county of Grant, are not and never have become valid laws of said territory of New Mexico, for the reason that the same never were introduced and passed through the council of said legislative assembly when a legal quorum of said council was present and participating in the proceedings thereof, and for the reason that a majority of a legal quorum of said council never voted in favor of said pretended laws so as to legally pass the same through said body; and your orators charge the facts to be that an Act of Congress of the United States of America was passed and approved on the 14th day of February, 1884, and thereby become a law, which said Act of Congress, among other things, provided that a session of the legislative assembly of said territory should be held, and said assembly convene on the third Monday of February, A. D. 1884; and said Act of Congress declares that the members elected to the territorial legislature of said territory in November, 1882, and all vacancies legally filled since that time if any, should be the legal members of the legislature by said Act authorized, subject to all valid contest.

"Your orators further state that in accordance with said Act of Congress a pretended session of said legislative assembly was held, commencing on the third Monday of February, A. D. 1884.

"Your orators further state the fact to be, and that the same so appears by the published journal of the proceedings of said pretended sessions of the council of said legislative assembly, that upon the convening of said council on the said third Monday in February, A. D. 1884, only five members appeared who had regularly received certificates of election and were so shown to be elected by the election returns of the said election held in November, A. D. 1882, to have been *elected mem- [653] bers of said council, to wit, José Armijo y Vigil, of Socorro county; Pablo Gallegos, of Rio Arribi county; W. H. Keller and Andrew Sena, of San Miguel county, and John A. Miller, of Doña Ana, Lincoln, and Grant counties, and that thereupon the said five persons qualified as members of said council by taking the oath of office required by law and signing the roll of members.

"Your orators further allege that by law the said council is composed of twelve members, and that seven thereof are necessary to constitute a legal quorum for the transaction of business.

"Your orators further allege that after said five members had been sworn in, as aforesaid, a motion was unanimously adopted by the vote of said five members only, and no more, that Thomas B. Catron, of Santa Fé county, be declared entitled prima facie to the seat from Santa Fé county, and that thereupon the said Thomas B. Catron took the oath of office as a member of said council, signed its roll, and thereafter acted as a member thereof.

"And your orators further allege that said Catron's seat was claimed by Henry L. Warren, of Santa Fé county, and that said Warren held a certificate of election as a member of said council from Santa Fé county, which said certificate was the first certificate of election issued by the county commissioners as evidence of the election of members of said council from said county at said election held in said month of November, A. D. 1882, but that afterwards said county commissioners, acting under protest and compelled by an order of the district court in said county of Santa Fé, issued a certificate of election to said Thomas B. Catron.

"Your orators further allege that they are not informed as to whom the election returns on file in the office of the secretary of the territory show to have been elected as a member of said council from the said county of Santa Fé at said election.

"Your orators further allege that afterwards, while said council was composed of the said five persons as aforesaid and the said Thomas B. Catron and no others, a motion was *therein introduced by the said John A. [654] Miller to the effect that Charles C. McComas and José Manuel Montoya be declared entitled pr ma facie to the seats from Bernalillo county, subject to the right of contest, and that said

motion was unanimously adopted by the vote of the said six members and no more, who were then acting, as aforesaid, as members of said council.

"Your orators further allege that said Charles C. McComas and José M. Montoya held no certificates of election whatever as members of said body, but, on the contrary, Charles Montaldo and Francisco Perea held the certificates of election to the seats therein of the members from said county of Bernalillo, and that all the election returns of the election held in said month of November, A. D. 1882, both in the office of the county commissioners, and in that of the secretary of said territory, showed and still show that said Charles Montaldo and Francisco Perea received a majority of the votes cast in said county at said election for members of the council from said county, and that said Charles C. McComas and José M. Montoya did not receive a majority of said votes so cast and were not duly elected members of said council.

"Your orators further allege that the said Charles C. McComas after the said election in November, A. D. 1882, had commenced proceedings as a contestant for the seat of said Charles Montaldo as a member in said council from Bernalillo county, and served his notice of contest on said Montaldo and taken testimony under said notice of contest, and that said José M. Montoya had so commenced contest proceedings against the said Francisco Perea for the other seat of the member from said county of Bernalillo, and that said notice of contest so served and testimony so taken were duly filed with the secretary of the territory, and by him were transmitted and delivered to the said pretended council so organized as aforesaid, and at the time of the proceedings aforesaid the said papers relating to said contest were in possession of the said secretary, and that long afterwards, to wit, on the 3d day of April, A. D. 1884, the committee on election of said pretended council reported to said body that the said [655] contested election* cases had been referred to them, and that they found that said McComas and Montoya were entitled to the seats then held by them in said body, which said reports are stated by the journal published by said body to have been on said day adopted.

"Your orators further allege that the said six persons aforesaid and the said McComas and Montoya constituted said council until on or about the 25th day of March, A. D. 1884, when the said W. H. Kellar absented himself from said body and never afterwards participated in its proceedings.

"And your orators further allege that after the said Kellar had ceased to act with said body, J. Innocente Valdez, who was elected a member of the council from Colfax and Mora counties, took the oath of office and participated in the proceedings; but your orators allege that at no time during the pretended session of said body did more than six persons, including the said Thomas B. Catron, take part in its proceedings, except the said Charles C. McComas and J. M. Montoya, unlawfully and arbitrarily seated as aforesaid.

"And your orators further allege that, including the said McComas, Montoya, and Catron, there were just eight members of said body present and voting when the said bill aforesaid, entitled 'An act authorizing the building of a penitentiary in the territory of New Mexico and regulating the management,' was introduced and passed through its several readings in said body; that said last mentioned bill by the journal of said pretended council is alleged to have passed, under a suspension of the rules of said council, on the 14th day of March, A. D. 1884, and which said journal shows that there were present on said day the said José Armijo y Vigil, T. B. Catron, Pablo Gallegos, W. H. Kellar, and McComas, Miller, Montoya, and Sena, and no more, and that said journal does not show that said last mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way except by the illegal and arbitrary action of the said six persons aforesaid that said McComas and Montoya were entitled to said seats in said body.

*"And your orators further allege that, [656] including the said McComas, Montoya, and Catron, there was just eight members of said body present and voting when said bill aforesaid, entitled 'An act to provide for the erection of a capitol building in the city of Santa Fé,' was introduced and passed through its several readings in said body; that said last mentioned bill, by the journal of said body, is alleged to have passed, under a suspension of the rules, on the 26th day of March, A. D. 1884, and which said journal shows there were present on said day the said José Armijo y Vigil, T. B. Catron, and McComas, Montoya, Gallegos, Sena, Miller, and Valdez, and no more, and that of these Messrs. Catron, McComas, Montoya, Gallegos, Sena, and Armijo y Vigil voted in favor of the passage of said last mentioned bill, while Messrs. Miller and Valdez voted against the passage of the same; and that said journal does not show that said last mentioned bill was ever passed on any other day, and that on said day it had never been determined by any legal quorum or by any other way, except by the illegal and arbitrary action of the six persons aforesaid, that said McComas and Montoya were lawfully entitled to seats in said body.

"Your orators further represent that said pretended acts of the legislative assembly aforesaid, having been approved by the governor's signature attached thereto and filed in the office of the secretary of the territory and certified by said secretary as valid laws, legally passed by the legislative assembly of the territory, and that said acts have been incorporated and published in volumes of the laws of the territory, so that on their face they seem to be valid laws, so as to give apparent validity to the assessment of said taxation and to the lien on the property of your orators aforesaid, when in truth and fact the said pretended acts of the said legislative assembly were never legally passed by said legislative assembly and are absolutely null and void, and that by reason of the premises the said defendant, collector as aforesaid, has acquired and can acquire no authority in law whatever for exacting and collecting the said pretended taxes from your orators, either by virtue of

said pretended acts of the legislative assembly or the steps taken as aforesaid thereunder."

657] *The bill then set up various grounds of equity interposition, not necessary to be repeated, and prayed an injunction and for general relief. To this bill a general demurrer was filed by the defendants and sustained, and the complainants declining to plead further, the bill was dismissed for want of equity with costs, December 4, 1885, whereupon complainants prayed an appeal to the supreme court of the territory, by which the decree was affirmed on the authority of *Chavez* v. *Luna* (N. M.) Jan. 23, 1889, Brinker, *J.*, dissenting. The case was thereupon brought by appeal to this court.

***Mr.* W. B. Childers,** for appellants:

The courts will look at the journals of legislative bodies to see if legislation has been constitutionally and legally enacted.

South Ottawa v. *Perkins*, 94 U. S. 267 (24: 157); *Gardner* v. *Barney*, 73 U. S. 6 Wall. 511 (18: 893); *Brown* v. *Nash*, 1 Wyo. Ter. 85; *Post* v. *Kendall County Suprs.* 105 U. S. 658 (26: 1205); *Gregg* v. *Forsyth*, 65 U. S. 24 How. 179 (16: 731); *San Mateo County* v. *Southern Pac. R. Co.* 8 Sawy. 293; *Green* v. *Weller*, 32 Miss. 651; *Spangler* v. *Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *People* v. *Starne*, 35 Ill. 121; *Ryan* v. *Lynch*, 61 Ill. 160; *Pacific R. Co.* v. *Governor*, 23 Mo. 353, 66 Am. Dec. 673; *Burnham* v. *Morrissey*, 14 Gray, 238, 74 Am. Dec. 676; *Miller* v. *State*, 3 Ohio St. 475; *Southwark Bank* v. *Com.* 26 Pa. 446; *Prince* v. *Skillin*, 71 Me. 361, 36 Am. Rep. 325; *State* v. *Rogers*, 10 Nev. 250, 21 Am. Rep. 788; *De Bow* v. *People*, 1 Denio, 9.

As to what constitutes a quorum, and what is meant by "House" in the Organic Act, see: *Southworth* v. *Palmyra & J. R. Co.* 2 Mich. 287; *Re Impeachment of Gov. Reed*, 12 Fla. 659; Cooley, Const. Lim. 141–145.

There can be no such thing as *de facto* legislation. The rule that the acts of *de facto* officers are upheld applies to purely ministerial officers.

No counsel for appellees.

***Mr. Chief Justice* Fuller** delivered the opinion of the court:

658] *By section 3 of the Organic Act of the territory of New Mexico (9 Stat. at L. 446, chap. 49) the executive power and authority in and over that territory was vested in a governor, whose duty was, among others, to "approve the laws passed by the legislative assembly before they shall take effect." By the 4th section it was provided that there should be a secretary of the territory, who shall "hold his office for four years unless sooner removed by the President of the United States," and that "he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and one copy of the executive proceedings, on or before the first day of December in each year, to the President of the United States, and, at the same time, two copies of the laws to the speaker of the house of Representatives and the President of the Senate, for the use of Congress." By section 5 "the legislative power and authority of said territory shall be vested in a governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives. The council shall consist of thirteen members, having the qualification of voters hereinafter prescribed, whose term of service shall continue two years. The house of representatives shall consist of twenty-six members, possessing the same qualifications as prescribed for members of the council, and whose term of service shall continue one year." By section 7 it was enacted "that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this Act. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

By chapter one of title XXIII. of the Revised Statutes, provisions were made "common to all the territories;" and most of those in the Organic Act of New Mexico were there reproduced, with the addition of certain matters of detail.

By section 1842, it was provided in nearly the identical words, *mutatis mutandis*, of paragraph 2 of section 7 of article *1 of the[659 Constitution of the United States, that every bill which had passed the legislative assembly of any territory should, before it became a law, be presented to the governor; if he approved it, he should sign it, but if not, he should return it, with his objections, to the house in which it originated, and that house should enter the same on its journals and proceed to reconsider it. If, after such reconsideration, two thirds agree to pass it, it should be sent, together with the objections, to the other house, where it should likewise be reconsidered, and, if approved by two thirds of that house, should become a law. "But in all such cases the votes of both houses shall be determined by ayes and nays, and the names of the persons voting for or against the bill shall be entered on the journal of each house." The section then provided for a bill becoming a law in like manner, as if signed by the governor, if not returned by him within three days, Sundays excluded (or five days in Washington and Wyoming) after it had been presented, unless the legislative assembly, by adjourning *sine die*, should prevent its return, in which case it should not become a law.

By section 1844 it was provided that the secretary of such territory should record and preserve all the laws of the legislative assembly and all the acts and proceedings of the governor in the executive department, "and transmit one copy of the laws and journals of the legislative assembly, within thirty days after the end of each session thereof, to the President," as well as two copies of the laws to the President of the Senate and the Speaker of the House for the use of Congress. And it was further provided that "he shall prepare the acts passed by the legislative assembly for publication, and furnish a copy hereof

to the public printer of the territory, within ten days after the passage of each act."

By the Act of July 27, 1868 (15 Stat. at L. 241, 242, chap. 272) the Organic Act was amended, and that amendment was carried forward into section 1921 of the Revised Statutes, which reads: "The secretary of New Mexico territory, upon the convening of the legislature thereof, shall administer the oath of office to the members elect of the two houses 660] and the *officers thereof, when chosen; and no other person shall be competent to administer such oath save in the absence of the secretary; in which case, any one member of either house may administer the oath to the presiding officer elected, and he shall administer the same to the members and other officers."

The acts of the legislative assembly of the territory of New Mexico at its twenty-sixth session, which convened at the capitol at the city of Santa Fé on Monday, the 18th day of February, 1884, and adjourned on Thursday, the 3d day of April, 1884, were duly certified to by the secretary of the territory as having been compared with the enrolled originals and original translations thereof, respectively, on file in his office, and that the same were true and correct copies thereof, and published by authority.

Among these acts as so published appear "An act authorizing the building of a penitentiary in the territory of New Mexico and regulating its management," approved March 14, 1884; and an act entitled "An act to amend an act authorizing the building of a penitentiary and regulating its management, approved March 14, 1884," approved March 26, 1884; and "An act to provide for the erection of capitol building in the city of Santa Fé," approved March 29, 1884. Laws of New Mexico, chap. 58-60.

The legislative journals for that year, to which reference will hereafter be made, show that each of these acts was signed by the president of the council and the speaker of the house, and its approval by the governor reported to the house in which the act originated in each instance.

The question in this case is whether the territorial courts should have gone behind the enrolled bills whose passage was thus duly attested, and which were duly approved, placed in the proper depository, and duly certified to and published, and held them void upon the ground that certain members of the quorum of one of the two bodies by which they were passed were seated without having certificates of election. And this notwithstanding the fact that "all the laws passed by the general assembly and governor" were, as must be assumed, duly submitted to Congress 661]*and that body did not see fit to disapprove any of them under the power reserved by section seven of the Organic Act, a power which had been exercised affirmatively in some instances. 16 Stat. at L. 44, chap. 21; 16 Stat. at L. 278, chap. 270; 20 Stat. at L. 280, chap. 41.

In *Miners Bank of Dubuque* v. *Iowa*, 53 U.S. 12 How. 1, 7 [13: 867, 870], a question arose whether the validity of a certain act of the territory of Iowa could be brought before this court under the 25th section of the Judiciary Act, which it was held it could not, and the court said: "It seems to us, that the control of these territorial governments properly appertains to that branch of the government which creates and can change or modify them to meet its views of public policy, viz: the Congress of the United States. That control certainly has not been vested in this court, either in mode or in substance, by the 25th section of the Judiciary Act It has been argued in this case, that as Congress, in creating the territorial governments of Wisconsin and Iowa, reserved to themselves the power of disapproving and thereby annulling the acts of those governments, and had, in the exercise of that power, stricken out several of the provisions of the charter of the bank of Dubuque, enacted by the legislature of Wisconsin, assenting to the residue; that therefore the charter of this bank should be regarded as an Act of Congress, rather than of the territorial government; and consequently the decision of the state court, in favor of the repealing law of Iowa, must be held to be one in which was drawn in question and overruled the validity of a statute of or an authority exercised under the United States, and as a decision also against a right, title, or privilege set up under a statute of the United States. The fallacy of this argument is easily detected. Congress, in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental."

*In *Chavez* v. *Luna* (N.M.) Jan. 23, 1889, [662 the supreme court of New Mexico held, upon a bill of complaint setting up in substance the same matters as alleged here, that where the constitution of a state prescribed the mode to be observed by the legislature in passing bills, there was no doubt whatever about the power of a court to inquire into the question as to whether the constitution had been violated or not, but that rule of law did not apply to the state of facts presented in that case, in which the only question was one of the organization of the body; and *People* v. *Mahaney*, 13 Mich. 481, was cited to the point that courts cannot entertain a bill to review the action of a legislature in the manner of its organization, or the election or qualification of its members. Referring to section 7 of the Organic Act of the territory, the court declined to decide whether in the general terms therein used, conferring legislative power upon the legislative assembly of New Mexico, it was intended to confer the usual and ordinarily incidental power to determine finally the election, qualification, and return of the members, but concluded that as by that section all laws passed by the legislative assembly and governor had to be submitted to Congress, and, if disapproved, were null and void and of no effect, it must be presumed that these acts were so submitted, and, there being nothing to show that they were disapproved, that they had received the passive assent

of the Congress, and had been in that way approved, and that, therefore, there was nothing upon which to ground the jurisdiction of the court over the subject sought to be reviewed. In the present case the decree below was affirmed on the authority of *Chavez* v. *Luna*, and the dissent was placed upon the ground that mere non-action by Congress was not to be taken as an approval of the acts of the legislature so as to preclude judicial investigation.

We need not consider this difference of opinion further than to say that the fact that resort to Congress was open to those who objected to the legality of the acts passed by this legislative assembly is not without significance in inquiring into the jurisdiction of the courts in the premises.

In *Field* v. *Clark*, 143 U. S. 649 [36:294], it was **663**] *held by this court, upon great consideration, that the signing by the speaker of the House of Representatives and by the President of the Senate in open session of an enrolled bill is an official attestation of such bill as one that has passed Congress; and that when the bill thus attested receives the approval of the President and is deposited in the Department of State according to law, its authentication as a bill that has passed Congress is complete and unimpeachable. That conclusion was reached in view of the clauses of the Constitution of the United States bearing upon the subject, and would seem to be decisive of this case.

It is true that the courts of many of the states under constitutional or statutory provisions of a peculiar character, which, expressly or by necessary implication, required or authorized the court to go behind the enrolled Act, when the question was whether the Act, when authenticated and deposited in the proper office, was duly passed by the legislature, have announced a different conclusion. These cases are given in the notes to *Field* v. *Clark*, and some of them are referred to and considered in the opinion in that case. But as the Organic Act of New Mexico, taken with the Revised Statutes, conforms quite closely to the provisions of the Federal Constitution, the rule laid down in *Field* v. *Clark* governs the case before us.

Perhaps, however it would be proper to extend our examination somewhat further. The question whether a seeming act of a legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury *South Ottawa* v. *Perkins*, 94 U. S. 260, 267 [24:154,157]; *Post* v. *Kendall County Supra*. 105 U. S. 667 [26:1204]. In the first case *Gardner* v. *Barney*, 73 U. S. 6 Wall. 499 [18: 890] was cited with approval, in which the court laid down the proposition: "That whenever a question arises in a court of law the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of **664**] conveying to the judicial mind a *clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." And see *Duncan* v. *McCall*, 139 U. S. 449 [35:219]; *Jones* v. *United States*, 137 U. S. 202, 216 [34:691,697]; *Field* v. *Clark*, 143 U. S. 649 [36:294].

The bill alleged that the counsel consisted of twelve members, seven constituting a quorum. By the Organic Act it was provided that the council shall consist of thirteen members. 9 Stat. at L. 448, chap. 49, § 5. The Act of June 19, 1878 (20 Stat. at L. 193, chap. 329) limited the number to twelve and directed the legislative assembly to divide the territory into representative and council districts. An Act of June 27, 1879 (21 Stat. at L. 35, chap. 40) referred to the Act of June 19, 1878, and to "the twelve members of the council." In the sessions of 1880 and 1882 there appear to have been thirteen members of the council. N. M. Acts, 1880, 11; Acts, 1882, 7. By an Act of December 21, 1881, the election held for members of the legislature on the second day of November, 1880, was declared to be valid and all the acts of the legislature, the members of which were chosen at that election, were validated, and the legislature directed to apportion the representative and council districts, but it was provided that if they failed to do so the apportionment should be made in accordance with an Act referring to the legislatures of Montana, Idaho, and Wyoming, approved June 3, 1880. 21 Stat. at L. 154, chap. 119; 22 Stat. at L. 1, chap. 3. By an Act of February 14, 1884, it was provided "that the members elected to the territorial legislature of New Mexico in November, anno Domini, eighteen hundred and eighty-two, and all vacancies legally filled since that time, if any, are hereby declared to be the legal members of the legislature hereby authorized, subject to all valid contests." And the legislature was directed to convene on the third Monday of February, 1884. 23 Stat. at L. 3, chap. 6. But whether composed of twelve or thirteen members, there can be no doubt that seven constitute a quorum authorized to do business.

It was the duty of the secretary of the territory, under section 1921, to administer the oath of office to the members elect *of the two [**665** houses, and there is nothing in this bill to exclude the presumption that he did so, and if so, it is difficult to see why persons so sworn in did not thereby become entitled in the first instance to take their seats, or why the council thus organized was not at least a council *de facto*.

The charges in the bill relate to three out of eight members, but as to one of these, Mr. Catron, the bill states that while he did not originally have a certificate of election from the board of county commissioners, which was *ex officio* the canvassing board, he did have a certificate issued by that board, under the order of the district court, in respect of which adjudication no further question appears to have been made. Neither as to him nor the two other members (Mr. McComas and Mr. Montoya) whose title to their seats is questioned, was it alleged that they were not elected to the council, but the averment as to the latter is that the election returns of the election held in November, 1882, showed and still show that two other persons received a majority of the votes cast in Bernalillo county at the election of members of the council for that county and that the two sitting members did not receive a majority of the votes so cast and were not duly elected members of said council.

Reference is made in the bill to the journals of the council and house of the legislative as-

sembly of New Mexico for its twenty sixth session, and we have examined them as published by authority. That of the council, after stating that the legislative council assembled February 18, 1884, in conformity with the Act of Congress (23 Stat. at L. 3) recites that the secretary of the territory being present, "proceeded to call the names of the councilmen elected from the different counties, respectively, for the purpose of swearing them in as such. The following gentlemen answered and were duly sworn, and signed the official register, to wit." Then follow the names of eight persons, including those whose title to seats is questioned in this proceeding. The record shows that the election of officers thereupon ensued, who being duly sworn in by the secretary, that officer retired. A committee was then appointed to wait upon the governor and 666 inform him that the *council was duly organized and ready to receive any communication which he might be pleased to make them, which committee having retired in the discharge of the duty assigned them, after a short absence returned, and reported that they had done so and that the governor "recognized this body as legally organized, and would be ready to deliver his message to both houses in joint session on the next day." But this record of the proceedings of February 18, 1884, is preceded by a prefatory statement headed "organization." This states that the secretary of the territory appeared at the council chamber at noon "for the purpose of swearing in the members of the council (all as a question of fact being present); he was met with a degree of confusion, which, being long continued," the secretary retired and proceeded to the house, where organization was effected. Subsequently, and on the same day, the secretary of the territory called the members of the council to order and made some remarks, stating among other things "the seats of members from Bernalillo county are disputed." It appears from the judgment of the district court presented, it has passed upon the question involved in the case of county officers elected at the same election that the members of the legislature were, from that county; and decided adversely to those elected upon the face of the returns, and that a large number of fraudulent votes were cast. And it appearing that the application of the same facts would change the result as to members claiming to have been elected upon the same ticket, and it likewise appearing that the question of fraud in said election has become one of public notoriety, and it also appearing that the seat of the member from Santa Fé county is involved in a similar contest, it therefore seems to me proper and just that at this time, the members only who are not involved in the contest should be sworn. Whereupon five members signed the oath and were sworn in. The secretary thereupon further remarked: "In view of the situation it seems to me just, in the absence of law to the contrary, that the members sworn in and not involved in contest should express their judgment as to who of the contestants are prima facie entitled to be sworn in. For this 667 purpose, and this *purpose alone, I will consider a motion to be submitted without debate." A motion was then made that Thomas B. Catron be declared entitled prima facie to the seat from Santa Fé county, subject to the right of contest, which motion was carried by unanimous vote. The name of Mr. Catron was then called by the secretary and he appeared, signed the oath and was sworn in. A similar motion was made as to Messrs. McComas and Montoya, which being adopted by unanimous vote, their names were called by the secretary and they appeared, signed the oath, and were sworn in as members from Bernalillo. Mr. José Armijo y Vigil was then elected president of the council and sworn in by the secretary, and "the latter then retired." We understand the object of this preface to be to explain that the three persons, in respect of whom it was claimed that they were improperly admitted to seats to the council, did not take their seats in virtue of the vote of the five members, whose right to act as members of the council was not disputed, but that the vote of those five was simply taken by the secretary as advisory, he himself determining upon his own responsibility who were entitled to be sworn in. So far as the record proper is concerned, irrespective of this prefatory matter, nothing appears upon the journals to show that this was otherwise.

The journal of the house discloses similar proceedings as to certain members from Bernalillo county. It further appears therefrom that two bodies had organized, each claiming to be the territorial council, one presided over by J. F. Chavez and the other by J. Armijo y Vigil, and each had sent a communication to that effect to the house. The house thereupon appointed a committee to ascertain which of the two councils was legally organized, a majority of which reported that, according to the law of the United States, the secretary of the territory was "the only authorized person to administer the oath to the members of either body of the legislature; that no body can legally be organized until first being sworn in by said officer;" "that the body represented and presided over by Hon. José Armijo y Vigil have been duly sworn in by the secretary of the territory and recognized by *the 668 governor of the territory, as the regularly organized and legal legislative council;" and recommended that the house recognize such council accordingly. The majority report was adopted, the sitting members from Bernalillo county voting in the affirmative, but there being a majority without them.

On the other hand, among the joint resolutions passed and approved at the session of the legislative assembly in question and to be found in the laws for 1884 as published, is one approved April 3, 1884, reciting that whereas the chairman of the committee on territories of the United States Senate had advised the governor of the purpose of the committe "to investigate the questions at issue in connection with the memorial of J. Francisco Chavez and others, referred to said committee," and having requested certain record evidence bearing upon the issues aforesaid, it was resolved that the secretary be authorized and directed to turn over for the use of that committee "all poll books of the said precincts of the counties of Bernalillo and Santa Fé, of the election held on the 7th day of November, 1882, and all other

record evidence concerning and touching said election in said counties now in his possession." Laws N. M. 1884, 241. The memorial thus referred to will be found in the Congressional Record for the first session of the Forty-eighth Congress, p. 1549, where it appears that a memorial signed by Mr. Chavez and six others, holding, as they state, the proper legal evidences of election to the twenty-sixth legislative assembly of New Mexico, was presented to the Senate of the United States on March 3, 1884, and was referred to the committee on territories.

This memorial refers to the provisions of the territorial laws that "each branch of the legislative assembly shall decide and determine the election and qualifications of their own members under the rules and restrictions that may be respectively adopted by each branch for that purpose." That "if a contested election be pending, the person holding the certificate of election shall take possession and discharge the duties of the office until the contest shall be be decided." N. M. Comp. Laws 1865, chap. 63, §§ 35, 50. And that the board of county commissioners shall act as boards of canvassers [669] of the *elections within their respective counties; "and shall immediately issue a certificate of election, under their hands, to the person that may have received the highest number of votes for any office." N. M. Laws 1876, chap. 1, §14, ¶ 9.

The proceedings of February 18, 1884, are then related at length, and it is insisted that the conduct of the secretary was unlawful, arbitrary and in defiance of right, justice, and the plain provisions of the law. We are not advised as to what became of the investigation based on the memorial and referred to in the joint resolution, but it would appear that Congress took no action whatever in the premises, although its attention was thus called to the condition of affairs.

It is undisputed, therefore, that the council which participated in the enactment of these laws was recognized by the governor and the secretary of the territory and by the house, nor is there any suggestion in the bill of the existence of any other council than the one thus recognized; and the courts of the territory have adjudged that these acts were duly enacted.

In the meantime, it must be presumed that bonds have been issued to provide funds for the erection of a penitentiary and a capitol, and that these public works have gone forward. Considerations of public policy and necessity for the protection of the public and individuals whose interests may be affected thereby forbid this mode of attacking the validity of acts of officers *de facto*, if this council were no more than that, whatever defects there may be in the legality of their appointment or election. *Norton* v. *Shelby County*, 118 U. S. 441 [30: 185].

Under these circumstances we think it clear that the judgment of the supreme court of the territory must be affirmed.

In *Clough* v. *Curtis*, 134 U. S. 361, 371 [33: 945, 949], petitions for mandamus to compel the secretary of the territory of Idaho to record certain proceedings as part of the proceedings of a session of the legislature of the territory, and to compel the clerk of the territorial house to bring his minutes and journals into court to be there corrected, came under review, and this court said: "It is not one of the functions of a *court to make up the records of the pro- [670 ceedings of legislative bodies. Nor can it be required, in a case not involving the private interest of parties, to determine whether particular bodies assuming to exercise legislative functions constitute a lawful legislative assembly. Such a question might indeed arise in a suit depending upon an enactment passed by such an assembly. And it might be that, in a case of that character, and under some circumstances, the court would be compelled to decide whether such an enactment was passed by a legislature having legal authority to enact laws. How far in the decision of such a question the judiciary would be concluded by the record of the proceedings of those bodies, deposited by the person whose duty it was to keep it with the officer designated by law as its custodian, are questions we have no occasion at this time to consider."

Without undertaking to consider under what circumstances which of two legislative bodies may be judicially determined to be the lawful and true body, or when or how the lawful organization of a legislative body may be judicially drawn in question, we are of opinion that the allegations of this bill made no such case for interposition as would have justified the courts in going behind the enrolled bills as deposited with the secretary of the territory and declaring them invalid because some of the members of the council were seated without certificates of election.

We may add that by an act passed by the legislative assembly in question, approved April 3, 1884 (N. M. Laws 1884, chap. 66) a compilation of the laws of the territory was provided for; which compilation was duly made and published by authority (N. M. Comp. Laws 1884); that an official index to these compiled laws was adopted; the compiled laws amended in many particulars; and other acts of 1884 amended or repealed, by the succeeding, the 27th legislative assembly (N. M. Laws 1886, 1887, chap. 49, and *passim*); and an act was also passed for the issue of bonds "for the purpose of paying the present and current indebtedness of the capitol building" (Laws 1886, 1887, chap. 45) which latter act was approved by Congress on June 23, 1888. 25 Stat. at L. 340, chap. 693.

Decree affirmed.

ELIAB W. METCALF, *Plff. in Err.*, [671
v.
CITY OF WATERTOWN.

(See S. C. Reporter's ed. 671-684.)

Statutes of limitations—actions on foreign judgments—judgment of U. S. circuit court.

1. Statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and

NOTE.—*As to what statute of limitations governs; effect of new statutes, lex fori, and not lex loci, governs*, see note to Townsend v. Jemison, 13: 194.

As to equity of redemption barred by time, see note

as construed by its highest court, are rules of decision in the courts of the United States.

2. Actions upon foreign judgments must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.

3. The ten year bar of the statutes of limitation of 1858, of Wisconsin, constitutes no defense to an action on a judgment recovered in the U. S. Circuit Court for the District of Wisconsin; the twenty years limitation of such statutes applies to such judgment.

[No. 18.]

Argued Dec. 8, 9, 1892. Reargued April 18, 1894. Decided May 14, 1894.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin, to review a judgment in favor of defendant, the City of Watertown, in an action brought in 1883, by Eliab W. Metcalf, plaintiff, as assignee of a judgment for $10,207.86, recovered in 1866, in the Circuit Court of the United States for the District of Wisconsin, upon said judgment; in which action the defense was that the cause of action did not arise within ten years before the action was brought and that the action was therefore barred by the statute of limitations of Wisconsin. Reversed, and cause remanded with direction to enter judgment for plaintiff.

See same case, 128 U. S. 586 (32: 543.)

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought June 29, 1883, in the Circuit Court of the United States for the Western District of Wisconsin, by a citizen of Ohio, the assignee of certain persons who were assignees in different proportions of a judgment for the sum of $10,207.86, recovered April 9, 1866, in the Circuit Court of the United States for the District of Wisconsin, by a citizen of Tennessee against a municipal corporation of Wisconsin. The petition having been amended (in accordance with the opinion delivered by this court when the case was before it at a former term, and reported in 128 U. S. 586 [32: 543]) by showing that this plaintiff's assignors were citizens of other states than Wisconsin, the defendant answered that the cause of action did not arise within ten years before this action was brought, and that the action was therefore barred by the statute of limitations of Wisconsin. The case having been submitted to the circuit court for trial without a jury, that court, on August 2, 1889, so held, and, having filed findings of fact and conclusions of law, rendered judgment for the defendant. The plaintiff sued out this writ of error.

The Revised Statutes of Wisconsin of 1849, chap. 127, § 41, applied one limitation to all judgments of courts of record within the United States, as follows: "Every judgment and decree in any court of record of the United States, or of any state or territory of the United States, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered."

*The Revised Statutes of 1858, chap. [672 138, contain the following provisions:

"Sec. 1. Civil actions can only be commenced within the periods prescribed in this chapter, except when in special cases a different limitation is prescribed by statute."

"Sec. 14. The periods prescribed in section one of this chapter, for the commencement of actions other than for the recovery of real property, shall be as follows:

"Sec. 15. Within twenty years: 1. An action upon a judgment or decree of any court of record of this state. 2. An action upon a sealed instrument, when the cause of action accrues within this state.

"Sec. 16. Within ten years: 1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States. 2. An action upon a sealed instrument, when the cause of action accrued without this state."

In the Revised Statutes of 1878, §§ 4220, 4221, the language of the provisions as to actions on judgments is modified, so as to include in the limitation of twenty years "an action upon a judgment or decree of any court of record of this state, or of the United States, sitting within this state;" and to confine the limitation of ten years to "an action upon a judgment or decree of any court of record of any other state or territory of the United States, or of any court of the United States, sitting without this state." By reason of a saving clause in § 4984, the case at bar is not governed by these statues, but by the statutes of 1858.

Messrs. **Chas. E. Monroe** and **Geo. A. Jenks** for plaintiff in error, on the first argument.

Messrs. **George W. Bird** and **Daniel Hall** for defendant, on the first argument.

Messrs. **Charles E. Monroe** and **Geo. A. Jenks** for plaintiff in error, on reargument.

Messrs. **Geo. W. Bird** and *Daniel Hall* for defendant in error, on reargument.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It will be perceived that the questions arising upon the *record in this case relate [673 to the meaning, applicability, and validity of the first paragraph of section 16 of the Revised Statutes of Wisconsin of 1858, which, taken in connection with sections 1 and 14, barred "an action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States," in ten years. The contention of the plaintiff is that, under a proper construction of the paragraph, judgment or decrees of the courts of the United States sitting within the state of Wisconsin are not included therein, and that if this were not so, it would be so far unconstitutional. De-

to Thomas v. Brockenbrough, 6: 287, and to Prevost v. Gratz, 5: 311.

As to effect of state decisions and laws, in regard to statute of limitations, upon United States courts, see note to Elmendorf v. Taylor, 6: 289.

That neither time nor statute of limitations runs against the state, see note to Gibson v. Chouteau, 20: 534.

fendant claims that such judgments or decrees plainly fall within the statute, no room being left for construction; and that it is valid as to suits on Federal judgments or decrees in the state courts, and therefore valid as to suits on such judgments or decrees in Federal courts, under the 34th section of the Judiciary Act of 1789.

By that section it was provided that "the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply;" and this was carried forward into section 721 of the Revised Statutes. And from the beginning this court has recognized statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court, as rules of decision in the courts of the United States. *Bauserman* v. *Blunt*, 147 U. S. 647, 652 [37: 316, 318], and cases cited.

M'Elmoyle v. *Cohen*, 38 U. S. 13 Pet. 312, 327 [10: 177, 184], is an early and leading case on the subject cited and largely quoted from by counsel for defendant. The statute of limitations of Georgia involved in that case required "actions of debt upon judgments obtained in courts other than the courts of this state" to be brought "within five years next after the judgments shall have been obtained," and an action having been brought in the Circuit Court of the United States for the District of Georgia upon a judgment rendered in a court of the state of South Carolina, it was held that the statute could be 674] *pleaded in bar thereof. *Mr. Justice* Wayne delivered the opinion of the court, and after stating that judgments recovered in one state "are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be, and consequently are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered," but that a plea of the statute of limitations was "well settled to be a plea to the remedy, and consequently that the *lex fori* must prevail;" proceeded as follows: "It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been, from a remote antiquity, fixed by every nation in virtue of that sovereignty by which it exercises its legislation for all person and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our states, under our system, exercise this right in virtue of their sovereignty? Or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other states by the lapse of time? The states use this right upon judgments rendered in their own courts; and the common law raises the presumption of the payment of a judgment after the lapse of twenty years. May they not then limit the time for remedies upon the judgments of other states, and alter the common law by statutes, fixing a less or larger time for such presumption, and altogether barring suits upon such judgments, if they shall not be brought within the time stated in the statute? It certainly will not be contended that judgment creditors of other states shall be put upon a better footing in regard to a state's right to legislate in this particular, than the judgment creditors of the state in which the judgment was obtained. And if this right so exists, may it not be exercised by a state's restraining *the remedy upon the judg- [675 ment of another state, leaving those of its own courts unaffected by a statute of limitations, but subject to the common law presumption of payment after the lapse of twenty years? In other words, may not the law of a state fix different times for barring the remedy in a suit upon a judgment of another state, and for those of its own tribunals? We use this mode of argument to show the unreasonableness of a contrary doctrine. But the point might have been shortly dismissed with this safe declaration, that there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is, that they are conclusive only as regards the merits; the common law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred."

Reference is also made to *Ross* v. *Duval*, 38 U. S. 13 Pet. 45 [10: 51], in which it was held that an act of the legislature of Virginia providing that judgments of any court within the state, when execution had not been issued, might be revived within ten years from that date by *scire facias* or action of debt thereon, and that when execution had been issued and not returned, other executions and proceedings on the judgment might be had within ten years and not after, was a statute of limitations and applicable to a judgment obtained in the Circuit Court of the United States for the District of Virginia. That was no more than applying to the judgments of the United States courts the same rule that applied to the judgments of the state courts, and in neither of these cases did the precise question arise presented in the case before us.

By the Act of May 26, 1790, chap. 11, and the supplement thereto of March 27, 1804, chap. 56, now embodied in section 905 of the Revised Statutes, it is provided that the records and judicial proceedings, not only of the courts of any state, but *also of any [676 territory or of any country subject to the jurisdiction of the United States, authenticated as therein prescribed, "shall have such

faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the state from which they are taken;" that is to say, such faith and credit as they are entitled to in the courts of the state territory, or other country subject to the jurisdiction of the United States from which they are taken.

In *Dupasseur* v. *Rochereau*, 88 U. S. 21 Wall. 130, 135 [22: 588, 590], *Mr. Justice* Bradley, speaking for the court, said: "The only effect that can be justly claimed for a judgment in the circuit court of the United States, is such as would belong to judgments of the state courts rendered under similar circumstances;" and "it is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances." The same views were expressed by the court through *Mr. Justice* Matthews in *Embry* v. *Palmer*, 107 U. S. 7, 9, 10 [27: 348, 349]; *Crescent City Live Stock L. & S. H. Co.* v. *Butchers Union S. H. & L. S. L. Co.* 120 U. S. 141, 146, 147 [30: 614, 616, 617]. It cannot be doubted that, in respect of their effect under section 905, the judgments and decrees of the circuit courts of the United States are entitled to the same sanctity and effect in the courts of each state, when those courts are held within the state, as their own judgments, nothing more but nothing less.

So far as that section relates to the effect to be given to the judicial proceedings of the states, it is founded on article 4, section 1 of the Constitution; but the power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States; which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof; and which declare the supremacy of the power of the national government within the limits of the Constitution. [677] *The judicial power of the United States is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Congress has accordingly established circuit courts; the judicial power vested in them extends to controversies between citizens of different states; and the citizens of each state are entitled to the privileges and immunities of citizens in the several states.

It is argued that this legislation, if given the construction contended for, would involve the assertion of power over the Federal courts, and by discrimination impair their jurisdiction and authority; and also in effect deprive the citizens of other states of privileges secured to them by the supreme law of the land; that as long as a limitation prescribed by state law is equally applicable to all judgments rendered within or without a state, there is no discrimination against judgments rendered in the Federal courts; but when there is a discrimination between judgments rendered in the courts of a state and those rendered in the Federal courts held in the same state, it is an attack upon the judicial authority of the United States, and in limitation of the right of citizens to invoke that jurisdiction. Hence, that this statute of 1858, if it have the scope insisted on, cannot apply as a rule of decision in this case under section 721, because the Constitution of the United States otherwise requires; that that section does not concede to the states the right to make laws that in any way discriminate against the judgments of the courts of the United States in a particular state, but simply prescribes the rule that whatever the state laws are in respect of the conduct and course of the judgments of its own courts should be the guide within constitutional limits for the action of courts of the United States in proceedings in respect of the judgments of those courts in that state; and that in that view the first paragraph of section 15, providing that actions could be brought within twenty years upon a judgment or decree of any court of record of Wisconsin, applied, while the first paragraph of section 16 did not apply except in reference to judgments of any court of the United States other than in the state of Wisconsin.

Massingill v. *Downs*, 48 U. S. 7 How. 760, 766 [12: 903, 905], is cited by plaintiff, which, *however, did not involve the limita- [678 tion of actions. There a lien upon real estate acquired by virtue of a judgment recovered in the Circuit Court of the United States for the Southern District of Mississippi in 1839, when, by a law of the state, it was a valid lien, was held not to be lost by non compliance with a subsequent statute of the state, passed in 1841, making it a condition of the validity of liens under judgments theretofore rendered that the judgments should be recorded within four months of the passage of the statute, in the office of the circuit court of the county in which the land was. And this court said: "In those states where the judgment or the execution of a state court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the circuit court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the state courts in a much better condition than in the Federal courts." *Cooke* v. *Avery*, 147 U. S. 375, 387 [37: 209, 213].

But we do not understand defendant's counsel to contend that a state has power to regulate or vary the proceedings or judgments of the United States courts as such, or that Congress can either delegate its own powers or enlarge those of a state, but that as a mere question of power a state may prescribe limitations upon judgments without regard to the court pronouncing them; that

a judgment is simply record evidence of the debt or liability as between the parties; that there is no constitutional prohibition upon the power to limit actions thereon, and that while actions on judgments in the courts of the United States cannot be controlled by the exercise of this power, that result is reached under section 721, which makes the law of the state in that regard a rule of decision.

As a general rule this court follows the decisions of the highest court of a state in the **679**] construction of the statutes of the state, unless they conflict with or impair the efficacy of some provision of the Constitution of the United States or of an Act of Congress; but we think we are at liberty, and perhaps required, under the circumstances existing here to interpret this statute for ourselves.

In June, 1870, the Circuit Court of the United States for the District of Wisconsin, in the case of *Cole* v. *Weil*, *Judge* Drummond and *District Judge* Miller holding the court, sustained a demurrer to the plea of the ten years' limitation in bar of an action upon a judgment recovered in the District Court of the United States for the District of Wisconsin. In January, 1885, the circuit court held otherwise in the case before us and found for the defendant on the defense now under consideration, and, judgment having been rendered, the cause was brought on error to this court, the record being filed October 9, 1885. On December 10, 1888, that judgment was reversed upon a question of jurisdiction and the cause remanded. 128 U. S. 586 [32: 543]. While that writ of error was pending in this court, and in August, 1886, an action was brought in one of the state circuit courts against the town of Waterloo, upon, among other causes of action, a judgment obtained in the United States Circuit Court for the District of Wisconsin. To this the ten year bar was pleaded and sustained, and the case carried to the state supreme court, which, September 20, 1887, decided that the judgment came within the words of subdivision 1 of section 16, chapter 138, Revised Statutes, 1858, and that the action thereon was barred by the lapse of ten years. *Waterman* v. *Waterloo*, 69 Wis. 260.

In *Ballin* v. *Friend Lace Importing Co.* 10 L. R. A. 742, 78 Wis. 404, decided December 16, 1890, plaintiffs obtained judgment against a corporation in the Circuit Court of the United States for the Eastern District of Wisconsin, and execution was issued thereon and returned no property found, whereupon they filed a bill in the state court under a state statute in that behalf for the sequestration of the property of the corporation and to have a receiver appointed in order to a fair and equal division of the assets of the corporation among all its creditors. The question was raised whether they, having **680**] obtained their judgment in the *circuit court of the United States, could avail themselves of the statutory remedy.

The supreme court held that they could, and said: "It is contended by the learned counsel of the appellant that the return of an execution on a judgment in a Federal court will not sustain this action, and that such a judgment is that of a foreign court or the same as one of a sister state. There may have been late decisions to such effect, but the current of authorities, as well as the laws of the United States and of this state, establish the rule that the judgments of the United States courts of the Wisconsin districts are to be treated as domestic judgments of a superior court of this state." The court referred to various acts of Congress under which proceedings and judgments in Federal courts are assimilated to those of state courts, and to the fact that in state courts they "are treated in all respects as to remedies like domestic judgments in the states in which they were rendered;" and after citing to the point that United States courts are not foreign within the state where they are held, *Turrell* v. *Warren*, 25 Minn. 9; *Wandling* v. *Straw*, 25 W. Va. 705; *Thomson* v. *Lee County*, 22 Iowa. 206; *St. Albans* v. *Bush*, 4 Vt. 58, 23 Am. Dec. 246; *Barney* v. *Patterson*, 6 Harr. & J. 182; *McCauley* v. *Hargroves*, 48 Ga. 50, 15 Am. Rep. 660, *Williams* v. *Wilkes*, 14 Pa. 228; *Embry* v. *Palmer*, 107 U. S. 3 [27: 346], thus concluded: "We are disposed to adopt this rule, so well established, as against any adverse decisions, as it appears more in the spirit of comity and reasonable. In this proceeding the judgment of the plaintiff will have the same effect as if rendered by any superior court of this state, because it was rendered in a Wisconsin district of a United States court."

It seems to us that if the supreme court had arrived at this conclusion at the time *Waterman* v. *Waterloo* was under consideration a different result might have been reached. It is true that in that case the supreme court said: "That the circuit courts of the United States are properly called domestic courts of the states wherein they are held could not possibly change the meaning of this language, 'or of *any court of the United States, [**681** without destroying it entirely. What other United States courts except the district and circuit courts of the United States, render judgments upon which the statute of limitations can run?" But we think we may be permitted to assume that if the supreme court had then definitively adjudicated that judgments of the United States courts held in Wisconsin were not to be regarded as those of a foreign court or of a sister state, but were to be treated as domestic judgments of a superior court of that state, it would have found a sufficient subject for the operation of the 1st paragraph of section 16 in respect of judgments and decrees "of any court of the United States," in the judgments and decrees of such courts when held in other states. Moreover, it should be observed that the question of the power under the Constitution to control in any way or to discriminate as to Federal judgments rendered in the state does not seem to have been brought to the attention of the court and was not adverted to.

Since the domestic character of the Federal courts sitting in the state of Wisconsin is conceded, and the principle fully recognized that their judgments are to be treated in all respects as to remedies like the judgments of the state courts, it would seem to follow

that the words "judgment or decree of any court of record of this state" in section 15 of chapter 138 of the Revised Statutes of 1858 included the judgments and decrees of Federal courts rendered within the state, and but for the words "or of any court of the United States," in section 16, there would be no difficulty in arriving at that conclusion. And in view of all the legislation upon the subject we think we are not obliged to take those words literally, but that they are open to construction.

By the Revised Statutes of 1849 a limitation of twenty years was prescribed for actions upon all judgments of record, wherever rendered, and upon all specialties wherever the cause of action accrued. Rev. Stat. 1849, chap. 127, §§ 14, 20, 41.

By an Act of 1866, as amended in 1868, it was provided that executions might be issued any time within five years, and at any time thereafter "upon any judgment which has [682] heretofore *been or may hereafter be rendered or docketed in any court of record in this state, . . . provided, that no execution shall issue, nor any action or proceedings be had upon any such judgment after twenty years from the time of the rendition or docketing thereof." Laws 1866, chap. 14, p. 16; Laws 1868, chap. 11, p. 14.

The Revised Statutes of 1878 provided that actions must be commenced within twenty years "upon a judgment or decree of any court of record of this state, or of the United States, sitting within this state," and "upon a sealed instrument when the cause of action accrues within this state," with an exception relating to municipal bonds; and within ten years "upon a judgment or decree of any court of record of any other state or territory of the United States, or of any court of the United States, sitting without this state," and "upon a sealed instrument when the cause of action accrued without this state," with a similar exception as to municipal bonds. Rev. Stat. 1878, §§ 4220, 4221.

The provisions of the Revised Statutes of 1858 under consideration (chap. 138, p. 821) were that the period of time for the commencement of actions other than for the recovery of real property should be:

"Section 15. Within twenty years: 1. An action upon a judgment or decree of any court of record of this state. 2. An action upon a sealed instrument, when the cause of action accrues within this state.

"Section 16. Within ten years: 1. An action upon a judgment or decree of any court of record of any state or territory within the United States or of any court of the United States. 2. An action upon a sealed instrument when the cause of action accrued without this state."

Thus it is seen that under the statute of 1849 there was no discrimination; under the statute of 1878 a discrimination was made between causes of action accruing on judgments, decrees, and sealed instruments, within, and without, the state; under the acts of 1866 and 1868 judgments of courts of record in the state were treated alike.

Was it intended by the statute of 1858 to *make any other discrimination than [683] that more accurately expressed in the statute of 1878? Was it intended to discriminate against the judgments and decrees of the Federal courts in Wisconsin as if they were foreign courts or courts of another state? Was it intended to disparage the jurisdiction and authority of the Federal courts? It is said in *Harrington* v. *Smith*, 28 Wis. 43, 59, that "the true rule for the construction of statutes is, to look to the whole and every part of the statute, and the apparent intention derived from the whole, to the subject-matter, to the effects and consequences, and to the reason and spirit of the law; and thus, to ascertain the true meaning of the legislature, though the meaning so ascertained may sometimes conflict with the literal sense of the words."

If we take the words in section 16, "any court of record of any state or territory of the United States," literally, they include the courts of Wisconsin as they did in the statute of 1849; yet we should say that the first paragraph of section 15 was not thereby repealed, but, on the contrary, that the cases therein mentioned were to be taken as excepted. And so, while the words in section 16, "any court of the United States," are broad enough to cover the courts of the United States in Wisconsin, we do not consider that the latter were embraced thereby, but that section 16 applied to those courts of the United States which were not included in section 15, as those holding courts in Wisconsin were. The distinction intended was between causes of action accruing within, and causes of action accruing without, the state, and the statute of 1878 was declaratory of a meaning which already existed. *Koshkonong* v. *Burton*, 104 U. S. 668, 671 [26: 886, 887], involved a different question, but it will be found that in the statement of the statute of 1858 the distinction was indicated.

We cannot attribute to the legislature of Wisconsin any design to discriminate against the judgments and decrees of the courts of the United States rendered in that state by reducing the statutory period for the commencement of actions thereon to a less number of years than obtained as to the judgments and decrees of the state courts, and so to compel citizens of other states to bring their suits originally in those *courts rather [684] than in the Federal courts, as secured to them by the Constitution, or their own citizens to do so if they had causes of action arising under the Constitution and laws of the United States. We do not entertain the least idea that the legislature was actuated by any such disposition, and are persuaded that the language of the Act of 1858 produced no such result.

We are of opinion that the ten year bar constituted no defense to the action of plaintiff, and, therefore, the judgment is reversed, and the cause remanded, with a direction to enter judgment for plaintiff on the findings.

JOHN Y. McKANE, *Appt.*,
v.
F. H. DURSTON, Agent and Warden of Sing Sing Prison, in the State of New York.

(See S. C. Reporter's ed. 684-689.)

Appeal in habeas corpus case—denying bail—immunities of citizens—review in criminal case—state law—U. S. Rev. Stat. § 766.

1. An appeal may be taken to this court from the final decision upon habeas corpus of a U. S. circuit court in the case of any person alleged to be restrained of his liberty in violation of the Constitution or any law or treaty of the United States.
2. The action of the court below in denying bail in a criminal case is not the subject of review, where the granting or refusing bail is made by the statute matter of discretion.
3. The U. S. Constitution does not make the privileges and immunities enjoyed by the citizens of one state under the constitution and laws of that state, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws.
4. A review by an appellate court of the final judgment in a criminal case, is not a necessary element of due process of law.
5. Whether an appeal in a criminal case should be allowed, and if so, under what circumstances or on what conditions, are matters for each state to determine for itself.
6. The continued execution of a sentence under a judgment of a state court in a criminal case, after an appeal to this court from a decision of the U. S. circuit court denying a writ of habeas corpus, is not a violation of U. S. Rev. Stat. § 766.

[No. 1185.]

Argued April 23, 1894. Decided May 14, 1894.

APPEAL from a judgment of the Circuit Court of the United States for the Southern District of New York, denying a writ of habeas corpus, directed to F. H. Durston, Agent and Warden of Sing Sing prison, requiring him to produce the body of the petitioner, John Y. McKane, before the court, and there abide such order as might be made in the premises; the petition representing that he was deprived of his liberty in violation of the Constitution of the United States. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Robert H. Griffin** and **Thomas A. Atchison**, for appellant:

This is an appeal from the final decision of the Circuit Court of the United States for the Southern District of New York, made on March 16, 1894, denying appellant's application for a writ of habeas corpus.

The question is fairly presented to this court, raised by counsel for appellee, as to whether or not the continued execution of this sentence against this appellent, after the perfecting of his appeal to this court, is or is not a violation of section 766 of the United States Revised Statutes.

Jugiro v. *Brush*, 140 U. S. 291, 295 (35: 510, 512).

This appellee in retaining this appellant at Sing Sing and in executing the sentence of hard labor upon him, is in daily and hourly violation of the United States law.

The court below erred in refusing appellant the writ of habeas corpus prayed for, inasmuch as his petition alleged violations of the Constitution and laws of the United States.

Ex parte Royall, 117 U. S. 241, 250 (29: 868, 871); *Cunningham* v. *Neagle*, 135 U. S. 41 (34: 63); *Ex parte Conway*, 48 Fed. Rep. 77; *Re Jordan*, 49 Fed. Rep. 238; *Ex parte Farley*, 40 Fed. Rep. 66, 71; *Re Speckler*, 43 Fed. Rep. 653, 661.

Messrs. **Benjamin F. Tracy** and **Edward M. Shepard**, for appellee:

The writ of habeas corpus should not be issued to review the judgment of a court of competent jurisdiction.

Ex parte Watkins, 28 U. S. 3 Pet. 193 (7: 650); *Ex parte Parks*, 93 U. S. 18 (23: 787); *Ex parte Siebold*, 100 U. S. 371 (25: 717); *Jugiro* v. *Brush*, 140 U. S. 291 (35: 510).

The appellant has no right under the Constitution of the United States to a stay of proceedings pending his appeal from the judgment of the court of oyer and terminer to the general term of the supreme court of New York.

If it be true that any of the states other than New York give a convict pending his appeal an absolute right to be let to bail, still that fact gives no right to a convict in a state not enacting such laws.

Paul v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Conner* v. *Elliott*, 59 U. S. 18 How. 591 (15: 497); *McCready* v. *Virginia*, 94 U. S. 391 (24: 248).

Mr. Justice **Harlan** delivered the [685 opinion of the court:

Upon the trial in one of the courts of New York of an indictment charging John Y. McKane, the present appellant, with having willfully violated certain provisions of the law of that state relating to elections and to the registration of voters, the accused was found guilty and was adjudged, February 19, 1894, to be imprisoned in the state prison at Sing Sing at hard labor for the term of six years. It was further ordered by the court that the convict be forthwith conveyed to that prison in execution of the sentence. That order was complied with, and he was delivered by the sheriff to the agent and warden of the prison to be therein confined in conformity with the sentence against him.

From the judgment ordering his imprisonment in Sing Sing, McKane prayed and was allowed an appeal to the general term of the supreme court of New York.

NOTE.—*As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of*, see note to United States v. Hamilton, 1: 490.

As to what is "due process of law," see note to Pearson v. Yewdall, 24: 436.

As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

On the 15th day of March, 1894, his counsel presented to the Circuit Court of the United States for the Southern District of New York an application for a writ of habeas corpus, directed to the agent and warden of Sing Sing prison, and requiring him to produce the body of the petitioner before the court, and there abide such order as may be made in the premises. The prisoner represented that he was deprived of his liberty in violation of the Constitution of the United States.

Under the statutes of the United States an appeal may be taken to this court from the final decision upon habeas corpus of a circuit court of the United States in the case of any person alleged to be restrained of his liberty in violation of the Constitution or any law or treaty of the United States. *Jugiro* v. *Brush*, 140 U. S. 291, 294, 295 [35: 510, 512]; Rev. Stat. §§ 751-753, 761-765; Act of March 3, 1885, chap. 353 (23 Stat. at L. 437). Section 766 provides: "Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or con- [686] fined, or restrained of his liberty, *in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

The object of this statute, as was said in *Jugiro* v. *Brush*, above cited, was, in cases where the applicant for the writ was held in custody under the authority of a state court, or by the authority of a state, to stay the hands of such court or state, while the question whether his detention was in violation of the Constitution, laws, or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises.

When McKane applied for the writ of habeas corpus he was an inmate of Sing Sing prison pursuant to the judgment of the court in which he was indicted and found guilty. His appeal to the general term of the supreme court, so far as the statutes of New York are concerned, did not prevent his being committed to that prison in execution of the sentence pronounced against him. For, by section 527 of the Code of Criminal Procedure of New York, it is provided that "an appeal to the supreme court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing, with the notice of appeal, a certificate of the judge who presided at the trial, or of a justice of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand."

As the accused does not claim to have filed with his notice of appeal the required certificate of reasonable doubt, his committal to prison pending his appeal to a higher court of the state was in conformity with the laws of New York

But it is contended that the Constitution of the United States secured to him the right to give bail pending his appeal to the general term of the supreme court of New York.

By the law of New York, "after the conviction for a crime not punishable with death, a defendant who has appealed, and when there is a stay of proceedings, but not otherwise, may be admitted to bail: 1. As a matter of right when the appeal *is from a judgment [687 imposing a fine only; 2. As a matter of discretion in all other cases." N. Y. Code Crim. Proc. § 555. There was no stay of proceedings on the judgment of conviction of McKane, and, therefore, under the statutes of the state, he was not entitled, of right, to be admitted to bail pending his appeal. If he applied for bail, and bail was denied, the action of the court was not the subject of review, because the granting or refusing bail was made by the statute matter of discretion. *Clawson* v. *United States*, 113 U. S. 143 [28:957].

It is, however, insisted, in effect, that these statutory regulations of the state are repugnant to section two of article four of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The only reason suggested in support of this position is, that in most of the states of the Union a defendant convicted of a criminal charge other than murder has the right as a matter of law, upon the granting of an appeal from the judgment of conviction, to give bail pending such appeal. Whatever may be the scope of section two of article four—and we need not, in this case, enter upon a consideration of the general question—the Constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one state under the constitution and laws of that state, the measure of the privileges and immunities to be enjoyed, as of right, by a citizen of another state under its constitution and laws. An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

It is, therefore, clear that the right of appeal may be accorded by the state to the accused upon such terms as in its *wisdom may be [688 deemed proper. In a large number of the states an appeal from a judgment of conviction operates as a stay of execution only upon conditions similar to those prescribed in the New York Code of Criminal Procedure; in others, a defendant, convicted of felony, is entitled of right to a stay pending an appeal by him. But as already suggested, whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each state to determine for itself.

Another provision of the Constitution of the United States invoked by the accused in support of his appeal is that part of the 5th Amendment prohibiting the deprivation of liberty without due process of law. We assume that counsel who prepared the application for a writ of *habeas corpus* intended to refer to that clause of the 14th Amendment which de-

clares that no state shall deprive any person within its jurisdiction of his liberty without due process of law. What has been said is sufficient to indicate that, in our judgment, there is nothing of merit in this contention. It need not be further noticed.

Our attention has been called to that section of the New York Code of Criminal Procedure which provides that if, before granting a certificate of reasonable doubt by the judge who presided at the trial, or by a justice of the supreme court, "the execution of the judgment have commenced, the further execution thereof is suspended, and the defendant must be restored by the officer in whose custody he is, to his original custody," which, in this case, would be to the sheriff of Kings county. § 531. The point here made, if we do not misapprehend counsel for the accused, is that a suspension of proceedings in the state court when it occurs under the circumstances stated in section 766 of the Revised Statutes of the United States, has the same effect as a certificate of reasonable doubt given by a state judge, under the state law, after the execution of the judgment of conviction has commenced. This contention cannot be sustained. The only purpose of the Federal statute was to prevent the state court, or the state, pending proceedings 689] on appeal to this court, *from changing, to the prejudice of the accused, the situation as it was at the time the appeal was taken from the judgment of a circuit court disallowing an application for a writ of habeas corpus based upon grounds of which, under the statutes of the United States, the courts of the Union could take cognizance. The warden of the prison in which McKane is confined is not authorized or directed—even if he could legally be authorized or directed—by the statutes of the United States to return the accused to the custody of the sheriff to await the final action of this court. The appeal to this court had no effect whatever upon the confinement of the accused, in conformity with the laws of the state, in Sing Sing prison before such appeal was taken from the judgment of the circuit court.

The judgment of the circuit court is affirmed.

STATE OF CONNECTICUT *ex rel.* NEW YORK & NEW ENGLAND R. CO., *et al.*, *Plffs. in Err.*

v.

GEORGE M. WOODRUFF ET AL., Commissioners, etc.

(See S. C. Reporter's ed. 689-691.)

Review of state judgment.

1. It must appear from the record that a Federal question was raised, in order to give this court jurisdiction over a state judgment.
2. Where the case was decided in the state court on grounds broad enough in themselves, to sustain the judgment, without reference to the Federal question, this court will not entertain jurisdiction.

[No. 958.]

Submitted April 30, 1894. Decided May 14, 1894.

IN ERROR to the Supreme Court of Errors of the State of Connecticut, to review a judgment of that court, affirming the judgment of the Superior Court, of New Haven County, Connecticut, denying an application for mandamus, requiring George M. Woodruff *et al.*, acting as a Board of Commissioners under the Connecticut act of April 4th, 1894, and the act supplementary thereto, and known as the Asylum Street Bridge Commission, to inquire into the merits of certain claims disallowed by them, and to order damages to be allowed to the New York & New England Railroad Company for said claims in connection with the Asylum Street improvement, at Hartford, Connecticut. On motion to dismiss. *Dismissed.*

Mr. **Henry C. Robinson**, for defendants in error in favor of motion:

The writ of error is one of the many actions brought by the relators to embarass the state in its wise and reasonable policy of eliminating the most dangerous grade crossings in its territory. Asylum street, in the city of Hartford, is one of the most crowded thoroughfares in the state, and, at the time when the legislature passed the laws in question, was occupied by many tracks of the N. Y. N. H. & H. and N. Y. & N. E. railroad companies. The city and the railroad companies were not able to agree upon plans for separating the grades. The general assembly created this commission selected for its practical wisdom and experience to accomplish the result. Large powers were given to the board, and the nature of the acts and the character of the board and their powers have been declared and adjudged in the three cases in which they have been considered after exhaustive arguments.

Woodruff v. *Catlin*, 54 Conn. 277; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63; *State* v. *Asylum Street Bridge Commission*, 63 Conn. 91.

As the board had already been held to be a quasi judicial body by the supreme court, the specious claim was made that the board had declined to take jurisdiction of the questions, and mandamus was applied for to compel them to take jurisdiction. The court below declined the motion for the writ, and the supreme court adjudged that the commission had taken jurisdiction, that the question called for large wisdom and discretion, and that over the tribunal wisely raised by the general assembly for the protection of the lives of citizens, the superior court, another judicial tribunal, had no control, and that the judgment of the commissioners was wise and right. The case did not go out at all upon questions involved in the 14th Amendment, but upon the power of one Connecticut court to control the judicial results of

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

another. The hint at a Federal question made in the reasons for appeal is scarcely alluded to in the opinion of the supreme court, and not passed upon excepting to say that, if it had been argued, it would be difficult to present claims which had not often before been overruled.

The only ground of appeal which alluded to the Constitution, raised only a question of construing the laws, and did not attack them as unconstitutional, and the assignments of error in this action attack the judicial action of the Connecticut supreme court, and not the legislative action of the Connecticut legislature. If by indirection the statute is attacked, then it is so attacked by a claim that it is offensive to the 14th Amendment for a lawful tribunal, in disposing of a nuisance, to comply with its defined statutory powers, in deciding what is a special expense for which they, in their wisdom, may allow compensation, and what is an incident to the improvement; and this writ of error asks the Supreme Court of the United States to review a judgment upon a question of fact passed upon by a governmental commission in suppressing a nuisance, without any facts before this court to consider, and with no information about the plans and changes, excepting as they may be guessed at from the vague and shadowy generalities of the application. In the case of Woodruff against these relators (59 Conn. 73) the relators, in several of their fifty-two grounds of demurrer, urged that the Constitution of the United States, 14th Amendment, was offended by this act raising the commission; upon the issue, the judgment of the court was directly and in terms against them. The court says:

"There is nothing in the legislative resolutions in violation of the Constitution of the United States."

If that judgment was offensive to the relators, they had their right to a writ of error to this court. They took out a writ of error, which was dismissed at their motion (see 140 U. S. 691 [35: 596]) and then, by agreement, submitted the questions of their claimed damages to the commissioners. Being dissatisfied with parts of the judgment, and satisfied with other parts, they retained the benefits of the other parts, and asked another tribunal for a mandamus upon the commissioner to compel them to change their opinion. Following a line of precedents in Connecticut, the supreme court held that the judgment of the commissioners could not be controlled by mandamus and to that judgment, and not to a judgment on the constitutionality of the statute, the relators brought this writ of error.

The prayer of the motion which is the foundation of the proceeding, recognizes the validity of the law, and prays for action under it, and an attempt is here made by the relators to turn about and say that the law is unconstitutional. The judgment below did not involve the constitutionality of the statute. The motion for a mandamus admits the validity of the acts in question. The motion is for mandamus to compel certain action under valid statutes; it is based on their validity.

The judgment below was upon an appeal from a judgment of the superior court, declining to issue a mandamus to an independent tribunal—a tribunal whose duties involved the exercise of judgment and discretion.

State v. *Asylum Street Bridge Commission*, 63 Conn. 95.

Such a judgment raises no Federal question. The superior court declined to issue the alternative writ, and the court of errors affirmed that judgment, because the action of the commission is not "subject to direction by mandamus."

State v. *Asylum Street Bridge Commission*, *supra*.

Questions relating to such practice are in no sense constitutional questions.

Seymour v. *Ely*, 37 Conn. 106; *Goddard* v. *Seymour*, 30 Conn. 395; *Freeman* v. *New Haven*, 34 Conn. 406; *State* v. *Staub*, 61 Conn. 567; *American Casualty Ins. & S. Co.* v. *Fyler*, 60 Conn. 449.

The substance therefore, of the assignment of errors, is simply that the court below misconstrued the acts, and the errors which it is sought to have this court review are all of them errors of interpretation. Such error raises no Federal question reviewable by this court.

Adams v. *Preston*, 63 U. S. 22 How. 473 (16: 273); *Congdon* v. *Goodman*, 67 U. S. 2 Black, 574 (17: 257); *Scott* v. *Jones*, 46 U. S. 5 How. 343 (12: 181); *Smith* v. *Adsit*, 83 U. S. 16 Wall. 185 (21: 310); *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 (20: 635); *Murray* v. *Gibson*, 56 U. S. 15 How. 421 (14: 755); *Nichol* v. *Levy*, 72 U. S. 5 Wall. 433 (18: 596); *Jackson* v. *Lamphire*, 28 U. S. 3 Pet. 280 (7: 679); *Withers* v. *Buckley*, 61 U. S. 20 How. 84 (15: 816); *Medberry* v. *Ohio*, 65 U. S. 24 How. 413 (16: 739); *Porter* v. *Foley*, 65 U. S. 24 How. 415 (16: 740); *Commercial Bank of Cincinnati* v. *Buckingham*, 46 U. S. 5 How. 343 (12: 181); *McNulty* v. *California*, 149 U. S. 647 (37: 883).

If the judgment below did sustain an unconstitutional statute, it would not be subject to revision for error, if it disposed of the suit below upon other and independent grounds.

Delaware City, S. & P. S. B. Nav. Co. v. *Reybold*, 142 U. S. 643 (35: 1144).

The case of *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63, made the matter *res adjudicata*.

If these assignments of error raise any constitutional question, it is precisely the same question, namely, the invalidity of the statute under discussion which was decided adversely to these same relators, in the suit between the same parties fully reported in 59 Conn. 63.

From the judgment there made, the relators brought their writ of error to this court, which was abandoned here, and dismissed per stipulation on this relator's motion, as set forth in 140 U. S. 691 (35: 596).

The court will take judicial knowledge of the fact of this dismissal by agreement. This leaves the judgment in Connecticut a finality, and the same parties cannot now come into this court and raise the same point.

2 Black, Judgm., § 706.

The plaintiffs in error are not attacking the constitutionality of the law, but the administration of it by its appointed tribunal.

State v. *Asylum Street Bridge Commission*, 63 Conn. 101.

The acts do not offend the 14th Amendment

of the Constitution. The statutes are clearly within the police powers of the state.

Woodruff v. *Catlin*, 54 Conn. 277; *Westbrook's App.* 57 Conn. 95; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63; *Doolittle* v. *Branford*, 59 Conn. 402; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 1; *Middletown* v. *New York, N. H. & H. R. Co.* 62 Conn. 492; *Davidson* v. *New Orleans*, 96 U. S. 97 (24: 616); *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463).

The hardship, impolicy, or injustice of the state laws is not necessarily an objection to their constitutional validity; and the remedy for evils of that character is to be sought from state legislatures.

Nashville, C. & St. L. R. Co. v. *Alabama*, 128 U. S. 96 (32: 352), 2 Inters. Com. Rep. 238; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174 (32: 377); *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 (32: 585); *Dent* v. *West Virginia*, 129 U. S. 114 (32: 623); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Minneapolis & St. L. R. Co.* v. *Emmons*, 149 U. S. 364 (37: 769).

The act is clearly good as amendatory of the relator's charter.

The legislative act is clearly within the reserved powers of the Connecticut general assembly upon whose powers the state constitution is only a limitation.

Wheeler's App. 45 Conn. 306.

Mr. **Tilton E. Doolittle**, for plaintiff in error, in opposition:

The judgment below involved the constitutionality of the act.

The act creating the commission has been three times considered by the supreme court of errors of the state of Connecticut.

Woodruff v. *Catlin*, 54 Conn. 277; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63; *State* v. *Asylum Street Bridge Commission*, 63 Conn. 91.

The case was not decided in the state court on grounds broad enough to sustain the decision without reference to the Federal question.

Bradley v. *New York & N. H. R. Co.* 21 Conn. 294; *Burritt* v. *New Haven*, 42 Conn. 174, 194; *Longworth* v. *Meriden & W. R. Co.* 61 Conn. 454.

It is no objection to the remedy asked for in this suit that the law creating the commission is not void, but is complained of only because it has been so applied as to violate a constitutional right.

Poindexter v. *Greenhow*, 114 U. S. 270 (29: 185); *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531-541 (23: 623-628).

THE CHIEF JUSTICE: The motion to dismiss is sustained. *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63; *State* v. *Asylum Street Bridge Com.* 63 Conn. 91; *New Y. & N. E. R. Co.* v. *Woodruff*, 140 U. S. 691 [35: 596]; *New York & N. E. R. Co.* v. *Bristol*, *ante*, p. 269; *Phoenix Ins. Co.* v. *Gardiner*, 78 U. S. 11 Wall. 204 [20: 112]; *Delaware City, S. & P. S. B. Nav. Co.* v. *Reybold*, 142 U. S. 643 [35: 1144]; *Hammond* v. *Johnston*, 142 U. S. 73 [35: 941]; *New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 79 [35: 943]; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210 [32: 908].

THE POSTAL TELEGRAPH CABLE COMPANY, *Appt.*, [692]

v.

THE CITY COUNCIL OF CHARLESTON ET AL.

(See S. C. Reporter's ed. 692-700.)

An ordinance of a city imposing a license fee upon telegraph company when valid—state taxing power.

1. An ordinance of a city imposing a license fee upon every telegraph company, or agency, doing business in the city, for business done exclusively in the city, not including business done to and from points without the state or business done for the government, its officers or agents, is not void as an interference with interstate commerce.
2. Messages of a telegraph company sent and delivered entirely within the state are subject to its taxing power.

[No. 1009.]

Submitted Jan. 22, 1894. Decided May 14, 1894.

APPEAL from a decree of the Circuit Court of the United States for the District of South Carolina, dismissing a suit in equity brought by the Postal Telegraph Cable Company, plaintiff, against the City of Charleston *et al.*, to restrain the collection of a license imposed upon said company by an ordinance of said city, and dissolving a temporary injunction. *Affirmed.*

The facts are stated in the opinion.

Messrs. **R. S. Guernsey** and **T. M. Mordecai**, for appellant:

The ordinance which imposes this tax of $500 is void because it is specific taxation of property or the use of it.

Harmon v. *Chicago*, 147 U. S. 396 (37: 216).

The license required by the ordinance is a tax upon the telegraph company for the privilege of exercising its franchise within the city of Charleston and is not a mere exercise of the police power granted to the city by the state.

San Francisco v. *Liverpool & L. & G. Ins. Co.* 74 Cal. 113; *Pembina Consol. S. Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650), 2 Inters. Com. Rep. 24; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 12 (24: 711); Cooley, Taxn. 386; Cooley, Const. Lim. 245.

The Postal Telegraph Cable Company having constructed its lines along the post roads in the city of Charleston, no state or municipal authority can exact a license for the privilege of conducting its business and restraining the powers conferred upon it under its franchises and under the acts of Congress.

NOTE.—*As to right of telegraph and telephone companies to use public streets and erect poles therein; compensation; injunction poles for street car propulsion; placing electric wires under surface of streets*, see note to St. Louis v. Western U. Teleg. Co. 37: 810.

As to power of Congress to control commerce; state statute when invalid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to Harmon v. Chicago, 37: 216.

Western U. Teleg. Co. v. *Pendleton*, 122 U. S. 358 (30: 1189), 1 Inters. Com. Rep. 806; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 (31: 790).

The Postal Telegraph Cable Company does no business which can properly be included under the provisions of this ordinance, for the reason that it does no business exclusively within the city of Charleston.

The ordinance in question is an interference with inter-state commerce and is *ultra vires* and void.

Pensacola Teleg. Co. v. *Western U. Teleg. Co.* 96 U. S. 1 (24: 708); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 785).

The decision of the United States Supreme Court, in the case of *Leloup* v. *Mobile*, 127 U. S. 640 (32: 311) 2 Inters. Com. Rep. 134, and cases there cited should be followed in the case at bar.

Ward v. *Maryland*, 79 U. S. 12 Wall. 427 (20: 451).

A burden imposed upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting it.

Minnesota v. *Barber*, 136 U. S. 313 (34: 455), 3 Inters. Com. Rep. 185; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 (30: 694), 1 Inters. Com. Rep. 45; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114 (34: 394), 3 Inters. Com. Rep. 178; *Minot* v. *Philadelphia, W. & B. R. Co.* 2 Abb. (U. S.) 323; *State* v. *Railroad Corp.* 4 S. C. 376.

An injunction is the proper remedy to prevent the collection of the illegal license tax and penalty in this case.

Ratterman v. *Western U. Teleg. Co.* 127 U. S. 411 (32: 229), 2 Inters. Com. Rep. 59; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 (29: 200).

Mr. **Charles Inglesby**, for appellees:

So far as the legality under the constitution of South Carolina, of the license tax is concerned, the question is *res adjudicata*.

State v. *Hayne*, 4 S. C. 413; *Information* v. *Jager*, 29 S. C. 438.

The ordinance expressly excluded all interstate commerce business, all government business, and is absolutely confined to the business done within the city of Charleston.

No constitutional implication prohibits a state tax upon the property of an agent of the government merely because it is the property of such an agent.

Union Pac. R. Co. v. *Peniston*, 85 U. S. 18 Wall. 5 (21: 787); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411 (32: 229); *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 6 (36: 602); *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994). *Home Ins. Co.* v. *Augusta*, 93 U. S. 122 (23: 826); *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 376 (27 423).

Mr. Justice **Shiras** delivered the opinion of the court:

On the first day of July, 1892, the Postal Telegraph Cable Company, a corporation of the state of New York, filed in the Circuit Court of the United States for the District of South Carolina a bill of complaint against the city of Charleston, a municipal corporation of the state of South Carolina, and William L. Campbell and Glenn E. Davis, citizens of the state of South Carolina, and respectively sheriff and treasurer of said city, seeking to restrain the collection of a license imposed upon the said Postal Telegraph Cable Company by an ordinance of the city council of Charleston. A preliminary injunction was granted enjoining the defendants from proceeding to collect said license until the hearing of the cause on its merits. Answers were filed by the city and by the city treasurer and city sheriff, and issue was joined by *replications. The com- [693 plainant put in evidence tending to sustain the allegations of the bill.

The facts, as disclosed by the bill, answers, and evidence, were substantially these:

The Postal Telegraph Cable Company, a corporation of the state of New York, has an office in the city of Charleston; is engaged in sending and receiving messages by wire to and from points inside and outside of the state of South Carolina; and has its lines over the post roads, highways, and railroads in the city of Charleston, and in several of the states. The company has accepted the provisions of the Act of Congress approved July 28, 1866, whereby it has put its lines at the service of the United States for postal, military, and other purposes, and given precedence to its business. The company has offices in other cities and towns in South Carolina, several of which have adopted ordinances exacting licenses from the company. During the year commencing January 1, 1892, and for several years prior to that time, the company has been engaged in the business of receiving and sending telegrams for private persons and for the public between the city of Charleston and other places within the state of South Carolina, and also in sending telegraphic communications between the governmental departments of the United States, and was and is engaged in the telegraph business for the purpose of interstate commerce. By an Act approved December 17, 1881, the general assembly of the state of South Carolina authorized the city council of Charleston to impose a license tax, not exceeding five hundred dollars, on all persons engaged in any business, trade or profession in the city of Charleston. By an ordinance, entitled, "An ordinance to regulate licenses for the year 1892," the city council enacted that every person, firm, company, or corporation engaged in any trade, business, or profession within the city of Charleston should obtain, on or before the 20th day of January, 1892, a license therefor. The provision relating to telegraph companies is as follows: "Telegraph companies or agencies, each for business done exclusively within the city of Charleston, and not *including [694 any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents, $500." A penalty, for failure to take out the license, of fifty per cent of the amount of the tax was provided for, and a continuing penalty of fifty per cent for each day's business done without taking out such license. The Postal Telegraph Cable Company, after notification, declined and failed to take out and pay

for such license, and, on May 28, 1892, in pursuance of the terms of the ordinance, the license tax of $500, with penalty of fifty per cent was assessed against the company and put in the hands of the city treasurer for collection, who issued execution therefor, addressed to the city sheriff, requiring him to proceed to collect said license tax and penalty by distress and sale.

At the final hearing, on June 21, 1893, the temporary injunction was dissolved, and the bill dismissed with costs. From this decree the present appeal was taken.

We do not deem it necessary to discuss the contention that the ordinance imposing the license tax in question is invalid by reason of its disregard of provisions of the constitution of South Carolina. The supreme court of that state has, in several cases, judicially settled that the power to raise revenue by a license tax on business, given by statute to the city council of Charleston, does not violate any provision of the state constitution. *State* v. *Hayne*, 4 S. C. 413; *Information* v. *Jager*, 29 S. C. 443.

It is claimed that the license required by the ordinance is a tax upon the telegraph company for the privilege of exercising its franchise within the city of Charleston, and not an exercise of the police power granted to the city by the state; that the Postal Telegraph Cable Company, having constructed its lines along post roads in the city of Charleston and elsewhere, no state or municipal authority can exact a license for the privilege of conducting its business, thus restraining the powers possessed by it under its franchises and under the acts of Congress; and that the ordinance in question is an interference with interstate commerce and therefore void.

695] *The questions thus suggested have been so frequently and so recently considered and decided by this court, in well known cases, that our duty will be sufficiently performed by briefly citing and applying those cases.

That this license is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Ins. Co.* v. *Augusta*, 93 U. S. 122 [23: 826]. There the city council of the city of Augusta passed an ordinance which imposed a license tax of $250 "on each and every fire, marine, or accidental insurance company located, having an office, or doing business within the city of Augusta." The Home Insurance Company, a corporation of the state of New York, and having an agency in the city of Augusta, refused to recognize the obligation of the ordinance, and filed a bill in the superior court of Richmond county in the state of Georgia, to enjoin the city council from collecting the license tax. That court, having refused the injunction prayed for, and having dismissed the bill, the case went to the supreme court of Georgia, which affirmed the decree of the superior court, and the case was then brought to this court.

It was argued on behalf of the insurance company that, as it had complied with the provisions of the laws of Georgia which authorized foreign insurance companies to do business in that state, it was not competent for a municipal corporation of the state to impose an additional condition on the right of the company to do business. But it was held, citing *License Tax Cases*, 72 U. S. 5 Wall. 462 [18:495], that the license in question must be regarded as nothing more than a tax; that the penalty provided was a mode of enforcing its payment; and that the license, when issued, was only a receipt for the tax, and not a grant of an authority to conduct business on condition of paying the license.

In *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 376 [27: 423], where a ferry company, authorized by an act of assembly of the state Illinois to carry on its business and paying state taxes prescribed in its charter, was called upon by a city ordinance to pay a license tax, it was held by this court that the exaction of a license fee is an ordinary exercise of police power *by municipal corporations; that the **[696** power of the state to authorize any city within its limits to enforce a license tax on trades or callings generally, especially those which are *quasi* public, cannot be disputed; and that whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference if the power to do either exists.

It was held, in *Western U. Teleg. Co.* v. *Massachusetts*, 125 U. S. 530 [31: 790], that a tax imposed by the laws of Massachusetts upon the Western Union Telegraph Company, a corporation of the state of New York, on account of the property owned and used by it within Massachusetts, was valid.

But it is contended that, while a state can prohibit a foreign corporation from doing business within its territory, or can impose conditions upon the exercise of its franchises, such power does not exist when such corporations are engaged in interstate commerce or are agents of the United States government, and reliance is placed on the case *Leloup* v. *Mobile*, 127 U. S. 640 [32: 311], 2 Inters. Com. Rep. 134. There it was held that where a telegraph company is doing the business of transmitting messages between different states, and has accepted and is acting under the telegraph law passed by Congress July 24, 1866, no state within which it sees fit to establish an office can impose upon it a license tax, or require it to take out a license for the transaction of such business; that telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different states they are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of state regulations, except such as are strictly of a police character; and that any state regulations by way of tax on the occupation, or business, or requiring a license to transact such business, are unconstitutional and void. Accordingly, a judgment of the supreme court of Alabama, which sustained the validity of an ordinance of a municipal corporation of that state imposing a license tax upon the Western Union Telegraph Company, engaged in the business of transmitting telegrams from and to points within the state of Alabama and between *private individuals of the state of Ala- **[697** bama, as well as between citizens of said state and citizens of other states, was reversed. But it was said, in the course of the discussion in that case, that "it is urged that a portion of the telegraph company's business is internal to the state

of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. This tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company."

In *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 [26: 1067], in error to the supreme court of Texas, it was held that, in respect to its foreign and interstate business, a telegraph company is, as an instrument of commerce, subject to the regulating power of Congress, and, if it accepts the provisions of Act of July 24, 1866 (Rev. Stat. §§ 5263, 5268) it becomes an agent of the United States, so far as the business of the government is concerned; and that the state laws, so far as they impose upon such company a specific tax on each message which it transmits beyond the state, or which an officer of the United States sends over its lines on public business, are unconstitutional; but it was said that "any tax which the state may put on messages by private parties, and not by agents of the United States, from one place to another exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States."

The case, in *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411 [32: 229], 2 Inters. Com. Rep. 59, was one where the telegraph company, a corporation of the state of New York, filed a bill in the Circuit Court of the United States for the Southern District of Ohio, against Ratterman, treasurer of Hamilton county, Ohio, seeking to restrain the collection of a tax on the gross receipts of the company, which were principally, but not wholly, derived from business between points within and points without the state of Ohio. The complainant, in its bill, expressed its willingness to pay and offered to pay taxes chargeable against its property and business **698**] within the state, but alleged that *the defendant refused to accept such partial payment, and demanded payment for the total assessment on all the gross receipts. The district and circuit judges certified a divison of opinion to this court, as to whether a single tax upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the state, but which were returned and assessed in gross and without separation or apportionment, was wholly invalid, or invalid only in proportion and to the extent that said receipts were derived from interstate commerce. *Mr. Justice* Miller delivered the unanimous opinion of this court. The case of *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*The State Freight Tax*") 82 U. S. 15 Wall. 232 [21: 146], was cited as ruling that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the state, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the state to collect that arising upon commerce wholly within its own territory. Accordingly the decree of the court below, following the opinion of the circuit judge, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the state, was affirmed.

The question arose and was determined in the same way, in the case of *Western U. Teleg. Co.* v. *Seay*, 132 U. S. 472 [33: 409], 2 Inters. Com. Rep. 726. It there appeared that a statute of Alabama imposed a tax "on the gross amount of the receipts by any and every telegraph company derived from the business done by it in this state." The Western Union Telegraph Company reported to the board of assessors only its gross receipts received from business wholly transacted within the state. The board required of the company a further return of its gross receipts from messages carried partly within and partly without the state. The company made such further return, and the tax was imposed on the gross receipts as shown by the two returns. This mode of assessment was sustained by the supreme court of* Alabama, [**699** but this court held that the statute of Alabama, thus construed, was a regulaton of commerce, and that the tax imposed upon the messages comprised in the second return was unconstitutional. In the discussion of the case, *Mr. Justice* Miller expressed himself as follows: "The principle of our cases is, in respect to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866 (Rev. Stat. §§ 5263-6268) that they shall not be taxed by the authorities of a state for any messages, or receipts arising from messages, from points within the state to points without, or from points without to points within the state, but that such taxes may be levied upon all messages carried and delivered exclusively within the state. The foundation of this principle is that messages of the former class are elements of commerce between the states and not subject to legislative control of the states, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the state, and, therefore, subject to its taxing power." See, likewise, *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 [35: 1035], 3 Inters. Com. Rep. 810.

The reasoning of these cases needs no reinforcement, and their conclusions are readily applied to the case in hand.

The express terms of the ordinance restrict the tax to "business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents."

It is claimed that the Postal Telegraph Cable Company is not within the terms of this ordinance, because it does not do any business exclusively within the city of Charleston; that its city offices are merely initial points for sending and receiving messages, and that, irrespective of the messages sent or received outside of the state, the intrastate messages are not between points within the city; and that, if license exactions were allowed to and made by the various cities in the state, great injury and wrong would be done to the telegraph company.

But this is a hardship, if such exists, that is not within our province to redress. If busi-
700] ness done wholly within a state is *within the taxing power of the state, the courts of the United States cannot review or correct the action of the state in the exercise of that power.

It is further contended that the ruling of the cited cases does not cover the case of a telegraph company which has constructed its lines along the post roads in the city of Charleston, and elsewhere, and which is exercising its functions under the Act of Congress as an agency of the government of the United States. It is obvious that the advantages or privileges that are conferred upon the company by the Act of July 24, 1866 (Rev. Stat. §§ 5263–5268) are in the line of authority to construct and maintain its lines as a means or instrument of interstate commerce, and are not necessarily inconsistent with a right on the part of the state in which business is done and property acquired to tax the same, within the limitations pointed out in the cases heretofore cited.

It was upon the doctrine of these cases that the court below acted in refusing the injunction and dismissing the bill, and its decree is therefore affirmed.

Harlan, *J.*, **Brown**, *J.*, **Jackson**, *J.*, dissented.

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OF THE

UNITED STATES

IN

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THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1893.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] FRANK J. PRIMROSE, *Plff. in Err.*,
v.
THE WESTERN UNION TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 1-34.)

Telegraph companies—reasonable regulation—terms on back of message—error in transmission—message in cipher—damages.

1. Telegraph companies are not common carriers, and are not subject to the same liabilities.

2. The regulation of a telegraph company requiring the sender of a message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, is a reasonable regulation.

3. The terms on the back of a telegraph message, so far as they are not inconsistent with law, form part of the contract between the sender and the company under which the message is transmitted.

4. Where the only mistake of any consequence in the transmission of a message consisted in the change of the word "bay" into "buy" or rather

NOTE.—*As to right of telegraph and telephone companies to use public streets and erect poles therein; compensation; injunction; poles for street car propulsion; placing electric wires under surface of streets*, see note to St. Louis v. Western U. Teleg. Co. 37: 810.

Damages against telegraph company for error in sending message, or for not delivering the same; duty of company to deliver; stipulations and printed conditions, effect of.

A reasonable effort must be made by a telegraph company to ascertain where the addressee of a telegram is and to deliver it to him; consequently, an instruction to the jury that the company is bound to deliver it only at the office or place of business of the addressee is erroneous. Pope v. Western U. Teleg. Co. 9 Ill. App. 283.

It is no excuse for failure to deliver a telegram as required by contract that the business at the receiving office is not sufficient to justify the employment of a separate telegraph operator or messenger boy. Western U. Teleg. Co. v. Henderson, 89 Ala. 510.

Whether a messenger was negligent in failing to find a physician where he went twice to his office with a telegram, but failing to find him made no further effort, is a question for the jury. Western U. Teleg. Co. v. Cooper, 1 L. R. A. 728, 71 Tex. 507.

It is no defense for failure to deliver a telegram addressed to a person at the city of Columbus, Indiana, where he had been living for six years in the same house within a mile of the telegraph office, that the messenger sent out to deliver it inquired unsuccessfully for the addressee at all the hotels and at the postoffice and of persons on the streets, but could get no information as to his whereabouts or place of residence. Western U. Teleg. Co. v. McKibben, 114 Ind. 511.

Delivery of a message to the wife of the addressee at his residence is proper, on information that he is out of the city and will be gone for two days. Given v. Western U. Teleg. Co. 24 Fed. Rep. 119.

Delivery to a hotel clerk of a message for a person having a room there, but then absent from the city, is sufficient. Western U. Teleg. Co. v. Trissal, 98 Ind. 566.

A message directed to one person "care of" another is sufficiently delivered by giving it to the latter, and his refusal to receive it and his handing it back to the messenger with directions where to send it will not make the telegraph company liable for negligence in failing to exercise reasonable diligence to find the other person. Western U. Teleg. Co. v. Young, 77 Tex. 245.

The fact that a message is addressed to a fictitious name does not relieve a telegraph company from the duty to deliver it where satisfactory evidence of the identity of the person for whom it was intended has been furnished in advance. Milliken v. Western U. Teleg. Co. 1 L. R. A. 281, 110 N. Y. 403.

Due care and diligence to find the person to whom a telegram is addressed must be exercised by a telegraph company, although the message is addressed in the care of another who cannot be found Western U. Teleg. Co. v. Houghton, 15 L. R. A. 129, 82 Tex. 561.

of the letter "a" into "u," the difference in telegraphic symbol between these two letters being a single dot, a jury would be warranted in finding that it was only ordinary negligence for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

5. The stipulation on a telegraphic message that if the handwriting of the message, delivered to the company for transmission, is obscure or in cipher the company will not be responsible for its miscarriage, is reasonable and not against public policy and the sender can recover of the company for a failure to transmit or deliver such a message, only the sum he paid for sending it.

6. Under a contract to transmit a message by telegraph the damages for breach must be limited to those which may fairly be considered as arising according to the usual course of things, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach.

[No. 59.]

Argued Nov. 1, 2, 1893. Decided May 26, 1894.

IN error to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment of that court, in favor of the defendant The Western Union Telegraph Company, in an action brought by Frank J. Primrose, plaintiff, to recover damages for a negligent mistake of defendant's agents in transmitting a telegraphic message from the plaintiff at Philadelphia to his agent at Waukeney, in the state of Kansas. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action on the case, brought January 25, 1888, by Frank J. Primrose, a citizen of Pennsylvania, against the Western Union Telegraph Company, a corporation of New York, to recover damages for a negligent mistake of the defendant's agents in transmitting a telegraphic message from *the plaintiff at Philadelphia to his agent at Waukeney, in the state of Kansas. [2

The defendant pleaded: 1st, not guilty; 2d, that the message was an unrepeated message, and was also a cipher and obscure message, and therefore, by the contract between the par-

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The sender's right to recover for mental anguish caused by the nondelivery of a telegram announcing her husband's dangerous illness is not defeated by the fact that the message did not directly indicate the relationship of the parties on its face, where it was a "rush message," bearing unmistakable evidence of its importance, and was amply sufficient to put the company on inquiry. Potts v. Western U. Teleg. Co. 82 Tex. 545.

A telegram from a mother to her son, stating that the latter's stepfather died the morning it was sent, accompanied by a statement by the one who delivered it to the telegraph agent that it was important and that it should be rushed through, is sufficient notice to the company that it was sent for the mother's benefit and was, in effect, an invitation to her son to come to her, to support a suit for damages for injury to her feelings because, owing to its nondelivery, he did not go to her for a week. Western U. Teleg. Co. v. Nations, 82 Tex. 589.

A telegraph company is not excused for its failure to promptly deliver a message, by the fact that the hour at which it was accepted, the office to which it was directed was practically closed against the sending office,—especially when no effort is made to send the message until too late the next day for the purpose for which it was intended. Western U. Teleg. Co. v. Bruner (Tex.) March 8, 1892.

A telegraph company which accepts and undertakes to deliver a message cannot excuse its failure to do so on the ground that the special delivery charges outside the free delivery limits were not paid, where it did not notify the sender that it had not been delivered. Anderson v. Western U. Teleg. Co. 84 Tex. 17.

The nonpayment by the sender of a message of the extra charge required where the person addressed resides beyond free delivery limits, will be no defense to an action for a penalty, in the absence of his knowledge of the regulation. Brashears v. Western U. Teleg. Co. 45 Mo. App. 433.

A telegraph company cannot limit its liability for the plain and palpable negligence of its operators and agents. Garrett v. Western U. Teleg. Co. 83 Iowa, 257.

It is not relieved from liability for failing to forward a message, by a stipulation that it shall not be liable for errors or delays or for nondelivery. Western U. Teleg. Co. v. Collins, 10 L. R. A. 516, 45 Kan. 88.

Its liability for mistakes or delays in delivering telegrams written not on the company's blank forms is not limited by stipulations in such forms, the terms of which were not actually known to the sender, although he had been in the habit of sending messages on those forms. Pearsall v. Western U. Teleg. Co. 124 N. Y. 256.

A stipulation in a printed form upon which messages are required to be written before being accepted for transmission, that the company shall not be liable for mistakes or delays or for nondelivery of unrepeated messages, beyond the amount paid for their transmission is contrary to public policy and void so far as it seeks to relieve the company from liability for negligence. Western U. Teleg. Co. v. Short, 9 L. R. A. 744, 53 Ark. 434. *Contra*, Western U. Teleg. Co. v. Stevenson, 5 L. R. A. 515, 128 Pa. 442; Kiley v. Western U. Teleg. Co. 109 N. Y. 231.

Where the message was properly transmitted and transcribed and the loss was occasioned by failure to promptly deliver, a stipulation on the blank limiting the company's liability in case of unrepeated messages is no defense to a suit to recover damages for the loss. Western U. Teleg. Co. v. Lowrey, 32 Neb. 732; Gulf, C. & S. F. R. Co. v. Wilson, 69 Tex. 739; Western U. Teleg. Co. v. Broesche, 72 Tex. 654; Western U. Teleg. Co. v. Way, 83 Ala. 542; White v. Western U. Teleg. Co. 14 Fed. Rep. 710; Western U. Teleg. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Western U. Teleg. Co. v. Henderson, 89 Ala. 510.

A printed stipulation in a telegraph blank, that no claim for damages for negligence in transmitting the telegram shall be valid unless presented in writing within thirty days, is reasonable and obligatory. Beasley v. Western U. Teleg. Co. 39 Fed. Rep. 181.

The rule that a telegraph company cannot stipulate against its own negligence will not prevent a stipulation requiring a claim to be presented within a certain time, such as sixty days. Western U. Teleg. Co. v. Daugherty, 11 L. R. A. 102, 54 Ark. 221.

If a telegram is written upon a printed blank, which contains a rule limiting the measure of the telegraph company's liability to damages by a rule requiring important messages to be repeated, and charging one half of the usual price for such repetition, the sender of the message is bound by the condition, although in fact he never read it. Breese v. United States Teleg. Co. 45 Barb. 274, 21 How. Pr.

ties under which the message was sent, the defendant was not liable for the mistake. At the trial, the following facts were proved and admitted:

On June 16, 1887, the plaintiff wrote and delivered to the defendant at Philadelphia, for transmission to his agent, William B. Toland, at Ellis in the state of Kansas, a message upon one of the defendant's printed blanks, the words printed below in italics being the words written therein by the plaintiff, to wit:

"THE WESTERN UNION TELEGRAPH COMPANY.

"NORVIN GREEN, President.
"THOS. T. ECKERT, General Manager.

"Receiver's No.	Time Filed 13	Check.

"Send the following message subject to the terms on back hereof, which are hereby agreed to. } *June 16, 1887.*

"*To Wm. B. Toland, Ellis, Kansas.*

"*Despot am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchases.*

"*FRANK J. PRIMROSE.*

"☞ READ THE NOTICE AND AGREEMENT ON BACK OF THIS BLANK. ☜"

Upon the back of the message was the following printed matter:

"ALL MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS:

"To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non delivery of any REPEATED message, *beyond fifty times the sum [3 received for sending the same, unless specially

86, 48 N. Y. 132, 8 Am. Rep. 526; United States Teleg. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519.

By writing the message under it, signing it and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions. Breese v. United States Teleg. Co. *supra;* Lewis v. Great Western R. Co. 5 Hurlst. & N. 867; Bryant v. American Teleg. Co. 1 Daly, 578; MacAndrew v. Electric Teleg. Co. 17 C. B. 3, 33 Eng. L. & Eq. 180; Western U. Teleg. Co. v. Carew, 15 Mich. 525.

A telegraph company has a right to make such a stipulation to restrict its liability to its customers, and the latter are bound thereby, when printed on the blanks used. MacAndrew v. Electric Teleg. Co. *supra;* Western U. Teleg. Co. v. Carew, *supra;* Ellis v. American Teleg. Co. 13 Allen, 226; Redpath v. Western U. Teleg. Co. 112 Mass. 71, 17 Am. Rep. 69; Clement v. Western U. Teleg. Co. 157 Mass. 463; Schwartz v. Atlantic & P. Teleg. Co. 18 Hun, 157; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 Am. Rep. 165; Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; Young v. Western U. Teleg. Co. 65 N. Y. 163; Kiley v. Western U. Teleg. Co. 109 N. Y. 235. *Contra.* Ayer v. Western U. Teleg. Co. 79 Me. 493; True v. International Teleg. Co. 60 Me. 9, 11 Am. Rep. 150; Bartlett v. Western U. Teleg. Co. 62 Me. 209, 16 Am. Rep. 437; Grinnell v. Western U. Teleg. Co. 113 Mass. 299, 18 Am. Rep. 485.

Where it is provided by statute that a telegraph company "is liable for all mistakes in transmitting messages," it seems that the company may nevertheless adopt reasonable rules governing the transmission of messages. Sweetland v. Illinois & M. Teleg. Co. 27 Iowa, 433, 1 Am. Rep. 285.

Telegraph companies may limit the measure of their liability to damages by reasonable rules and regulations, brought home to the knowledge of and assented to by those with whom they deal. Camp v. Western U. Teleg. Co. 1 Met. (Ky.) 164, 71 Am. Dec. 461.

A rule of a telegraph company requiring important messages to be repeated, in order to guard against mistakes in transmitting them, and charging one half the usual price for such repetition, and providing that the company will not be responsible for mistakes in the transmission of unrepeated messages, is reasonable. Camp v. Western U. Teleg. Co. *supra;* Wann v. Western U. Teleg. Co. 87 Mo. 472, 90 Am. Dec. 395; Western U. Teleg. Co. v. Carew, 15 Mich. 525.

Telegraph companies may limit the measure of their liability, but such rule must be brought home to the knowledge of the person who brings the message for transmission. De Rutte v. New York, A. & B. Electro-Magnetic Teleg. Co. 1 Daly, 547, 30 How. Pr. 403.

The presumption is that the sender of a telegram so written has knowledge of the terms and conditions which are printed, and the fact that they are printed in very small type will not control this presumption; there being a heading in plain type, "All messages taken by this company subject to the following terms." Wolf v. Western U. Teleg. Co. 62 Pa. 83, 1 Am. Dec. 387.

Telegraph companies are not under the obligations of common carriers. Birney v. New York & W. P. Teleg. Co. 18 Md. 341, 81 Am. Dec. 607; Camp v. Western U. Teleg. Co. 1 Met. (Ky.) 164, 71 Am. Dec. 461; Shields v. Washington Teleg. Co. (La.) Allen, Teleg. Cas. 5; New York & W. P. Teleg. Co. v. Dryburg, 35 Pa. 297, 78 Am. Dec. 338; Wann v. Western U. Teleg. Co. 37 Mo. 472, 90 Am. Dec. 395.

The stipulations printed on the blanks above the message which the plaintiffs required the company to send, and which was signed by the plaintiffs, forms a part of a contract between the parties, and is binding on the sender. Young v. Western U. Teleg. Co. 2 Jones & S. 390, 65 N. Y. 163; Kiley v. Western U. Teleg. Co. 109 N. Y. 231.

If a telegram is written on a printed blank, which bears upon it this direction, the sender accepts the provisions printed on the back, as a part of his contract with the company, whether he reads them or not. Western U. Teleg. Co. v. Carew, 15 Mich. 525.

However it may be in cases where the error causing the injury was occasioned by not repeating, or would have been manifestly prevented or avoided by repeating, yet this condition cannot cover and excuse negligence or delay in delivering a message received or any other nonfeasance or misfeasance not imputable to or excused by not repeating. Western U. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Birney v. New York & W. P. Teleg. Co. 18 Md. 341, 81 Am. Dec. 607.

A telegraph company cannot, by rules and regulations of its own making, protect itself against liability for the consequence of its own fraud, willful misconduct, or gross negligence, or any conduct inconsistent with good faith. United States Teleg. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Wann v. Western U. Teleg. Co. 37 Mo.

insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

"Correctness in the transmission of a message to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz, one per cent for any distance not exceeding 1000 miles, and two per cent for any greater distance. No employes of the Company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

"The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

"NORVIN GREEN, President.

"THOS. T. ECKERT, General Manager."

On the evening of the same day, an agent of the defendant delivered to Toland, at Waukeney, upon a blank of the defendant company, the message in this form, the written words being printed below in italics·

"THE WESTERN UNION TELEGRAPH COMPANY.

"This company TRANSMITS and DELIVERS messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

"Errors can be guarded against only by repeating a message back to the sending station for comparison, and the Company will not hold itself liable for errors or delays in transmission or delivery of

472. 90 Am. Dec. 395; Western U. Teleg. Co. v. Crall, 38 Kan. 679; Ellis v. American Teleg. Co. 13 Allen, 234; True v. International Teleg. Co. 60 Me. 9, 11 Am. Rep. 156.

A stipulation will not exempt the company from liability for a loss occasioned by its own fault or negligence, or by the want of proper skill or ordinary care on the part of its operators in transmitting an unrepeated message. Sweetland v. Illinois & M. Teleg. Co. 27 Iowa, 433, 1 Am. Rep. 285.

The company, taking the maximum charge, cannot by any condition imposed on persons using the telegraph, escape from the obligation to use reasonable care in sending messages (Playford v. United Kingdom Electric Teleg. Co. L. R. 4 Q. B. 706, 17 L. T. N. S. 243) or from the failure to use due care in delivering an unrepeated message which has been sent over its wires without any error. Western U. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

Such a rule will not exempt the company from loss sustained in consequence of the entire omission of the company, through forgetfulness of its operator to send or attempt to send a message, although such message was not to be repeated. Birney v. New York & W. P. Teleg. Co. 18 Md. 341, 81 Am. Dec. 607.

Where such a rule exists, merely proving a mistake in the transmission of an unrepeated message is not sufficient to establish liability on the part of the company; the plaintiff must go further, and introduce evidence more directly tending to show such fault or negligence. Sweetland v. Illinois & M. Teleg. Co. 27 Iowa. 433, 1 Am. Rep. 285.

A clause in the printed conditions of a telegraph company, that they will not be responsible for mistakes or delay in the transmission of a message, applies merely to the transmission of the message and not to mistakes or a delay in the delivery of the message, after it has been correctly transmitted. Bryant v. American Teleg. Co. 1 Daly, 575.

But where the receiver of a telegram requested the operator to inquire if it had been correctly transmitted, was told it had been done by him, the company is liable for errors in it as for a repeated message. Western U. Teleg. Co. v. Landis (Pa.) 11 Cent. Rep. 193.

Telegraph companies may limit the measure of their liability to damages by reasonable rules and regulations brought home to the knowledge of those with whom they deal; but they cannot thus protect themselves against liability for a want of fidelity and care in the exercise of the employment which they undertake to prosecute. Western U. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

Telegraph companies cannot, by contract, relieve themselves from liability for their negligence in failing to deliver messages. Smith v. Western U. Teleg. Co. 83 Ky. 104.

Telegraph companies are liable to the person to whom a message is sent and delivered, for damages caused by their negligence in ommitting a word therefrom. Wolfskehl v. Western U. Teleg. Co. 46 Hun, 542.

The damages for the breach of the contract must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed. Gray, Telegraphs, 149; Daughtery v. American U. Teleg. Co. 75 Ala. 168, 51 Am. Rep. 435; Hart v. Western U. Teleg. Co. 66 Cal. 579, 58 Am. Rep. 119; Western U. Teleg. Co. v. Graham. 1 Colo. 230, 9 Am. Rep. 136; United States Teleg. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; True v. International Teleg. Co. 60 Me. 9, 11 Am. Rep. 156; Bartlett v. Western U. Teleg. Co. 62 Me. 209, 16 Am. Am. Rep. 437; Beaupré v. Pacific & A. Teleg. Co. 21 Minn. 155; Mackay v. Western U. Teleg. Co. 16 Nev. 222; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 Am. Rep. 165; Leonard v. New York, A. & B. Electro-Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446; Landsberger v. Magnetic Teleg. Co. 32 Barb. 530; Rittenhouse v. Independent Line of Telegraph, 1 Daly, 474, 44 N. Y. 263, 4 Am. Rep. 673; Western U. Teleg. Co. v. Griswold, 37 Ohio St. 301; Daniel v. Western U. Teleg. Co. 61 Tex. 452, 48 Am. Rep. 305; Kingborne v. Montreal Teleg. Co. 18 U. C. Q. B. 60; Lane v. Montreal Teleg. Co. 7 U. C. C. P. 23; Candee v. Western U. Teleg. Co. 34 Wis. 471, 17 Am. Rep. 452; Western U. Teleg. Co. v. Simpson, 73 Tex. 422.

Injury to feelings, caused by a failure to deliver a message relating to domestic affairs, where the failure is the result of negligence of the company or its servants, is an element of actual damages. Wadsworth v. Western U. Teleg. Co. 86 Tenn. 695; Western U. Teleg. Co. v. Cooper, 1 L. R. A. 128, 71 Tex. 507; Stuart v. Western U. Teleg. Co. 66 Tex. 580; Gulf, C. & S. F. R. Co. v. Levy, 59 Tex. 543; Hays v. Houston & G. N. R. Co. 46 Tex. 272; Gulf, C. & S. F. R. Co. v. Wilson, 69 Tex. 739; So Relle v. Western U. Teleg. Co. 55 Tex. 310, 40 Am. Rep. 805. But see Beasley v. Western U. Teleg. Co. 39 Fed. Rep. 181; Rowell v. Western U. Teleg. Co. 75 Tex. 26.

Neither in an action of tort nor in one of contract can a party recover damages for mental anguish alone. Wood's Mayne, Damages, (1st Am. ed.) 54 *note*; Gray, Telegraphs, 147.

UNREPEATED MESSAGES, beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

"This is an UNREPEATED MESSAGE, and is delivered by request of the sender, under the conditions named above.

"NORVIN GREEN, President.

"THOS. T. ECKERT, General Manager.

NUMBER	SENT BY	REC'D BY	CHECK.
Rt.	*S.*	*F. N.*	*22 Collect 3 extra words.*

"RECEIVED at 5 *K. p. m.* *June 16, 1887.*

"Dated *Philadelphia*, 16. *Forwarded from Ellis.*

"To *W. B. Toland, Waukeney, Kansas.*

"*Destroy am exceedingly busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase.*

"*FRANK J. PRIMROSE.*"

4] *The difference between the message as sent and as delivered is shown below, where so much of the message sent as was omitted in that delivered is in brackets, and the words substituted in the message delivered are in italics.

"[Despot] *destroy* am exceedingly busy [bay] *buy* all kinds quo perhaps bracken half of it mince moment promptly of purchase[s]."

By the private cipher code made and used by the plaintiff and Toland, the meaning of these words was as follows:

"Yours of the [fifteenth] *seventeenth* received; am exceedingly busy; [I have bought] *buy* all kinds, five hundred thousand pounds; perhaps we have sold half of it; wire when you do anything; send samples immediately, promptly of [purchases] *purchase.*"

The plaintiff testified that on June 16, 1887, he wrote the message in his own office on one of a bunch or book of the defendant's blanks which he kept at hand, and sent it to the defendant's office at Philadelphia; that he had a running account with the defendant's agent there, which he settled monthly, amounting to $180 for that month; that he did not then read, and did not remember that he had ever before read, the printed matter on the back of the blanks; and that he paid the usual rate of $1.15 for this message, and did not pay for a repetition or insurance of it.

He also testified that he then was, and for for many years had been, engaged in the business of buying and selling wool all over the country, and had employed Toland as his agent in that business, and early in June, 1887, sent him out to Kansas and Colorado with instructions to buy 50,000 pounds, and then to await orders from him before buying more; that, before June 12, Toland bought 50,000 pounds, and then stopped buying; and that he had sent many telegraphic messages to Toland during that month and previously, using the same code.

The defendant's agent at Philadelphia, called as a witness for the plaintiff, testified that he sent this message for the plaintiff, and knew that he was a dealer in wool, and that Toland was with him, but in what capacity 5] he did not know; *that he had frequently sent messages for him, and considered him one of his best customers during the wool season; that telegraphic messages by the present system were sent and received by sound, and were all dots and dashes; that "b" was a dash and three dots, and "y" was two dots, a space and then two dots; and that the difference between "a" and "u" was one dot, "a" being a dot and a dash, and "u" two dots and a dash, and the pause upon the last touch of the "u" that an experienced telegraph operator, if the words were properly rapped out and he was paying proper attention, could not well mistake the one for the other, but might be misled if he was not careful; and that it was very likely that another dot could be put in if there was any interruption in the wire. He further testified that there was a great difference between the words "despot" and "destroy" in telegraphic symbols; and that the letter "s" was made by three dots, so that, if an operator received the word "purchases" over the wires, and wrote down "purchase" he omitted three dots from the end of the word.

The plaintiff introduced depositions, taken in September, 1888, of one Stevens and one Smith, who were respectively telegraph operators of the defendant at Brookville and at Ellis in the state of Kansas on June 16, 1887.

Stevens testified that Brookville was a relay station of the company, at which messages from the East were repeated westward; that on that day one Tindall, his fellow operator in the Brookville office, handed him a copy in Tindall's handwriting of the message in question (an impression copy of which he identified and annexed to his deposition) containing the words "despot" and "bay" and he immediately transmitted it word for word to Ellis; that the equipment of the office at Brookville was in every respect good and sufficient, and that he had no recollection of the wires between it and Ellis having been in other than good condition on that day.

Smith testified that on that day he received the message at Ellis from Brookville, and immediately wrote it down word for word, just as received (and identified and annexed to his deposition an impression copy of what he then wrote down) *containing the words [6 "destroy" and "buy," and transmitted it, exactly as he received it, to Waukeney, to which Toland had directed any messages for him to be forwarded; and that the office at Ellis was well and sufficiently equipped for its work, but he could not recall what was the condition of the wires between it and Brookville.

The plaintiff also introduced evidence tending to show that June 16, 1887, was a bright and beautiful day at Ellis and Waukeney; that Toland, upon receiving the message at Waukeney, made purchases of about 300,000 pounds of wool; and that the plaintiff, in settling with the sellers thereof, suffered a loss of upwards of $20,000.

The circuit court, following *White* v. *Western U. Teleg. Co.* 5 McCrary, 103, and *Jones* v. *Western U. Teleg. Co.* 18 Fed. Rep. 717, ruled that there was no evidence of gross negligence on the part of the defendant, and that as the message had not been repeated, the plaintiff, by the terms printed upon the back of the message, and referred to above his signature on its face, could not recover more than the sum of $1.15, which he had paid for sending it. The plaintiff not claiming that sum, the court directed a verdict for the defendant, and rendered judgment thereon. The plaintiff tendered a bill of exceptions, and sued out this writ of error.

Messrs. **Joseph de F. Junkin** and *George Junkin*, for plaintiff in error:

A telegraph company is a common carrier, and subject to the law of common carriers.

Deleware & A. Teleg. & Teleph. Co. v. *State*, 3 U. S. App. 30; *Budd* v. *New York*, 143 U. S. 517 (36:247), 4 Inters. Com. Rep. 45; *Munn* v. *Illinois*, 94 U. S. 113 (24:77); Shearm. & Redf. Neg. §§ 554, 555.

Being a common carrier, a telegraph company cannot legally impose conditions upon one whose message it accepts for transmission, relieving itself from responsibility for damages to the sender, resulting from its own negligence.

New York & W. P. Teleg. Co. v. *Dryburg*, 35 Pa. 298, 78 Am. Dec. 338; *Harris* v. *Western U. Teleg. Co.* 9 Phila. 88; *Koons* v. *Western U. Teleg. Co.* 12 W. N. C. 49; *Western U. Teleg. Co.* v. *Tyler*, 74 Ill. 168, 24 Am. Rep. 279, 60 Ill. 421; *Western U. Teleg. Co.* v. *Fenton*, 52 Ind. 1; *Ayer* v. *Western U. Teleg. Co.* 79 Me. 493; *True* v. *International Teleg. Co.* 60 Me. 9, 11 Am. Rep. 156; *Bartlett* v. *Western U. Teleg. Co.* 62 Me. 209, 16 Am. Rep. 437; *Hibbard* v. *Western U. Teleg. Co.* 33 Wis. 558; *Western U. Teleg. Co.* v. *Griswold*, 37 Ohio St. 301; *De la Grange* v. *Southwestern Teleg. Co.* 25 La. Ann. 383; *Turner* v. *Hawkeye Teleg. Co.* 41 Iowa, 458, 20 Am. Rep. 605; *Candee* v. *Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452; *Western U. Teleg. Co.* v. *Meek*, 49 Ind. 53; *Rittenhouse* v. *Independent Line of Telegraph*, 1 Daly, 474; *Western U. Teleg. Co.* v. *Howell*, 38 Kan. 685; *Western U. Teleg. Co.* v. *Hall*, 124 U. S. 444 (31: 479); *Dorgan* v. *Telegraph Co.* 1 Am. L. T. N. S. 413; Whart. Neg. § 763; Shearm. & Redf. Neg. §§ 558, 559, 565.

A common carrier cannot stipulate for exemption from the consequences of his own neglect or that of his servants.

Hart v. *Pennsylvania R. Co.* 112 U. S. 338 (28:720); *New Jersey Steam Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How. 344 (12:465); *York Mfg. Co.* v. *Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107 (18:170); *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264 (22:556); *Ogdensburg & L. C. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 123 (22:827); *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174 (23:872); *Grand Trunk R. Co.* v. *Stevens*, 95 U. S. 655 (24:535).

The error in the telegraphic message in itself was evidence of gross negligence.

Western U. Teleg. Co. v. *Crall*, 38 Kan. 679.

In the present case, it was affirmatively shown that the message reached its last operator but one, with exactness, clearly showing how easy such accuracy was.

Messrs. **Silas W. Pettit, John F. Dillon,** *George H. Fearons* and *Rush Taggart*, for defendant in error:

The liability of the carrier as an insurer of the property carried is always connected with the custody of the goods.

Gales v. *Hailman*, 11 Pa. 515.

There is no real analogy between the case of a common carrier of goods actually intrusted to him and the case of a telegraph company employed to transmit only the contents of a written message.

Gibbon v. *Paynton*, 4 Burr. 2298; *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 380 (21: 640); *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331 (28:717); *New York Cent. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 24 (25:531); *Magnin* v. *Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608; Lawson, Carriers, § 86.

The sender of a message is bound by the terms of the agreement under which the message is sent, whether he has read it or not; he is estopped from denying that he has read and acceded to it.

Wolf v. *Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 387; *Southern Exp. Co.* v. *Caldwell*; 88 U. S. 21 Wall. 264 (25:556); *Young* v. *Western U. Teleg. Co.* 2 Jones & S. 390; *Breese* v. *United States Teleg. Co.* 48 N. Y. 139, 8 Am. Rep. 526; *Redpath* v. *Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Western U. Teleg. Co.* v. *Carew*, 15 Mich. 525; *Western U. Teleg. Co.* v. *Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *Beasley* v. *Western U. Teleg. Co.* 39 Fed. Rep. 181.

This telegraph company is not a common carrier, but a bailee performing through its agents a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government.

Birney v. *New York & W. P. Teleg. Co.* 18 Md. 341, 81 Am. Dec. 607; *Womack* v. *Western U. Teleg. Co.* 58 Tex. 176, 44 Am. Rep. 614.

The contract limiting the liability of the company for errors or omissions in the transmission of telegraphic messages unless they are repeated, is a valid one, and the regulation of the company refusing to be responsible for errors or omissions in transmission unless it is afforded the protection of a repetition of the message, is a reasonable regulation and one which the telegraph company had a right to make.

Passmore v. *Western U. Teleg. Co.* 78 Pa. 238; *Aiken* v. *Western U. Teleg. Co.* 5 S. C. N. S. 358; *Western U. Teleg. Co.* v. *Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Wann* v. *Western U. Teleg. Co.* 37 Mo. 472, 90 Am. Dec. 395; *Becker* v. *Western U. Teleg. Co.* 11 Neb. 87, 38 Am. Rep. 356; *Camp* v. *Western U. Teleg. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461; *Hart* v. *Western U. Teleg. Co.* 66 Cal. 579, 55 Am. Rep. 119; *Ellis* v. *American Teleg. Co.* 95 Mass. 226; *Kiley* v. *Western U. Teleg. Co.* 109 N. Y. 231; *United States Teleg. Co.* v. *Gildersleere*, 29 Md. 232, 96 Am. Dec. 519; *Jones* v. *Western U. Teleg. Co.* 18 Fed. Rep. 717; *MacAndrew* v. *Electric Teleg. Co.* 17 C. B. 13, 33 Eng. L. & Eq. 180; *Playford* v. *United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706, 17 L. T. N. S. 243; *Grinnell* v. *Western U. Teleg. Co.* 113 Mass. 303, 18 Am. Rep. 485; *Clement* v. *Western U. Teleg. Co.* 137 Mass. 463.

Telegraph companies have a right to refuse to be responsible for errors or omissions in the transmission of cipher and obscure messages.

Hadley v. *Baxendale*, 9 Exch. 341; *Sanders* v. *Stuart*, L. R. 1 C. P. Div. 326; *Cannon* v. *Western U. Teleg. Co.* 100 N. C. 300; *Beaupré* v. *Pacific & A. Teleg. Co.* 31 Minn. 155; *Lowery* v. *Western U. Teleg. Co.* 60 N. Y. 198, 19 Am. Rep. 154; *Western U. Teleg. Co.* v. *Wilson*, 22 L. R. A. 434, 32 Fla. 527; *Candee* v. *Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452; *Behm* v. *Western U. Teleg. Co.* 8 Biss. 131; *Mackay* v. *Western U. Teleg. Co.* 16 Nev. 222; *Western U. Teleg. Co.* v. *Martin*, 9 Ill. App. 587; *Daniel* v. *Western U. Teleg. Co.* 61 Tex. 452, 48 Am. Rep. 305; *Hart* v. *Western*

U. Teleg. Co. 66 Cal. 579, 55 Am. Rep. 119; *Abeles* v. *Western U. Teleg. Co.* 37 Mo. App. 554; *Kinghorne* v. *Montreal Teleg. Co.* 18 U. C. Q. B. 60.

The plaintiff offered no evidence of negligence.

Pollock, Torts, (Am. ed.) 106.

The plaintiff, in order to recover, must show that this mistake was caused by the fault of the company.

Sweetland v. *Illinois & M. Teleg. Co.* 27 Iowa, 458, 1 Am. Rep. 285.

Only nominal damages, or the amount paid for sending the message, can be recovered.

Candee v. *Western U. Teleg. Co.*, *Mackay* v. *Western U. Teleg. Co.*, and *Daniel* v. *Western U. Teleg. Co. supra*; *Sanders* v. *Stuart*, L. R. 1 C. P. Div. 326; *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 206 (35: 150); Gray, Telegraphs, § 87.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words, "Send the follow-[13] ing message *subject to the terms on back hereof, which are hereby agreed to;" and, just below the place for his signature, this line: "☞ Read the notice and agreement on back of this blank ☜."

Upon the back of the blank were conspicuously printed the words, "All messages taken by this company are subject to the following terms," which contained the following conditions or restrictions of the liability of the company:

"[1st] To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same;

"[2d.] Nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured;

"[3d.] Nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages."

After stating the rates at which correctness in the transmission of a message may be insured, it is provided that "no employee of the company is authorized to vary the foregoing."

"[4th.] The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The conditions or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first, by which the company is not to be liable for mistakes in the transmission or delivery of any message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half that sum in addition; and that *part of the [14 third, by which the company is not to be liable at all for errors in cipher or obscure messages.

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 269, 270 [22: 556, 558, 559]; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 464 [26: 1067, 1068.]

The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are entrusted with nothing but an order or message, which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of damages, for a failure to transmit or *deliver it, has no [15 relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

As said by *Mr. Justice* Strong, speaking for this court, in *Southern Exp. Co.* v. *Caldwell*, above cited: "Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357 [21: 627]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 397, 442 [32: 788, 792], and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by *Mr. Justice* Blatchford, speaking for the whole court, that "where a contract of this kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331, 343 [28: 717, 721].

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again 16] as the usual *price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants, or otherwise.

In *Western U. Teleg. Co.* v. *Hall*, 124 U. S. 444, 453 [31: 479, 482], the effect of such a regulation was presented by the certificate of the circuit court, but was not passed upon by this court, because it was of opinion that upon the facts of the case the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in *McAndrew* v. *Electric Teleg. Co.* 17 C. B. 3, and in *Baxter* v. *Dominion Teleg. Co.* 87 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.

In the earliest American case, decided by the court of appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: "The public are admonished by the notice, that in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the *company [17 liable for any mistake that may occur." *Camp* v. *Western U. Teleg. Co.* 1 Met. (Ky.) 164, 168, 71 Am. Dec. 461.

In *Western U. Teleg. Co.* v. *Carew*, 15 Mich. 525, 535, 536, the supreme court of Michigan held that a similar regulation was a valid part of the contract between the company and the sender, whether he read it or not. "The regulation," said *Chief Justice* Christiancy, "of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question." "The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions."

In *Birney* v. *New York & W. P. Teleg. Co.* 18 Md. 341, 358, 81 Am. Dec. 607, the court of appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit.

In *United States Teleg. Co.* v. *Gildersleve*, 29 Md. 232, 246, 248, the same court, speaking by *Mr. Justice* Alvey (since Chief Justice of Maryland, and the Court of Appeals of the District of Columbia) said: "The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for that purpose." "The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own willful misconduct, or gross negligence, or any conduct inconsistent with good faith; nor has it

attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee by requiring the message to be repeated, could have assured 18] himself of its *dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of nondelivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message. And having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix the liability on the company."

In *Passmore* v. *Western U. Teleg. Co.* 9 Phila. 90, and 78 Pa. 238, at the trial in the district court of Philadelphia, there was evidence that Passmore, of whom one Edwards had offered to purchase a tract of land in West Virginia, wrote and delivered to the company at Parkersburg, upon a blank containing similar conditions, a message to Edwards at Philadelphia, in these words: "I hold the Tibbs tract for you; all will be right," but which, as delivered by the company in Philadelphia, was altered by substituting the word 'sold" for "'hold;" and that Edwards thereupon broke off the contract for the purchase of the land, and Passmore had to sell it at a great loss. The verdict being for the plaintiff, the court reserved the question whether the defendant was liable, inasmuch as the plaintiff had not insured the message, nor directed it to be repeated; and afterwards entered judgment for the defendant, notwithstanding the verdict, in accordance with the opinion of *Judge* Hare, the most important parts of which are as follows:

"A railway, telegraph or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason, which is said to be the life of the law, can approve; or, at the least, such as it need not condemn. By no device can a body corporate 19]avoid *liability for fraud, for willful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid, which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule —which, in marking out a path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents—may be a reasonable rule, and, as such, upheld by the courts."

"The function of the telegraph differs from that of the postoffice in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument, that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder storms and other natural causes. It is, therefore, obvious that entire accuracy cannot always be obtained by the greatest care; and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message was sent should telegraph it back to the station whence it came."

"Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to *comply, they will clearly be answerable for[20 any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition." 9 Phila. 92-94, 78 Pa. 242-244.

The judgment was affirmed by the supreme court of Pennsylvania, for the reasons given by *Judge* Hare and above stated. 78 Pa. 246; *Western U. Teleg. Co.* v. *Stevenson*, 5 L. R. A. 515, 128 Pa. 442, 455.

In *Breese* v. *United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526, the plaintiffs' agent wrote, at his own office in Palmyra, on one of the company's blanks, substantially like that now before us, and delivered to the company at Palmyra, a message addressed to brokers in New York, and in these words, "Buy us seven ($700) hundred dollars in gold." In the statement of facts upon which the case was submitted, it was agreed that he had never read the printed part of the blank, and that "the message thus delivered was transmitted from the office at Palmyra, as written; but, by some error of the defendant's operators working between Palmyra and New York," it was received in New York and delivered in this form, "Buy us seven thousand dollars in gold," and the brokers accordingly bought that amount for the plaintiffs who sold it at a loss. It was held that there was no evidence of negligence on the part of the company, and that, the message not having been repeated, the company was not liable.

In *Kiley* v. *Western U. Teleg. Co.* 109 N. Y.

231, 235-237, a similar decision was made, the court saying: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other states of the Union and in England. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to 21] them; that *they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this state, and generally elsewhere, been upheld as reasonable." "The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was shown that the failure was due to the willful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been detected and the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation."

In the supreme judicial court of Massachusetts, the reasonableness and validity of such regulations have been repeatedly affirmed. *Ellis* v. *American Teleg. Co.* 13 Allen, 226; *Redpath* v. *Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Grinnell* v. *Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Clement* v. *Western U. Teleg. Co.* 137 Mass. 463.

There are cases, indeed, in which such regulations have been considered to be wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar.

Some of them were actions brought not by the sender, but by the receiver of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance. Such were *New York & W. P. Teleg. Co.* v. *Dryburg*, 22] 35 Pa. 298, 78 Am. Dec. 338; **Harris* v. *Western U. Teleg. Co.* 9 Phila. 88; and *De la Grange* v. *Southwestern Teleg. Co.* 25 La Ann. 383.

Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which, in effect all liability beyond the price paid was avoided. *True* v. *International Teleg. Co.* 60 Me. 9, 18, 11 Am. Rep. 156; *Bartlett* v. *Western U. Teleg. Co.* 62 Me. 209, 215, 16 Am. Rep. 437; *Candee* v. *Western U. Teleg. Co.* 34 Wis. 471, 476, 17 Am. Rep. 452; *Hibbard* v. *Western U. Teleg. Co.* 33 Wis. 558, 564. In Bartlett's case, the court said: "Most, if not all, the cases upon this subject refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that owing to the liability to error, from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated; the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and, as the person sending the message is presumed to be the best judge of its importance, he must on his own responsibility make his election whether to have it repeated." 62 Me. 216, 217, 16 Am. Rep. 437.

The passage cited from the opinion of the Circuit Court of Appeals in *Delaware & A. Teleg. & Teleph. Co.* v. *State*, 3 U. S. App. 30, 105, in which the same judge who had decided the present case in the circuit court said, "It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment," had regard, as is evident from the context, and from the reference to *Budd* v. *New York*, 143 U. S. 517 [36: 247], 4 Inters. Com. Rep. 45, to those rules only which require persons or corporations exercising a public employment to serve all alike, without discrimination, and which make them subject to legislative regulation.

In *Rittenhouse* v. *Independent Line of Telegraph*, 1 Daly, 474, and 44 N. Y. 263, and in *Turner* v. *Hawkeye Teleg. Co.* 41 Iowa, 458, 20 Am. Rep. 605, it does not appear that the company had undertaken to restrict its liability by express stipulation.

*The Indiana decisions cited appear to [23 have been controlled by a statute of the state, enacting that telegraph companies should "be liabe for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting or delivering despatches." *Western U. Teleg. Co.* v. *Meek*, 49 Ind. 53; *Western U. Teleg. Co.* v. *Fenton*, 52 Ind. 1.

The only cases, cited by the plaintiff, in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be *Tyler* v. *Western U. Teleg. Co.* 60 Ill. 421, 14 Am. Rep. 38, and 74 Ill. 168; *Ayer* v. *Western U. Teleg. Co.* 79 Me. 493; *Western U. Teleg. Co.* v. *Griswold*, 37 Ohio St. 301; *Western U. Teleg. Co.* v. *Croll*, 38 Kan. 679; *Western U. Teleg. Co.* v. *Howell*, 38 Kan. 685; and a charge to the jury by *Mr. Justice* Woods, when circuit judge, as reported in *Dorgan* v. *Telegraph Co.* 1 Am. L. T. N. S. 406, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in *Tyler* v. *Western U. Teleg. Co.* above cited.

In that case, the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker, "Sell one hundred (100) Western Union; answer price." In the message, as delivered by the company to the broker, the message was changed by substituting "one thousand (1000.)"

It was assumed that "Western Union" meant shares in the Western Union Telegraph Company. The supreme court of Illinois held that the stipulation was "unjust, unconscionable, without consideration, and utterly void." 60 Ill. 439, 14 Am. Rep. 38.

The propositions upon which that decision was based may be sufficiently stated, in the very words of the court as follows: "Whether the paper presented by the company, on which a message is written and signed by the sender is a contract or not, depends on circumstances," 24] and "whether he *had knowledge of its terms and consented to its restrictions is for the jury to determine as a question of fact upon evidence *aliunde*." "Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators." "The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;" and, "in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company." The printed conditions could not "protect this company from losses and damage occasioned by causes wholly within their control," but "must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable." 60 Ill. 431–433, 14 Am. Rep. 38.

The effect that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not; or else to allow to the stipulation no effect whatever, for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court, when the case came before it a second time, as follows: "On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held, it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves, and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges 25] were paid the duty of the *company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent on the original charges." 74 Ill. 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: "It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one under which appellees defended, is a reasonable regulation and amounts to a contract." And again: "We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed." 60 Ill. 430, 431, 435, 14 Am. Rep. 38.

In the case at bar, the message, as appeared by the plaintiff's own testimony, was written by him at his office in Philadelphia, upon one of a bunch of the defendant's blanks, which he kept there for the purpose. Although he testified that he did not remember to have read the printed matter on the back, he did not venture to say he had not read it; still less that he had not read the brief and clear notices thereof upon the face of the message, both above the place for writing the message, and below his signature. There can be no doubt, therefore, that the terms on the back of the message, so far as they were not inconsistent with law, formed part of the contract between him and the company under which the message was transmitted.

The message was addressed by the plaintiff to his own agent in Kansas, was written in a cipher understood by them *only, and was [26 in these words: "Despot am exceedingly busy bay all kinds quo perhaps bracken half of it mince moment promptly of purchases." As delivered by the company to the plaintiff's agent in Kansas, it had the words "destroy" instead of "despot" "buy" instead of "bay," and "purchase" instead of "purchases."

The message having been sent and received on June 16, the mistake, in the first word, of "despot" for "destroy," by which, for a word signifying, to those understanding the cipher, that the sender of the message had received from the person to whom it was addressed his message of June 15, there was substituted a word signifying that his message of June 17 had been received (which was evidently impossible) could have had no other effect than to put him on his guard as to the accuracy of the message delivered to him.

The mistake of substituting for the last word "purchase" in the singular, the word "purchases" in the plural, would seem to have been equally unimportant, and is not suggested to have done any harm.

The remaining mistake, which is relied on as the cause of the injury for which the plaintiff seeks to recover damages in this action, consisted in the change of a single letter, by substituting "u" for "a," so as to put it "buy" in the place of "bay." By the cipher code, "buy" had its common meaning, though the message contained nothing to suggest to any one, except the sender or his agent, what the

latter was to buy; and the word "bay," according to that code, had (what no one without its assistance could have conjectured) the meaning of "I have bought."

The impression copies of the papers kept at the defendant's office at Brookville and Ellis, in the state of Kansas (which were annexed to the depositions of operators at those offices, and given in evidence by the plaintiff at the trial), proved that the message was duly transmitted over the greater part of its route, and as far as Brookville; for they put it beyond doubt that the message, as received and written down by one of the operators at Brookville, was in its original form; and that, as written down by the 27 operator at Ellis, it was in its altered *form. While the testimony of the deponents is conflicting, there is nothing in it to create a suspicion that either of them did not intend to tell the truth. Nor is there anything in the case, tending to show that there was any defect in the defendant's instruments or equipment, or that any of its operators were incompetent persons.

If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis; or else in a mistake of the operator at Ellis, in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville.

As has been seen, the only mistake of any consequence in the transmission of the message consisted in the change of the word "bay" into "buy," or rather of the letter "a" into "u." In ordinary handwriting, the likeness between these two letters, and the likelihood of mistaking the one for the other, especially when neither the word nor the context has any meaning to the reader, are familiar to all; and in telegraphic symbols, according to the testimony of the only witness upon the subject, the difference between these two letters is a single dot.

The conclusion is irresistible, that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence; and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

Any other conclusion would restrict the right of telegraph companies to regulate the amount 28] of their liability within the *narrower limits than were allowed to common carriers in *Hart* v. *Pennsylvania R. Co.*, already cited, in which five horses were delivered by the plaintiff to a railroad company for transportation under a bill of lading, signed by him and his agent, which stated that the horses were to be transported upon the terms and conditions thereof, "admitted and accepted by" the plaintiff "as just and reasonable," and that freight was to be paid at a rate specified, on condition that the carrier assumed a liability not exceeding two hundred dollars on each horse; and the circuit court, and this court, on writ of error, held that the contract between the parties could not be controlled by evidence that one of the horses was killed by the negligence of the railroad company, and was a race horse, worth fifteen thousand dollars. 2 McCrary, 333, 112 U. S. 331 [28: 717].

It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these parties, it is stipulated that the company shall not be "liable in any case" "for errors in cipher or obscure messages;" and that it is further stipulated that "no employee of the company is authorized to vary the foregoing," which evidently includes this, as well as other restrictions.

It is difficult to see anything unreasonable, or against public policy, in a stipulation that if the handwriting of a message, delivered to the company for transmission, is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible.

As the message was taken down by the telegraph operator at Brookville in the same words in which it was delivered by the plaintiff to the company at Philadelphia, it is evident that no obscurity in the message, as originally written by the plaintiff, had anything to do with its failure to reach its ultimate destination in the same form.

*But it certainly was a cipher message; [29 and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employé of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach. This was directly adjudged in *Western U. Teleg. Co.* v. *Hall*, 124 U. S. 444 [31: 479].

In *Hadley* v. *Baxendale*, 9 Exch. 345, decided in 1854, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in *Western U. Teleg. Co.* v. *Hall*, above cited, and in *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 199, 206, 207 [35: 147, 150], Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating the damages arising out of any

breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from 30] a *breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355.

In *Sanders* v. *Stuart*, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits, which they would otherwise have made by the transaction, to the amount of £150, *Lord Chief Justice* Coleridge, speaking for himself and *Lords Justices* Brett and Lindley, said: "Upon the facts of this case we think that the rule in *Hadley* v. *Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be, if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it;' for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz, the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs) the first portion of the rule applies also; for there are no damages more than nominal which can 'fairly and reasonably be considered 31] as arising naturally, *i. e.* according *to the usual course of things, from the breach of such a contract as this." L. R. 1 C. P. Div. 326, 328; 45 L. J. C. P. 682, 684.

In *United States Teleg. Co.* v. *Gildersleve*, already referred to, which was an action by the sender against a telegraph company for not delivering this message received by it in Baltimore, addressed to brokers in New York, "Sell fifty (50) gold," *Mr. Justice* Alvey, speaking for the court of appeals of Maryland, and applying the rule of *Hadley* v. *Baxendale*, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars, as fifty thousand dollars, by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251.

In *Baldwin* v. *United States Teleg. Co.* which was an action by the senders against the telegraph company, for not delivering this message, "Telegraph me at Rochester what that well is doing," *Mr. Justice* Allen, speaking for the court of appeals of New York, said, "The message did not import that a sale of any property, or any business transaction, hinged upon the prompt delivery of it, or upon any answer that might be *received. For all the[32 purposes for which the plaintiffs desired the information, the message might as well have been in a cipher, or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance." "The dispatch not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that, whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of

knowledge of it, and could not have contemplated either a loss of a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752, 6 Am. Rep. 165. See also *Hart* v. *Direct U. S. Cable Co.* 85 N. Y. 633.

The supreme court of Illinois, in *Tyler* v. *Western U. Teleg. Co.* above cited, took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434. 14 Am. Rep. 38. And in the recent case of *Postal Teleg. Cable Co.* v. *Lathrop*, the same court said: "It is clear enough that, applying the rule in *Hadley* v. *Baxendale, supra*, a recovery cannot **33**] be had for a failure to correctly *transmit a mere cipher dispatch unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justifiable in saying that it can contain no information of value as pertaining to a business transaction; and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss." 7 L. R. A. 474, 131 Ill. 575, 585.

The same rule of damages has been applied, upon failure of a telegraph company to transmit or deliver a cipher message, in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. *Candee* v. *Western U. Teleg. Co.* 34 Wis. 471, 479–481, 17 Am. Rep. 452; *Beaupré* v. *Pacific & A. Teleg. Co.* 21 Minn. 155; *Mackay* v. *Western U. Teleg. Co.* 16 Nev. 222; *Daniel* v. *Western U. Teleg. Co.* 61 Tex. 452, 48 Am. Rep. 305; *Cannon* v. *Western U. Teleg. Co.* 100 N. C. 300; *Western U. Teleg. Co.* v. *Wilson*, 22 L. R. A. 434, 32 Fla. 527; *Behm* v. *Western U. Teleg. Co.* 8 Biss. 131; *Western U. Teleg. Co.* v. *Martin*, 9 Ill. App. 587; *Abeles* v. *Western U. Teleg. Co.* 37 Mo. App. 554; *Kinghorne* v. *Montreal Teleg. Co.* 18 U. C. Q. B. 60, 69.

In the present case, the message was, and was evidently intended to be wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties, *when they [**34** made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the circuit court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message. *Judgment affirmed.*

Mr. Chief Justice **Fuller** and *Mr. Justice* **Harlan** dissented.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

MOSES H. SCOTT, *Plff. in Err.*,
v.
JOHN H. McNEAL, ET AL.

(See S. C. Reporter's ed. 34-51.)

Letters of administration—state decision—due process of law—probate court of Washington territory—appointment of administrator of a person living, is void.

1. Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him.
2. Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is not bound by that court's construction of a statute of a state.
3. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.
4. By the law of the territory of Washington, the probate court is not authorized to conclusively decide, as against a living person, that he is dead and thereupon to dispose of his estate.
5. The appointment by the probate court of an administrator of the estate of a living person, without notice to him, is without jurisdiction, and wholly void as against him and all acts of the administrator, whether approved by that court or not, are equally void; the receipt of money by the administrator is no discharge of a debt; and a conveyance of property by the administrator passes no title.

[No. 890.]

Submitted Oct. 23, 1893. Decided May 14, 1894.

IN ERROR to the Supreme Court of the state of Washington, to review a judgment of that court, affirming the judgment of the superior court of Thurston county, in the state of Washington, in favor of the defendants, John McNeal, *et al.*, in an action of ejectment brought by Moses H. Scott, plaintiff, to recover possession of a tract of land in that county. *Reversed, and case remanded for further proceedings.*

See same case below, 5 Wash. 309.

NOTE.—*As to what is "due process of law," see* note to Pearson v. Yewdall, 24: 436.

As to jurisdiction of United States Supreme Court; it is for state courts to construe their own statutes; Supreme Court will not review their decisions except when especially authorized by statute, see note to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

Statement by *Mr. Justice* **Gray:**

This was an action of ejectment, brought January 14, 1892, in the superior court of Thurston county in the state of Washington by Moses H. Scott against John McNeal and Augustine McNeal to recover possession of a tract of land in that county.

35] *At the trial, it was conceded that the title in this land was in the plaintiff until 1888; and he testified that he entered into possession thereof, and made improvements thereon, and had never parted with the possession, nor authorized any one to go upon the land; that he had demanded possession of the defendants, and they had withheld it from him; and that its rental value was $100 a year.

The defendants denied the plaintiff's title, and claimed title in themselves under a deed from an administrator of the plaintiff's estate, appointed in April, 1888; and in their answer alleged that in March, 1881, the plaintiff mysteriously disappeared from his place of abode, and without the knowledge of those with whom he had been accustomed to associate, and remained continuously away until July, 1891, and was generally believed by his former associates to be dead; and specifically alleged, and at the trial offered evidence tending to prove the following facts:

On April 2, 1888, Mary Scott presented to the probate court of the county of Thurston in the territory of Washington a petition for the appointment of R. H. Milroy as administrator of the estate of the plaintiff, alleging "that one Moses H. Scott, heretofore a resident of the above named county and territory, mysteriously disappeared some time during the month of March, 1881, and more than seven years ago; that careful inquiry made by relatives and friends of said Moses H. Scott, at different times since his said disappearance, has failed to give any trace or information of his whereabouts, or any evidence that he is still living; that your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance;" that he was never married, and left no last will or testament yet heard of; that he left real estate in his own right in this county, of the value of $600, more or less; that his heirs were three minor children of a deceased brother; and that the petitioner was a judgment creditor of Scott.

Notice of that petition was given by posting in three public places, as required by law, a notice dated April 7, 1888, signed by the probate judge and in these words: "In the Probate Court 36] *of Thurston County, W. T. — Mary Scott having filed in this court a petition praying for the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o' clock A. M., at the office of the undersigned."

At the time thus appointed, the probate court, after appointing a guardian *ad litem* for said minors, and hearing witnesses, made an order by which, "it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead, and that his surroundings, when last seen (about eight years ago) and the circumstances of that time and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county: Now, therefore, the court find that the said Moses H. Scott is dead to all legal intents and purposes, having died on or about March 25, 1888; and no objections having been filed or made to the said petition of Mary Scott, and the guardian *ad litem* of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of guardianship issue to him upon his filing a good and sufficient bond in the sum of one thousand dollars." Letters of administration were issued to Milroy, and he gave bond accordingly.

On July 16, 1888, the probate court, on the petition of Milroy as administrator, and after the usual notice, and with the consent of the guardian *ad litem* of said minors, made an order, authorizing Milroy as administrator to sell all Scott's real estate. Pursuant to this order, he sold by public auction the land now in question, for the price of $301.50, to Samuel C. Ward. On November 26, 1888, the probate court confirmed the sale, the land was conveyed to Ward, and the purchase money was received by Milroy, and was afterwards applied by him to the payment of a debt of Scott, secured by a mortgage of the land.

*On November 25, 1889, Ward conveyed 37] this land by warranty deed to the defendants, for a consideration paid of $800; and the defendants forthwith took and since retained possession of the land, and made valuable improvements thereon.

At the time of the offer of this evidence, the plaintiff objected to the admission of the proceedings in the probate court, upon the ground that they were absolutely void, because no administration on the estate of a live man could be valid, and the probate court had no jurisdiction to make the orders in question; and objected to the rest of the evidence as irrelevant and immaterial. But the court ruled that, the probate court having passed upon the sufficiency of the petition to give it jurisdiction, and having found that the law presumed Scott to be dead, its proceedings were not absolutely void; and therefore admitted the evidence objected to, and directed a verdict for the defendants, which was returned by the jury and judgment rendered thereon. The plaintiff duly excepted to the rulings and instructions at the trial, and appealed to the supreme court of the state.

In that court, it was argued in his behalf "that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law." But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. St. 309.

The plaintiff sued out this writ of error; and assigned for error, that the probate proceedings, as regarded him and his estate, were without jurisdiction over the subject-matter, and absolutely void; and that the judgment of the superior court, and the judgment of the

supreme court of the state affirming that judgment, deprived him of his property without due process of law, and were contrary to the 14th Amendment of the Constitution of the United States.

Mr. **Nathan S. Porter,** for plaintiff in error:

Unless there is a deceased person's estate over which the probate court's jurisdiction may be invoked, the jurisdiction over a live person's estate is negatived; and if the court assumes to act in such instances, it acts without jurisdiction over the subject-matter, and its proceedings in that behalf are wholly void.

Thomas v. *People*, 107 Ill. 517, 47 Am. Rep. 458; Freem. Void Judicial Sales (3d ed.) § 4.

The pretended administration of Scott's estate, based upon such proceedings, was a violation of the 5th and 14th Amendments to the Constitution of the United States.

The plaintiff, by such decision, was deprived of his property by void process, without due process of law, he never having had his day in court.

The probate court was a court of special and limited jurisdiction. The existence of the jurisdictional facts upon which the proceedings of such courts are based, is always open to inquiry on collateral attack.

Thompson v. *Whitman*, 85 U. S. 18 Wall. 457 (21: 897). *Mutual Ben. L. Ins. Co.* v. *Tisdale*, 91 U. S. 238 (23: 314; *Pennoyer* v. *Neff*, 95 U. S. 714(24: 565); *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 (21: 897); *Griffith* v. *Frazier*, 12 U.S. 8 Cranch, 9 (3:471); *Lavin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf.224; *United States* v. *Payne*, 4 Dill. 387; *Jochumsen* v. *Suffolk Sav. Bank*, 3 Allen, 87; *Melin* v. *Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *Devlin* v. *Com.* 101 Pa. 273, 47 Am. Rep. 710; *Thomas* v. *People*, 107 Ill. 517, 47 Am. Rep. 458; *Swiggart* v. *Harber*, 5 Ill. 364, 39 Am. Dec. 418; *D'Arusment* v. *Jones*, 4 Lea, 251, 40 Am. Rep. 12.

The administration on the estate of a live person is an absolute nullity. The court acts without jurisdiction over the subject-matter in such cases in proceedings to which the supposed decedent is in no sense a party.

1 Woerner, Am. Law of Administration, §§ 209-211; 1 Freem. Judgm. (4th ed.) §§ 120, 319*b*; 2 Black, Judgm, § 640; Freeman, Void Judicial Sales (3d ed.) § 4; Rorer, Judicial Sales (2d ed.) §§ 478, 485, 488; Wash. Code of 1881, §§ 1340, 1388, 1389; Van Fleet, Collateral Attack, p. 644, § 610.

Mr. **Milo A. Root,** for defendants inerror:

Where a probate court upon a petition setting forth jurisdictional facts, finds those facts (including fact of death) to exist, the proceedings will protect all persons depending thereon in good faith, even though the supposed decedent subsequently proved to be alive.

Roderigas v. *East River Sav. Inst.* 63 N. Y. 460, 20 Am. Rep. 555; *Plume* v. *Howard Sav. Inst.* 46 N. J. L. 211, 229; 1 Woerner, Am. Law of Administration, §§ 211, 212.

Property disposed of by authority of a competent court under the statute regulating probate proceedings is not taken without "due process of law."

The probate proceedings on their face affirmatively showed all of the jurisdictional facts. Hence, they were entitled to full credit. Defendants in error relied upon them. Their rights acquired thereby cannot be questioned in any collateral manner.

Rorer, Judicial Sales (2d ed.) § 480 *notes* 1, 8, § 315, *note* 1; *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 157, 169 (7: 381, 385); *United States* v. *Arredondo*, 31 U. S. 6 Pet. 708, 709 (8: 553, 554); *Wight* v. *Wallbaum*, 39 Ill. 555, 563; *Grignon* v. *Astor*, 43 U. S. 2 How. 340, 342 (11: 291, 292); *Iverson* v. *Loberg*, 26 Ill. 181, 182, 79 Am. Dec. 364; *Cockey* v. *Cole*, 28 Md. 286, 92 Am. Dec. 684.

The probate court was a court of record having a seal, and of exclusive original jurisdiction in all matters of probate.

Wash. Code of 1881, § 1299; 1 Bl. Judgm. 284; *Stahl* v. *Mitchell*, 41 Minn. 325; *Fisher* v. *Bassett*, 9 Leigh, 119, 33 Am. Dec. 228; *Delphi* v. *Startzman*, 104 Ind. 346.

The petition alleged that Scott was dead, having been heretofore a resident of Thurston county, and that he left property in said county subject to administration. These were the jurisdictional facts, and all that were necessary to legally set the court in motion. Its acts were therefore *coram judice*.

Iverson v. *Loberg*, *supra*.

The jurisdiction of the probate court in this matter depended upon facts which it was required to ascertain in passing upon the petition for letters, and its decision as to those facts is binding until reversed on appeal or in direct proceedings.

Otis v. *Rio Grande*, 1 Woods, 279; *Dequindre* v. *Williams*, 31 Ind. 444; *Bonsall* v. *Isett*, 14 Iowa, 309; *Roderigas* v. *East River Sav. Inst.* 63 N. Y. 460, 20 Am. Rep. 555; *Merritt* v. *Horne*, 5 Ohio St. 307, 67 Am. Dec. 298; *Colton* v. *Beardsley*, 38 Barb. 30; 1 Herman, Estoppel, § 378.

Proof before the probate court of seven years' absence raised the presumption of Scott's death. That presumption, not being controverted, legally and conclusively established the fact of death in that inquiry.

1 Greenl. Ev. §§ 33, 34; *Miller* v. *Beates*, 3 Serg. & R. 490, 8 Am. Dec. 658; *Whiting* v. *Nicholl*, 46 Ill. 230, 92 Am. Dec. 248.

The finding of the fact of death is conclusive.

Newman v. *Jenkins*, 10 Pick. 515.

When jurisdiction once attaches either in superior or inferior courts, every intendment will be made in favor of the validity of subsequent proceedings, and such proceedings cannot be attacked collaterally.

Pursley v. *Hayes*, 22 Iowa, 13, 92 Am. Dec. 350; *Wight* v. *Wallbaum*, 39 Ill. 555, 563; *Thomas* v. *Le Baron*, 8 Met. 355; *Florentine* v. *Baron*, 69 U. S. 2 Wall. 210, 215 (17: 783, 785); *Schley* v. *Baltimore*, 29 Md. 35.

Probate courts are courts of record having general jurisdiction over a certain class of subjects, and as to those matters as liberal intendments will be made in favor of their jurisdiction as in any court of general jurisdiction.

Von Kettler v. *Johnson*, 57 Ill. 109; *Housh* v. *People*, 66 Ill. 178.

Probate courts are not courts of inferior jurisdiction. Their proceedings impart the same verity and are entitled to as liberal intendments as those of any court.

Johnson v. *Beazley*, 65 Mo. 250. 27 Am. Rep. 276; *Turner* v. *Malone*, 24 S. C. 398; *Moffitt* v. *Moffitt*, 69 Ill. 641; *Key* v. *Vaughn*, 15 Ala. 497; *Dayton* v. *Mintzer*, 22 Minn. 393; *Hanna* v. *Yocum*, 17 Ill. 387; *Luco* v. *Commercial Bank*, 70 Cal. 339; *Caulfield* v. *Sullivan*, 85 N. Y. 153; *McCauley* v. *Harvey*, 49 Cal. 497; *State* v. *Henchman*, 27 Pa. 479; *Shroyer* v. *Richmond*, 16 Ohio St. 455.

Where even a court of inferior jurisdiction passes upon the question of its jurisdiction and finds in its favor, and the jurisdictional facts affirmatively appear, the judgment is conclusive and cannot be attacked collaterally.

Sheldon v. *Wright*, 5 N. Y. 497, 514; *Turner* v. *Waldron*, 24 S. C. 398; *Epping* v. *Robinson*, 21 Fla. 36; *McCurdy* v. *Baughman*, 43 Ohio St. 78; Bigelow, Estoppel (5th ed.) 66.

As to whether a particular probate court has jurisdiction in a certain estate is a question to be determined by that court, and when once determined, is conclusive and not to be questioned in a collateral proceeding.

Bostwick v. *Skinner*, 80 Ill. 147; *Propst* v. *Meadows*, 13 Ill. 157; *Cox* v. *Thomas*, 9 Gratt. 323.

When a court finds that sufficient notice was given, objections to the notice of hearing petition, manner of posting, etc., cannot be heard in a collateral proceeding.

Young v. *Lorain*, 11 Ill. 625, 52 Am. Dec. 463; *Bonsall* v. *Isett*, 14 Iowa, 309; *Hotchkiss* v. *Cutting*, 14 Minn. 537.

It is the policy of the law to sustain judicial sales.

Rorer, Judicial Sales (2d ed.) §§ 486, 487; *Tomlinson* v. *Devore*, 1 Gill, 346.

Granting letters of administration is in the nature of a proceeding *in rem*.

2 Bl. Judgm. § 808; 2 Freem. Judgm. § 608; 1 Herman, Estoppel, § 327; *Satcher* v. *Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Perkins* v. *Fairfield*, 11 Mass. 227; *Robb* v. *Irwin*, 15 Ohio, 689; *Borden* v. *State*, 11 Ark. 519, 54 Am. Dec. 217.

Public policy and necessity require that rights depending upon death of persons long absent and unheard from should be settled by some definite rule, regardless, to some extent, of private interests.

2 Freem. Judgm. 607.

A man is presumed to intend the natural and lawful consequence of his acts, and is responsible therefor. We have these probate proceedings as the legal consequences of his absence. He certainly cannot now be allowed to complain of them and seize this property now made valuable by these respondents.

2 Herman, Estoppel, §§ 736, 752, 759, 760; Bigelow, Estoppel (4th ed.) p. 546, 548, 564, 565; *Stevens* v. *Dennett*, 51 N. H. 324, 331, 336.

Mr. Justice **Gray** delivered the opinion of the court:

The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance, under order of the probate court of the county of Thurston and territory of Washington, by an administrator of his estate, appointed by that court on April 20, upon a petition filed April 2, 1888.

*The form of the order appointing the ad- [39 ministrator is peculiar. By that order, after reciting that the plaintiff disappeared more than seven years before and had not since been seen or heard of by his relatives and acquaintances, and that the circumstances at and immediately after the time when he was last seen, about eight years ago, were such as to give them the belief that he was murdered about that time, the probate court finds that he "is dead to all legal intents and purposes, having died on or about March 25, 1888," that is to say, not at the time of his supposed murder seven or eight years before but within a month before the filing of the petition for administration. The order also, after directing that Milroy be appointed administrator, purports to direct that "letters of guardianship" issue to him upon his giving bond; but this was evidently a clerical error in order, or in the record, for it appears that he received letters of administration and qualified under them.

The fundamental question in the case is whether letters of adminstration upon the estate of a person who is in fact alive have any validity or effect as against him.

By the law of England and America, before the Declaration of Independence, and for almost a century afterwards, the absolute nullity of such letters was treated as beyond dispute.

In *Allen* v. *Dundas*, 8 T. R. 125, in 1789, in which the Court of King's Bench held that payment of a debt due to a deceased person, to an executor who had obtained probate of a forged will, discharged the debtor, notwithstanding the probate was afterwards declared null and void and administration granted to the next of kin, the decision went upon the ground that the probate, being a judicial act of the ecclesiastical court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was argued for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defense. But the court clearly stated the essential distinction between the two cases. *Mr. Justice* Ashurst said: "The case of a probate of a supposed will during the *life of the party may be distin [40 guished from the present; because during his life the ecclesiastical court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead, it is within their jurisdiction." And *Mr. Justice* Buller said: "Then this case was compared to a probate of a supposed will of a living person; but in such a case the ecclesiastical court have no jurisdiction, and the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this; if they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places; but where they have no jurisdiction, their whole proceedings are a nullity." 3 T. R. 129, 130. And such is the law of England to this day. Williams, Exrs. (9th ed.) 478, 1795; Taylor, Ev. (8th ed.) §§ 1677, 1714.

In *Griffith* v. *Frazier*, 12 U. S. 8 Cranch, 9, 23, [3: 471, 475], in 1814, this court, speaking by *Chief Justice* Marshall, said: "To give the

ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person, whose estate is to be committed to the care of others, be dead or in life. It is a breach of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also 41] *Mutual Ben. L. Ins. Co.* v. *Tisdale*, 91 U.S. 238, 243 [23: 314, 317]; *Hegler* v. *Faulkner*, *ante*, p. 653.

The same doctrine has been affirmed by the supreme court of Pennsylvania in a series of cases beginning seventy years ago. *McPherson* v. *Cunliff* (1824) 11 Serg. & R. 422, 430, 14 Am. Dec. 642; *Peebles' App.* (1826) 15 Serg. & R. 39, 42; *Devin* v. *Com.* (1882) 101 Pa. 273, 47 Am. Rep. 710. In the last of those cases, it was held that a grant of letters of administration upon the estate of a person who, having been absent and unheard from for fifteen years, was presumed to be dead, but who as it afterwards appeared, was in fact alive, was absolutely void, and might be impeached collaterally.

The supreme judicial court of Massachusetts, in 1861, upon full consideration, held that an appointment of an administrator of a man who was in fact alive, but had been absent and not heard from for more than seven years, was void, and that payment to such an administrator was no bar to an action brought by the man on his return; and in answer to the suggestion of counsel, that "seven years' absence, upon leaving one's usual home or place of business, without being heard of, authorizes the judge of probate to treat the case as though the party were dead," the court said: "The error consists in this, that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." *Jochumsen* v. *Suffolk Sav. Bank*, 3 Allen, 87, 96. See also *Waters* v. *Stickney*, 12 Allen, 1, 13, 90 Am. Dec. 122; *Day* v. *Floyd*, 130 Mass. 488, 489

The Civil Code of Louisiana, in title 3, "Of Absentees," contains provisions for the appointment of a curator to take care of the property of any person who is absent from or resides out of the state, without having left an attorney therein; and for the putting of his presumptive heirs into provisional possession after he has been absent and not heard from for five, or, if he has left an attorney, seven years, or sooner if *there be strong presumption of [42 his death; and for judicial sale, if necessary, of his movable or personal property, and safe investment of the proceeds; and, upon proof that he has not been heard from for ten years, and has left no known heirs, for sale of his whole property, and payment of the proceeds into the treasury of the state, as in the case of vacant successions; but neither the curator, nor those in provisional possession, can alienate or mortgage his immovables or real estate; and if he returns, at any time, he recovers his whole property, or the proceeds thereof, and a certain proportion of the annual revenues, depending upon the length of his absence. The main object of those provisions, as their careful regulations show, is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead. Accordingly, the supreme court of Louisiana held that the appointment, by a court having jurisdiction of successions of an administrator of the estate of a man represented to be dead, but who was in fact alive at the time of the appointment, was void; and that persons claiming land of his, under a sale by such administrator under order of the court, followed by long possession, could not hold the land against his heirs; and, speaking by *Chief Justice* Manning, said: "The title of Hotchkiss as administrator is null, because he had no authority to make it, and the prescription pleaded does not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time, and which becomes perfect through prescription; but it was void, because the court was without authority to order it." "It is urged, on the part of the defendants, that the decree of the court ordering the sale of the succession property should protect them, and, as the court which thus ordered the sale had jurisdiction of successions, it was not for them to look beyond it. But that is assuming as true that which we know was not true. The owner was not dead. There was no succession." And the court added that *Chief Justice* Marshall, in *Griffith* v. *Frazier*, 12 U. S. 8 Cranch, 9 [3: 471], disposed of that position. *Burns* v. *Van Loan* (1877) 29 La. Ann. 560, 563.

*The absolute nullity of administration [43 granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many other states. *French* v *Frazier* (1832) 7 J. J. Marsh. 425, 427; *State* v. *White* (1846) 29 N. C. 116; *Duncan* v. *Stewart* (1854) 25 Ala. 408, 60 Am. Dec. 527; *Andrews* v. *Avory* (1858) 14 Gratt. 229, 236, 73 Am. Dec. 355; *Moore* v. *Smith* (1858) 11 Rich. L. 569, 73 Am. Dec. 122; *Morgan* v. *Dodge* (1862) 44 N. H. 255, 259, 82 Am. Dec. 213; *Withers* v. *Patterson* (1864) 27 Tex. 491, 497, 86 Am. Dec. 643; *Johnson* v. *Beazley* (1877) 65 Mo. 250, 264, 27 Am. Rep. 276; *Melia* v. *Simmons* (1878) 45 Wis. 334, 30 Am. Rep. 746; *D'Arusement* v. *Jones* (1880) 4 Lea, 251, 40 Am. Rep. 12; *Stevenson* v. *San Francisco City & County*

Super. Ct. (1882) 62 Cal. 60; *Perry* v. *St. Joseph & W. R. Co.* (1882) 29 Kan. 420, 423; *Thomas* v. *People* (1883) 107 Ill. 517, 47 Am. Rep. 458, in which the subject is fully and ably treated.

The only judicial opinions, cited at the bar (except the judgment below in the present case) which tend to support the validity of letters of administration upon the estate of a living person, were delivered in the courts of New York and New Jersey within the last twenty years.

In *Roderigas* v. *East River Sav. Inst.* 63 N. Y. 460, 20 Am. Rep. 555, in 1875, a bare majority of the court of appeals of New York decided that payment of a deposit in a savings institution to an administrator under letters of administration issued in the life time of the depositor was a good defense to an action by an administrator appointed after his death, upon the ground that the statutes of the state of New York made it the duty of the surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was alive or dead, and therefore his determination of that question was conclusive. That decision was much criticized as soon as it appeared, notably by *Chief Justice* Redfield in 15 Am. L. Reg. (N. S.) 212. And in a subsequent case between the same parties in 1879, the same court unanimously reached a different conclusion, because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof —thus making the validity of the letters of ad- 44] ministration to depend *not upon the question whether the man was dead, but upon the question whether the surrogate thought so. *Roderigas* v. *East River Sav. Inst.* 76 N. Y. 316, 32 Am. Rep. 309.

In *Plume* v. *Howard Sav. Inst.* 47 N. J. L. 211, 230, in 1884, which was likewise an action to recover the amount of a deposit in a savings institution, the plaintiff had been appointed by the surrogate administrator of a man who, as the evidence tended to show, had neither drawn out any part of the deposit, nor been heard from, for more than twenty years; an inferior court certified to the supreme court of New Jersey the questions whether payment of the amount to the plaintiff would bar a recovery thereof by the depositor, and whether the plaintiff was entitled to recover; and that court, in giving judgment for the plaintiff, observed, by way of distinguishing the case from the authorities cited for the defendant, that "in most, if not all, of such cases, it was affirmatively shown that the alleged decedent was actually alive at the time of the issuance of letters of administration, while in the present case there is no reason for even surmising such to have been the fact."

The grounds of the judgment of the supreme court of the state of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of *Roderigas* v. *East River Sav. Inst.* 63 N. Y. 460, 20 Am. Rep. 555, and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate; the court saying: "Our statutes only authorize administration of the estate of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Section 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before *said [45 court or in the exercise of its jurisdiction." Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. 309, 317, 318.

After giving to the opinion of the supreme court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.

The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains "nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia* ("*Virginia* v. *Rives*") 100 U. S. 313, 318, 319 [25: 667, 669]; *Ex parte Virginia*, 100 U. S. 339, 346 [25: 676, 679]; *Neal* v. *Delaware*, 103 U. S. 370, 397 [26: 567, 574]. And the first one, as said by *Chief Justice* Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554 [23: 588, 592], repeating the words of *Mr. Justice* Johnson in *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 244 [4: 559, 561]; was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S. 657, 683, 684 [36: 1123, 1133]; *Mobile & O. R. Co.* v. *Tennessee*, *ante*, p. 593.

*No judgment of a court is due process of [46 law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by *Mr. Justice* Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurispru-

dence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." *Pennoyer* v. *Neff*, 95 U. S. 714, 733 [24: 565, 572].

Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The Mary*, 13 U. S. 9 Cranch, 126, 144 [3: 678, 684]; *Hollingsworth* v. *Barbour*, 29 U. S. 4 Pet. 466, 475 [7: 922, 926]; *Pennoyer* v. *Neff*, 95 U. S. 714, 727 [24: 565, 570]. And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a foreign court of admiralty, for instance, in some cases, as observed by *Chief Justice* Marshall, "unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." *Rose* v. *Himely*, 8 U. S. 4 Cranch, 241, 269 [2: 608, 617]. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, al-[47] though the *decree of condemnation recited that it was. *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 [21: 897].

The estate of a person supposed to be dead is not seized or taken into the custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting that petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. *Mutual Ben. L. Ins. Co.* v. *Tisdale*, 91 U. S. 238, 243 [23: 314, 317].

The local law on the subject, contained in the Code of 1881 of the territory of Washington, in force at the time of the proceedings now in question, and since continued in force article 27, section 2, of the constitution of the state, does not appear to us to warrant the conclusion that the probate court is authorized to conclusively decide, as against a living person that he is dead, and his estate therefore subject to be administered and disposed of by the probate court.

On the contrary, that law, in its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the probate court of jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for the payment of his debts. By § 1, the common law of England, so far as not inconsistent with the Constitution and laws of the United States, or with the local law, is made the rule of decision. In the light of the common law, the exclusive original jurisdiction, conferred by § 1299 upon the probate court in the probate of wills and the granting of letters testamentary or of administration, is limited to the estates of persons deceased; and the power conferred by that section to summon and examine on oath, as parties or witnesses, executors and administrators or other persons entrusted with or accountable for the "estate of any deceased person," and "any person touching any matter of controversy before said court or in the exercise of its jurisdiction," is equally limited. By § 1340, wills are to be proved and letters testamentary or of administration are to be granted in the county of *"which de-[48] ceased was a resident," or in which "he may have died," or in which any part of his estate may be, "he having died out of the territory." By § 1388, administration of the estate of "a person dying intestate" is to be granted to relatives, next of kin, or creditors, in a certain order, with a proviso in case the person so entitled or interested neglect "for more than forty days after the death of the intestate" to apply for administration. By § 1389, an application for administration must "set forth the facts essential to giving the court jurisdiction of the case," and state "the names and places of residence of the heirs of the deceased, and that the deceased died without a will;" and by § 1391, notice of such application is to be given by posting in three public places in the county where the court is held a notice "containing the name of the decedent," the name of the applicant, and the time of hearing. And by §§ 1493 and 1494, a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth "the amount of the personal estate that has come to his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seised, the condition and value of the respective lots and portions, the names and ages of the devisees, if any, and of the heirs of the deceased;" and must show that it is necessary to sell real estate "to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration."

Under such a statute, according to the overwhelming weight of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphans' court, or court of the ordinary or the surrogate, does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administrations depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction *in this respect being limited [49] to the estates of deceased persons, they have

no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead and thereupon undertake to dispose of his estate.

A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved or whose estate is sought to be administered, because, without that fact, the court has no jurisdiction over his estate; and not because its decision upon the question whether he is living or dead can in anywise bind or estop him, or deprive, him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes that fact, and is addressed, not to him, but to those who after his death may be interested in his estate, as next of kin, legatees, creditors or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta.*

Next of kin or legatees have no rights in the estate of a living person. His creditors indeed, may, upon proper proceedings, and due notice to him, in a court of law or of equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors nor purchasers can acquire any rights in his property through the action of a court of probate, or of an administrator appointed by that court, dealing, without any notice to him, with his whole estate as if he were dead.

The appointment by the probate court of an administrator of the estate of a living person, without notice to him, being without jurisdiction, and wholly void as against him, all acts of the administrator, whether approved by that court or not, are equally void; the receipt of money by the administrator is no discharge of a debt; and a conveyance of property by the administrator passes no title.

The fact that a person has been absent and [50] not heard from *for seven years may create such a presumption of his death as, if not overcome by other proof, is such prima facie evidence of his death, that the probate court may assume him to be dead and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper pleadings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction, and the administrator no authority; and he is not bound, either by the order appointing the administrator, or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the Circuit Court of the United States for the Southern District of New York in 1880, substantially like *Roderigas* v. *East River Sav. Inst.* as reported in 63 N. Y. 460, 20 Am. Rep. 555, above cited, *Judge* Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the 14th Amendment of the Constitution of the United States. This court concurs in the proposition, there announced, "that it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever, as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel *by a judgment to which he is nei- [51] ther party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty." *Lavin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 24.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him, or to confer any authority upon him, as against the plaintiff.

Judgment reversed, and case remanded to the supreme court of the state of Washington, for further proceedings not inconsistent with this opinion.

JAMES M. CONSTABLE ET AL., *Appts.*
v.
THE NATIONAL STEAMSHIP COMPANY.

(See S. C. Reporter's ed. 51-102.)

Delivery of cargo—exemption from fire—usage of the port—notice of unloading—deviation—change of pier—practice—stipulation in bill of lading—when carrier not an insurer—usage in port of New York—owners of cargo—agreement with collector.

1. The rule that a delivery of the cargo, to discharge the carrier from his liability, must be

NOTE.—*As to bill of lading: how far may be varied, contradicted, or explained by parol evidence; effect of,* see note to King v. The Lady Franklin, 19: 455.

As to consignment; how far consignment of goods vests the property in consignee, and to whom is the carrier responsible for loss or injury, see note to Grove v. Brien, 12: 1142.

From what liability a contract that a common carrier is not to be responsible for loss or damage will exonerate, see note to New Jersey Steam Nav. Co. v. Merchant's Bank of Boston, 12: 465.

made upon the usual wharf of the vessel and actual notice be given to the consignee, if he be known, may be varied by stipulation.

2. The carrier may extend his statutory exemption from fire (under U. S. Rev. Stat. § 4282) to such loss by fire as occurs after the discharge of the cargo, by special stipulation to that effect in the bill of lading.

3. The delivery of goods from a ship must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility.

4. The provision in the bill of lading that the goods shall be taken from alongside by the consignee immediately the vessel is ready to discharge is inconsistent with the idea of personal notice of discharge of cargo.

5. A deviation which is a customary incident of the voyage, and according to the known usage of trade, neither avoids a policy of insurance,

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As to delivery by common carrier by water, see note to Richardson v. Goddard, 16: 412.

As to what is included in baggage for which carrier is responsible, see note to Hannibal & St. J. R. Co. v. Swift, 20: 423.

Delivery of freight by carrier; notice of arrival, liability of carrier after arrival; carrying live stock.

A steamer is not negligent so as to render it liable for the destruction of cotton by fire, in having it piled upon a landing a mile away from the nearest town, which is of but 250 population and on a point with water on both sides within 1 or 2 feet, although it is stored in the open air and there is no watchman employed, in the absence of any reason to anticipate its destruction by fire. Benuitt v. The Guiding Star, 53 Fed. Rep. 936.

A railway company's liability for a carload of lumber burned on one of its side tracks is that of a warehouseman, or bailee, and not of a common carrier, where the intending shipper, after loading the lumber on the car, which was pointed out to him by a freight agent, did not notify the company of its readiness for transportation or of the consignee. Busnight v. Atlantic & N. C. R. Co. 111 N. C. 592.

A carrier's neglect and wrongful detention of goods in its depot after the consignee has come after them and been told that they have not arrived is the proximate cause of their subsequent loss by fire, and makes the carrier liable for the loss as warehouseman, although the fire was not caused by its negligence. East Tennessee, V. & G. R. Co. v. Kelly, 17 L. R. A. 691, 91 Tenn. 699, 708.

A railroad company is not liable as a common carrier for goods destroyed by fire after they are unloaded and stored in its depot, although the consignee had repeatedly called for them and been told that they were not there. East Tennessee, V. & G. R. Co. v. Kelly, *supra*.

A carrier, after attempting to deliver goods consigned by it "C. O. D." and duly notifying the consignor that they are stored in its warehouse because some of the consignees are unknown and cannot be found and others cannot pay until a certain date, thereupon becomes a warehouseman, and is not liable where the goods are thereafter destroyed by the burning of its storehouse without its fault. Hasse v. American Exp. Co. 94 Mich. 153.

Under a contract for carriage a common carrier is an insurer until the transit is ended, and then liable only as warehouseman during such reasonable time as the goods are in its custody awaiting the call of the consignee. Bassett v. Connecticut River R. Co. 145 Mass. 129; Blaisdell v. Connecticut River R. Co. 145 Mass. 132.

On the arrival of the goods at their destination and their discharge from the cars, the liability of the company ceases as carrier and it becomes a bailee for hire. Buddy v. Wabash, St. L. & P. R. Co. 20 Mo. App. 200; Holtzclaw v. Duff, 27 Mo. 395; Cramer v. American Merchants U. Exp. Co. 56 Mo. 524; Gashweiler v. Wabash, St. L. & P. R. Co. 83 Mo. 112, 53 Am. Rep. 558.

Where goods were destroyed by the fire the same night of their arrival the company was held as a carrier, reasonable time for removal not having elapsed. As to other goods, notice having been given to the consignee, and reasonable time having elapsed for their arrival, the company was held liable as a warehouseman, its agent having failed to deliver the goods, on demand, to drayman of the consignee. Louisville & N. R. Co. v. McGuire, 79 Ala. 307.

A carrier's liability terminates whenever the care and custody of the property has passed from the carrier to the owner or some bailee of his own choosing, or whenever the owner has, after its arrival at its destination, had a reasonable opportunity of taking the property into his own charge. Arthur v. St. Paul & D. R. Co. 38 Minn. 95.

A railway company remains liable in the absence of special contract, or proven custom, as common carrier until the consignee has reasonable time, after notice of arrival, to remove the goods. Hedges v. Hudson River R. Co. 49 N. Y. 223; Fenner v. Buffalo & S. L. R. Co. 44 N. Y. 505, 4 Am. Rep. 709; Zinn v. New Jersey SB. Co. 49 N. Y. 442, 10 Am. Rep. 402; McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; McKinney v. Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209.

Reasonable time is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods. L. L. & G. R. Co. v. Maris, 16 Kan. 333; Derosia v. Winona & St. P. R. Co. 18 Minn. 133; Finney v. St. Paul & P. R. Co. First Div. 19 Minn. 251; Wood v. Crocker, 18 Wis. 345, 86 Am. Dec. 773.

Notice of the arrival of goods given by the carrier to the consignee after dark, during one of the winter months, will not require him to call for them before business hours on the following day. Lake Erie & W. R. Co. v. Hatch, 6 Ohio C. C. 230.

Failure of a carrier to deliver goods on demand, after storage, without lawful excuse, is a breach of the carrier's original contract, for which suit may be brought on that contract. Wilson v. California Cent. R. Co. 94 Cal. 166.

Carriers operating a steamboat are liable for willful refusal to deliver at a private landing goods which they have received and receipted for, marked to such landing. Stricker v. Leathers, 13 L. R. A. 600, 68 Miss. 803.

A railroad company with knowledge of the fact is not exempt from liability for damages for failure to deliver freight for the reason that the freight is to be used for an illegal purpose at the point of destination, unless that illegal purpose was the consideration of the contract. Waters v. Richmond & D. R. Co. 110 N. C. 338.

A carrier is liable for loss upon nursery stock by its freezing while it is withheld from the consignee, under an unjustifiable claim for freight in excess of that specified in the bill of lading, issued by a connecting carrier having a right to make a through rate, and which is exhibited to its agent although no tender or demand is made by the consignee. Milton v. Denver & R. G. R. Co. 1 Colo. App. 307.

Notice must be given a consignee upon arrival and storage of goods, in order to reduce the degree of care required of the carrier to that of a warehouseman. Wilson v. California Cent. R. Co. 94 Cal. 166.

nor subjects the carrier to the responsibility of an insurer.

6. Where the pier of the carrier was so blocked that the vessel could not obtain access to it to discharge her cargo it was not a deviation, but a matter of ordinary prudence to select a neighboring pier for that purpose.

7. A practice, if well established, is presumed to have been followed in individual cases, and is accepted as sufficient proof of the fact in question when primary evidence of such fact is wanting.

8. A stipulation in the bill of lading that the carrier should not be liable for a fire happening after unloading the cargo, is reasonable and valid, and exempts the carrier from liability for loss by fire

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It is the duty of a carrier, when the consignee is not ready to accept the freight, to unload and store it subject to his lien for freight charges, and not to subject him to a charge for demurrage by holding the vessel or cars in which it was transported for an unnecessary time. The Reuben Doud, 46 Fed. Rep. 800.

A carrier is not an insurer of livestock, but must provide suitable means for its conveyance, and use all reasonable diligence and forethought in the varying circumstances arising in the business. Coupland v. Housatonic R. Co. 15 L. R. A. 534, 61 Conn. 531.

A contract by a railroad company for the transportation of horses and their delivery at its depot, providing for their storage unless called for, and containing stipulations in relation to unloading which imply that the company will unload them, requires the company to unload the horses at the place of destination, notwithstanding a usage of its agent there, known to the shipper, of requiring owners of animals to unload them. Benson v. Gray, 13 L. R. A. 262, 154 Mass. 391.

A carrier undertaking to transport stock in cars which are not properly constructed for feeding and watering is bound to furnish places where the stock may be unloaded, watered, and fed, without injury, in all kinds of weather, under Tex. Rev. Stat. art. 284. International & G. N. R. Co. v. McRae, 82 Tex. 614.

A railroad company which, upon the arrival of a carload of wheat, notifies the consignees of its arrival, and thereupon places it in a reasonably safe place to await their action, is not liable for its accidental destruction by fire without negligence on its part. Pindell v. St. Louis & H. R. Co. 41 Mo. App. 84.

A carrier is liable for the loss of goods by fire while stored in a warehouse at the place of destination because not called for by the owner, where the carrier, after receiving the goods, had refused to ship them without prepayment of freight, and then promised to hold them during the detention of the owner, but afterwards shipped them without notice to the owner, who did not know of the shipment until after the fire. Campion v. Canadian Pac. R. Co. 11 L. R. A. 128, 43 Fed. Rep. 775.

A carrier of livestock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, or against loss caused by the act of God. Boehl v. Chicago, M. & St. P. R. Co. 44 Minn. 191, 45 Am. & Eng. R. Cas. 351.

The mere fact that cattle shipped died after their delivery at the point of destination is not sufficient to relieve the carrier of liability on the ground that the damage is too remote, if the death of the cattle resulted solely from injuries by reason of the carrier's negligence while transporting them. Missouri Pac. R. Co. v. Edwards, 78 Tex. 307.

The liability of a ship as a common carrier continues for a reasonable time to enable the shipper to claim and take possession of his goods, although he is a passenger on the same ship, and not entitled to notice. Hamburg American Packet Co. v. Gattman, 27 Ill. App. 182.

A carrier cannot be held liable for a safe keeping of goods which it has delivered to a warehouseman, in accordance with its custom, long acquiesced in by the consignee. Black v. Ashley, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428.

The fact that a consignee neglects to accept or receive the goods does not justify the carrier in abandoning them or in negligently exposing them to injury. Scheu v. Benedict, 116 N. Y. 510.

A carrier cannot excuse itself from liability for a wrongful delivery of goods on the ground that such delivery was made through a mistake. Clement v. New York Cent. & H. R. Co. 30 N. Y. S. R. 718.

No subsequent actual levy will relieve from liability for delivering goods to a person not then entitled to them. Nickey v. St. Louis, I. M. & S. R. Co. 35 Mo. App. 79.

Property in transit seized upon legal process sued out against the owner is in the custody of the law, and the carrier is excused from liability for not delivering it. Jewett v. Olsen, 18 Or. 419, 42 Am. & Eng. R. Cas. 435.

If a carrier which gives a bill of lading which makes the goods deliverable upon the order of the consignor delivers them without production of the bill, it does so at its peril. National Bank of Chester v. Atlanta & C. A. L. R. Co. 25 S. C. 216.

A delay of a carrier in transporting perishable goods is not excused by a failure of the consignee to unload the goods on Sunday, by which means they might have been saved. St. Clair v. Chicago, B. & Q. R. Co. 80 Iowa, 304, 42 Am. & Eng. R. Cas. 414.

No notice to a consignee of the arrival of goods is necessary, in order to relieve the carrier from liability except as warehouseman, after a reasonable time. Columbus & W. R. Co. v. Ludden, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404.

A carrier is not liable for the death of a bull calf from overaction and overheating at the time of unloading him from a car, because it was done at the depot platform at which single head of cattle were usually unloaded instead of at the stockyard, where the unruly disposition of the calf, which caused the trouble, was not known until he was taken from the car. Chicago, B. & Q. R. Co. v. Owen, 21 Ill. App. 339.

The owner of goods can maintain no action against the carrier for refusal to deliver them before payment or tender of the freight. Henderson v. 300 Tons of Iron Ore, 38 Fed. Rep. 36.

Where the bill of lading fixes no time for the delivery of the cargo, the delivery is required to be made only with reasonable diligence. Petrie v. Heller, 35 Fed. Rep. 310.

Where a railroad company receives freight for shipment it is not liable for delay in its delivery which is caused by a strike of its employes, accompanied by violence and intimidation of such a character as cannot be overcome by the company or controlled by the civil authorities when called upon. International & G. N. R. Co. v. Tisdale, 4 L. R. A. 545, 74 Tex. 8.

Where a shipper takes a bill of lading for the delivery of goods to himself, the carrier is liable for delivery to another person on his mere presentation of the bill of lading unindorsed. Weyand v. Atchison, T. & S. F. R. Co. 1 L. R. A. 650, 75 Iowa, 573; Douglas v. People's Bank of Kentucky, 86 Ky. 176; Graville v. Manhattan R. Co. 105 N. Y. 525; 59 Am. Rep. 516.

to the cargo, while in his possession, after unloading, where there was no negligence on his part.

9. The discharge of the cargo of a ship at a pier other than the usual one, but near by, is not a deviation, such as to render the carrier an insurer, of the goods so unloading.

10. If any notice of the unloading of a vessel at a pier other than its usual one, is required at all, under the stipulations of the bill of lading, a bulletin posted in the custom house is sufficient notice under the practice and usages of the port of New York.

11. Where the owners of the cargo have taken no steps upon the faith of the cargo being unladen at the carrier's pier, they are not prejudiced by a change of unloading to a neighboring pier.

12. An agreement of the carrier with the collector of customs to pay the consignee the value of goods burned, made as a condition to the collector's permit for the goods to remain upon the wharf forty-eight hours, is not one of which the owners can avail themselves as adding to the obligations of their contract with the carrier, where it is stipulated in the bill of lading that the goods shall be at consignee's risk of fire.

[No. 21.]

Argued March 15, 16, 1893. Reargued April 6, 9, 1894. Decided May 26, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, affirming a decree of the District Court dismissing a libel in admiralty by the firm of Arnold, Constable & Co., against the National Steamship Company, owner of the British Steamship "Egypt," to recover the value of thirty six cases of merchandise carried by said steamer from Liverpool to New York, delivered on the pier of the Inman's Steamship Company, and destroyed upon the same night by fire through the alleged negligence of the respondent. *Affirmed.*

See same case below, 29 Fed. Rep. 184.

Statement by *Mr. Justice* **Brown:**

This was a libel in admiralty by the firm of Arnold, Constable & Co. against the National Steamship Company, owner of the British steamship Egypt, to recover the value of thirty-six cases of merchandise carried by this steamer from Liverpool to New York, delivered on the pier of the Inman Steamship Company on January 31, 1883, and upon the same night destroyed by fire through the alleged negligence of the respondent. The an-[53] swer admitted most of the material *allegations of the libel, but denied all charges of negligence, and also of liability for the loss of the merchandise.

Upon a hearing upon pleadings and proofs in the district court, the libel was dismissed (29 Fed. Rep. 184) and upon appeal to the circuit court, the decree was affirmed.

Libelants thereupon appealed to this court.

The following is an abstract of the facts found by the circuit court, so far as the same are material to the questions involved:

"2. The Egypt was one of a line of steamers owned by the respondent, and plying regularly between Liverpool and New York as common carriers. The steamers of this line arrived as often as from three to eight times per month.

"3. Respondent has run a line of such steamers for over twenty years, and during that time has docked them at a dozen different piers in the city of New York. From 1872 to 1878 it leased the pier No. 36 (old No. 44) North river, and usually docked its vessels there. Subsequently it leased pier No. 39, North river, about six hundred feet north of pier No. 36, and has since usually docked its vessels there, and not elsewhere. The piers between Nos. 35 and 41, North river (excluding pier No. 37) were in 1883 all used by regular English steamship lines. These lines usually dock at their own piers, but not always, and in case of any emergency dock elsewhere, and permit each other, when the necessity arises, to use the exclusive dock of each.

"4. That said goods were shipped at the port of Liverpool on board the Egypt, and were consigned to the libelants at New York under a bill of lading, the material portions of which are cited in the opinion. (A copy is also given in the margin.) The Egypt also

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National Steamship Company, Limited.
Head Office, 21 Water street, Liverpool; New York Office, 69 Broadway.
Liverpool to New York every Wednesday.
[Stamp, six pence.]

Shipped in good order and well conditioned, by Moore & Pringle, in and upon the steamship called the Egypt, whereof —— —— is master for the present voyage, or whoever else may go as master in the said ship, and now lying in the port of Liverpool and bound for New York *via* Queenstown, with liberty to sail with or without pilots, and to tow and assist vessels in all situations and to all ports –

Forty-three cases merchandise (linens and cottons) three cases and five bales (carpets and Dundees) being marked and numbered as in the margin, and to be delivered subject to the following exceptions and conditions, viz: The act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers, or peoples, loss or damage resulting from vermin, rust, sweating, wastage, leakage, breakage, or from rain, spray, coal, or coal dust, insufficiency of strength of packages, inaccuracy, indistinctness, illegibility, or obliteration of marks, numbers, brands, or addresses, or descriptions of goods, injury to wrappers, however caused, or from corruption, frost, decay, stowage, or contact with or smell or evaporation from other goods, or from loss or damage caused by heavy weather or pitching or rolling of the vessel, or from inherent deterioration, risk of lighterage to or from the vessel, transshipment, jettison, explosion, spontaneous combustion, fire before loading in the ship or after unloading, heat, boilers, steam, or steam machinery, including consequences of defects therein or damages thereto, collision, stranding, straining, or other perils of the seas, rivers, steam and steam navigation or land transit of whatsoever nature or kind, and all damage, loss, or injury arising from the perils or matters above mentioned, and whether such perils or matters arise from negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the ship owner. Not accountable for weight, contents, value, length, measure, or quantities or condition of contents, nor for money, documents, gold, silver, bullion, specie, precious metals, jewelry, precious stones, or other highly-valued goods, or beyond the amount of one hundred pounds sterling for any one package, unless bills of lading are signed therefor and the value therein expressed and freight paid accordingly. The National Steamship Company (Limited) or its agents or any of servants are not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for any claims for loss, damage, or detention to goods under through bill of lading where the loss or detention occurs or damage is done whilst the goods are not actually in the possession of the National Steamship Company (Limited) or shipped on board

54] *carried as a considerable portion of her cargo goods shipped by the Inman Company, which had given respondent the option of discharging at its pier, No. 36.

55] *"5. The Egypt arrived on January 31, 1883, and was entered at the custom house at 1.45 o'clock in the afternoon.

56] *"7. For a month or more respondent had been blocked at its own pier, No. 39, in consequence of heavy cargoes, delays of its vessels by westerly winds and ice in the slips, and had been obliged in consequence to discharge two of its vessels at outside uncovered piers.

"8. Respondent's manager had arranged to send the Holland, another ship of respondent's line, and due before the Egypt, to its own pier, No. 39, and to send the Egypt to the Inman pier, No. 36. This arrangement was carried out—the Holland sent to No. 39, and the Egypt to No. 36, there being no room for her at No. 39.

"9. Steamers of regular lines, on their arrival at New York, if their docks are blocked, are not kept in the stream longer than to enable them to get berthed elsewhere. If kept in the stream the consignees make great complaint. It was more costly to dock the Egypt at No. 36, but this was done to secure to the consignees a more prompt discharge and delivery of their goods.

"10. That the Egypt began at about 4.30 o'clock in the evening of said 31st of January, 1883, to discharge her cargo upon the dock, and the thirty-six cases of merchandise belonging to the libelants were landed and discharged there prior to the fire.

57] *"11. Upon the entry at the customhouse of the Egypt there was granted by the collector of customs a general order to unload the steamer, and to send packages to the public store. An application was also immediately made to the collector to allow the unpermitted cargo to remain upon the wharf for forty-eight hours from the time of the granting of the general order. This application was in the following form:

"To W. H. Robertson, Esq., Collector of Customs.

"Request is hereby made to allow the cargo of the steamer Egypt, Sumner, from Liverpool, England, unladen but not permitted to remain upon the wharf for forty-eight hours from the time of granting general order, at the sole risk of the owners of said steamer, who will pay to the consignee or owner the value of such cargo respectively as may be stolen, burned or otherwise lost, and who will also pay all duties which may be in any way lost by so remaining.

"F. J. W. Hurst, Owner,
"Per J. C. Ryor, Attorney."

"Such application was in the form required by the collector, without which permit would not be granted, and the entire cargo would be sent to public store. A permit was granted by the collector upon this application. A special license was also granted to unload the steamship after sunset, and a bond in $20,000 was given for such license, as required by law.

"12. The general order above stated, the special license, the applications and permits, and the agreements and engagements therein contained were the usual and customary ones ordinarily made and granted in such cases, and were made under and by the authority in

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Steamship Company's (Limited) steamer, nor in any case for more than known or invoiced value of the goods, whichever shall be least. Goods of an inflammable, explosive, or otherwise dangerous character, shipped without permission and full disclosure of their nature and contents, may be seized and confiscated or destroyed by the ship owner at any time before delivery without any compensation to the shipper or consignee. In case any part of the within goods cannot be found for delivery during the vessel's stay at the port of destination they are, when found, to be sent back by first steamer at ship's expense, the steamer not to be held liable for any claim for delay or sea risk.

The only condition upon which glass will be carried is that the ship owner shall not be held liable for any breakage which may occur from negligence or any other cause whatever.

The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship.

The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury.

In the event of the said steamer being prevented from any cause from commencing or pursuing this voyage or putting back to Liverpool or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to have liberty to transship the goods by any other steamer to call at any port or ports.

All fines, expenses, losses, or damage which the ship or cargo may incur or suffer on account of incorrect or insufficient marking of the packages or description of their contents shall be paid by the shippers or consignee, as may be required, and the ship owner shall have a lien upon the goods for the payment hereof.

In the case of all goods at through rates to the interior of the United States or Canada the shipper or consignee engages to supply the agent of the steamer at New York (F. W. J. Hurst) with the necessary papers for passing the goods through the custom house by the time of steamer's arrival or to pay all extra expense incurred in default thereof.

Should any existing or future order or restriction of the English emigration commissioners or of the English board of trade authorities prevent the above goods from being conveyed in any passenger vessel the National Steamship Company (Limited) or any of its servants or agents are to be free of any liability for nonfulfillment of their portion of this contract. In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions (whether written or printed) in the like good order and well conditioned, from the ship's tackle (where the ships responsibility shall cease) at the aforesaid port of New York, unto Messrs. Arnold, Constable & Co. or to his or their assigns. Freight and primage for the said goods to be paid at New York as per margin. General average, if any, payable according to New York and Antwerp rules. Freight if payable in Liverpool, to be paid on delivery of the bills of lading in cash, without deduction, vessels lost or not lost. Freight, if payable abroad, to be paid in currency or gold (at the current rate of exchange for banker's sight bills on the day of the steamer's arrival) at consignee's option and before delivery of any portion of the goods specified.

In witness whereof the master or agent of the said ship hath affirmed to two bills of lading, exclusive of the master's copy, all of this tenor and date, one of which bills being accomplished, the other to stand void. A. Titherington.

Dated in Liverpool, 18 January, 1883.

(In the margin of the bill of lading appear the numbers of the various packages of merchandise.)

the bill of lading conferred upon the respondent and upon the collector of the port, and in accordance with the provisions of law and the regulations of the treasury department in that behalf.

"14. Under these several orders and permits, a portion of the cargo of the Egypt, including libelants' merchandise, was discharged and landed upon the Inman dock, where the same was destroyed by fire about 2 o'clock the next morning. That said cargo, including said 58] merchandise belonging to*libelants, was at the time of its destruction aforesaid, in the possession of the respondent, and had never been taken into the possession of the collector of the said port of New York. That said fire broke out without any imputed negligence, and that by it the steamer was also somewhat burned.

"15. That between the arrival of the steamer and the destruction of the merchandise there was not sufficient time in which to enter libelants' goods at the customhouse, pay the duties thereon, and obtain the requisite permits for the removal of the same. That, in fact, no duties were paid upon libelants' goods, and no permits obtained prior to the destruction of the goods by fire; that said goods were at the time of their destruction 'unpermitted' goods.

"16. That upon obtaining the permits referred to, the respondent's custom house broker caused a notice of the time and place of discharge to be posted on the bulletin board of the custom house. It is usual to so post such notices. It is not usual to publish them in the newspapers.

"17. No notice was ever sent to or received by the libelants, nor did they have any actual knowledge of the readiness to discharge, or of the time or place of discharge of the Egypt upon her arrival.

"18. Libelants never knew that the merchandise had been landed and deposited upon the Inman dock, and never had an opportunity of removing such merchandise."

The other facts, so far as they are material, are stated in the opinion of the court.

Upon such facts the circuit court found, as conclusions of law, that the respondent had the right to dock and discharge the Egypt at the Inman pier; that it was exempt from liability for the goods destroyed by fire on such pier; and that there was, by reason of the application to the collector to allow the unpermitted cargo to remain on the wharf, no valid agreement or binding obligation to pay the libelants the value of the goods burned.

Messrs. **Joseph H. Choate,** *Treadwell Cleveland* and *William V. Rowe,* for appellants, on both arguments:

Any departure from the usual course, without legal necessity, renders the ship owner liable as an insurer, and nullifies the stipulations in the bill of lading. And in this instance the effect of the admitted departure from the usual course, by going to a strange dock and omitting to give the usual and necessary notice of the time and place of discharge, was analogous to the effect of a technical deviation.

Hostetter v. *Park,* 137 U. S. 30 (34: 568); *Isaacson* v. *New York Cent. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142; *Maryland Ins. Co.* v. *LeRoy,* 11 U. S. 7 Cranch, 26 (3: 257); Story, Bailm. § 509; Angell, Carriers, § 175; 1 Parsons, Ship. & Adm. 172 *note;* Hutchinson, Carriers (2d ed.) § 190; Carver, Carriers (2d ed.) § 289.

The usual wharf, and the wharf pointed out by the course of trade between the parties, is the only proper place of discharge under the bill of lading. The failure to land there in this instance constitutes, in the absence of notice, a deviation and departure from the usual course, which renders the respondent absolutely liable for all loss.

Story, Bailm. § 545; Angell, Carriers, § 310; *Mordecai* v. *Lindsay* ("*The Eddy*") 72 U. S. 5 Wall. 481 (18: 486); *Salmon Falls Mfg. Co.* v. *The Tangier,* 1 Cliff. 396; *Richmond* v. *Union S. B. Co.* 87 N. Y. 240; *Gibson* v. *Culver,* 17 Wend. 305, 31 Am. Dec. 297.

No usage has been established sanctioning this unusual discharge without notice to consignees.

Hostetter v. *Park,* 137 U. S. 30, 40 (34: 568, 572); *Davis* v. *Garrett,* 6 Bing. 716.

It was negligence on the part of the respondent to land the goods upon the Inman dock—an unusual place—late in the afternoon and during the night, without notice to the consignees.

Richardson v. *Goddard,* 64 U. S. 23 How. 28 (16: 412); *The Santee,* 7 Blatchf. 186.

The provisions of the bill of lading, designed to exempt the carrier from liability, in certain cases of loss caused by fire, have no application to the present case.,

Mordecai v. *Lindsay* ("*The Eddy*") 72 U. S. 5 Wall. 481 (18: 486); *The Santee,* 2 Ben. 519.

There is no express provision of the contract relieving the carrier from the obligation to give notice, and every just implication requires him to give it.

Gleadell v. *Thomson,* 56 N. Y. 194; *Park* v. *Preston,* 108 N. Y. 434; *The E. H. Fittler,* 1 Low. Dec. 114; *The Kate,* 12 Fed. Rep. 883; *The Tybee,* 1 Woods, 361; *Taylor* v. *Liverpool & G. W. SS. Co.* L. R. 9 Q. B. 549, 550; *The Boskenna Bay,* 40 Fed. Rep. 91; *McKinney* v. *Jewett,* 90 N. Y. 267; *Turbell* v. *Royal Exch. Shipping Co.* 110 N. Y. 170.

If these clauses of this bill of lading be deemed to authorize a discharge without notice, and to relieve the ship owner from all liability thereafter, they are unjust and unreasonable, and, therefore, absolutely void.

Peek v. *North Staffordshire R. Co.* 10 H. L. Cas. 473; *Michigan Cent. R. Co.* v. *Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318 (21: 297); *New York Cent. R. Co.* v. *Lockwood,* 84 U. S. 17 Wall. 357 (21: 627); *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 397 (32: 788).

The clause exempting the carrier from all liability for loss "capable of being covered by insurance" is unreasonable and void.

Hart v. *Pennsylvania R. Co.* 112 U. S. 331 (28: 717); *Inman* v. *South Carolina R. Co.* 129 U. S. 128 (32: 612); *The Hadji,* 22 Blatchf. 235.

Mr. **John Chetwood,** for appellee, on first argument:

The discharge at pier No. 36 was good and lawful. Notice was not necessary.

This fire in question, and the damages caused by it, are not within the terms of the applica-

tions to the collector for forty-eight hours' delay in sending goods to public store.

The alleged contract, in the application by the agent of the steamship for a delay of forty-eight hours by the collector before sending to public store cargo which had been discharged on the dock, to pay for such goods as should be burned, is not a maritime contract, and this court has no jurisdiction of any action based upon it.

The Iddo Kimball, 8 Ben. 297.

The Egypt is not liable on this alleged contract *in rem*, whatever view be taken of it.

The Monte A. 12 Fed. Rep. 332; *Vanderwater* v. *Mills*, 60 U. S. 19 How. 91 (15: 557); *The Prince Leopold*, 9 Fed. Rep. 333; *The Thames*, 10 Fed. Rep. 848.

The libelants cannot bring actions upon the alleged contract contained in the application for the forty-eight hours delay.

McPherson v. *Cox*, 86 N. Y. 472.

The clause in the bill of lading "Fire, before loading, in the ship, or after unloading," and the clause "Goods so left by the consignee will be at his . . . . risk of fire . . . ." fully exempt respondent from liability.

Holton, Shipping (ed. 1824), 395; *Harman* v. *Clarke*, 4 Campb. 160; *Harman* v. *Mant*, 4. Campb. 161; *Cope* v. *Cordova*, 1 Rawle, 203; *Unnerchr* v. *The Hindoo*, 1 Fed. Rep. 629; *McKinney* v. *Jewett*, 90 N. Y. 267; *The Tybee*, 1 Woods, 358; *Petrocochino* v. *Bott*, L. R. 9 C. P. 355, 360.

The application to the collector constitutes no contract at all. The collector could not bring an action on it.

Addison, Cont. 9.

Mr. **James C. Carter,** for appellee, on reargument.

59] **Mr. Justice* **Brown** delivered the opinion of the court

The case involves the liability of a steamship company for the loss by fire of a consignment of goods unloaded without personal notice to the consignee upon the wharf of the company other than the one owning the vessel.

By the Limited Liability Act, Rev. Stat. § 4282, no ship owner is liable to answer for the loss of any merchandise shipped upon his vessel by reason of any fire "happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner," and in the case of *National Steam Nav. Co.* v. *Dyer* ("*The Scotland*") 105 U. S. 25 [26: 1001], the exemptions and limitations of this act were held to apply to foreign as well as domestic vessels. A similar exemption from fire happening without the "fault or privity" of the owner is contained in the British Merchants' Shipping Act of 1854, section 503. The bill of lading in this case also contains an exemption of liability from loss caused by fire "before loading in the ship or after unloading." There is no comma after the word "loading" or "ship," but obviously it should be read as if there were. In view of the fact that, under no aspect of the case, would the owner of the vessel be liable for the consequences of any fire occurring on board of such vessel without his fault, and that an attempt is made in this case to impose the liability, not of a warehouseman, but of a common carrier and insurer against fire, after the contract of carriage had been fully performed, it would seem that such liability ought not to be raised out of the contract in this case except upon clear evidence, and for the most cogent reasons. The liability of the company for the goods while upon the wharf is a mere incident to its liability for them while upon the ship, and if the liability is more extensive under the incidental contract of storage than it was under the principal contract of carriage, it is an exception to the general rule that the incidental liability of a contracting party is not broader than his liability under the principal contract.

*Two facts are mainly relied upon in [60 this case for holding the respondent company to the liabilities of an insurer:

1. That the Egypt did not unload at her usual wharf but at what is known as the Inman pier, and that no actual notice was given to the libelants of such unloading.

2. In the application to the collector to allow the unpermitted cargo of the steamer to remain upon the wharf for forty-eight hours there was a stipulation that it should be "at the sole risk of owners of said steamer."

We shall proceed to dispose of these questions in their order.

1. As bearing upon the liability of the vessel after the cargo is unladen the following exemptions in the bill of lading are pertinent and necessary to be considered:

(1) "Fire before loading in the ship, or after unloading.

(2) "The National Steamship Company (Limited) or its agents or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance.

(3) "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury, in the warehouse provided for that purpose, or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship."

It is admitted that, under what may be termed the common law of the sea, a delivery of the cargo to discharge the carrier from his liability must be made upon the usual wharf of the vessel and actual notice be given to the consignee, if he be known. This was the ruling of this court in the case of *Richardson* v. *Goddard*, 64 U. S. 23 How. 28, 39 [16: 412, 416], and *Mordecai* v. *Lindsay* ("*The Eddy*"), 72 U. S. 5 Wall. 481 [18: 486], and is in conformity with the great weight of English and American authority. *Hyde* v. *Trent. & M. Nav. Co.* 5 T. R. 389; *Gibson* v. *Culver*, 17 Wend. 305, 31 Am. Dec. 297; 1 Parsons, Shipping, 222.

*This rule, however, originated prior to [61 the era of steam navigation, when a voyage from Liverpool to New York rarely consumed less than three weeks; when the time of the arrival of the vessel could not be forecast wth any

accuracy; when crews were discharged immediately upon her arrival; and the vessel was usually detained several weeks in the slow and laborious process of unloading, taking on cargo, and refitting before setting out upon another voyage. Such methods of delivery were found wholly inadequate to the necessities of modern commerce, and particularly to the comparatively short voyages of the large transatlantic passenger steamers, which are kept permanently equipped with large and expensive crews, at a cost of several hundred dollars per day, and in order to be profitably employed must be kept in almost constant motion. In such cases the consignees of the cargo may be numbered by the hundreds, and a requirement that each consignee shall have a personal notice of the unloading of the cargo, in order to relieve the carrier from responsibility would necessitate delays which might consume the entire profits of the voyage. It is of the utmost importance that the discharge of the cargo shall begin as soon as possible after the vessel arrives at her wharf, and if the consignee may sometimes be spurred to greater diligence, or put to some inconvenience in removing his consignments, he receives a compensation in the lower rate of freight the vessel is thereby enabled to charge.

To obviate the difficulties attendant upon the ancient method of discharging, the regular steamship lines are in the habit of providing themselves with wharves having covered warehouses, into which the cargo is discharged, and of inserting in their bills of lading stipulations similar to those found in this case, viz, that the responsibility of the vessel shall cease after the goods are discharged, and thus of extending their statutory exemption from fire to such as may occur before loading or after unloading. In view of the fact that the piers of the regular steamship lines are well known to every importer, and the day of arrival of each steamer may be predicted almost to a certainty, we perceive nothing unreasonable in this stipulation. *An importer, hav- [62 ing reason to anticipate the arrival of goods by a certain steamer, by putting himself in communication with the office of the company, may usually secure a notice of several hours of the actual arrival of the vessel at her wharf. It seems, too, by the sixteenth finding in this case that, in lieu of a personal notice to each consignee or of publication through the papers, a custom has grown up in the port of New York of posting on a bulletin board in the custom house a notice of the time and place of discharge. Taking all these facts into consideration, we see no impropriety in the company limiting itself to the liability of a warehouseman with respect to the goods so discharged into his own warehouse. Indeed as applied to the usual wharf of the steamer, we do not understand it to be seriously questioned in this case. In fact, an argument appears to have been made in the district court to the effect that the Limited Liability Act applied to the fire to exonorate the company, but the court held, and doubtless properly, that a fire originating upon the dock could not be said to have "happened to the ship" within the meaning of section 4282, even though the fire extended to and did some damage to the vessel. *Morewood* v. *Pollok*, 1 El. & Bl. 743. No good reason, however, is perceived why, if a wise policy requires the exemption of the carrier from a fire occurring without his fault, such exemption should not extend to any such fire while the goods are in his possession and under his control, or at any time before actual delivery to the consignee. But, however this may be, there can be no question of the power of the carrier to extend his statutory exemption from fire to such as occur after the discharge of the cargo, by special stipulation to that effect in the bill of lading. Thus in *York Mfg. Co.* v. *Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107 [18: 170], it was held that the common law liability of a carrier might be limited by special contract with the owner, and that the exemption in a bill of lading from losses by fire was sufficient to protect the carrier, if the fire were not occasioned by any want of due care on his part. See also *New Jersey Steam Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How. 344, 382 [12: 465. 482]; *Michigan Cent. R. Co.* v. *Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318 [21: 297]; *Phoenix Ins. Co.* v. *Erie & W. Transp. Co.* 117 U. S. 312 [29: 873]. *Indeed, a general exemption from the con- [63 sequences of fire has been held to extend not only to fires happening on board the vessel, but to fires occurring to the goods while on the wharf awaiting transportation. *Scott* v. *Baltimore C. & R. S. B. Co.* 19 Fed. Rep. 56.

No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility. Thus in *Dixon* v. *Dunham*, 14 Ill. 324, it was said that "it was competent for the defendant," the carrier, "to set up a custom or usage in the port of Chicago, that goods should be delivered at the wharf selected by the master of the vessel, and that consignees should receive their goods there, with the averment of knowledge of such a custom in the plaintiff, and that this contract was made in accordance with it." So also in *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314, *Chief Justice* Tindall said: "We know of no general rule of law which governs the delivery of a bill of goods under a bill of lading, where such delivery is not expressly according to the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery." See also *Farmers & M. Bank* v. *Champlain Transp. Co.* 23 Vt. 186, 56 Am. Dec. 68; *Salmon Falls Mfg. Co.* v. *The Tangier*, 1 Cliff. 396; *Richmond* v. *Union S. B. Co.* 87 N. Y. 240; *Gibson* v. *Culver*, 17 Wend. 305, 31 Am. Dec. 297; *The Boston*, 1 Low. Dec. 464. In *The Sultana* v. *Chapman*, 5 Wis. 454, there was a delivery at a place where the court held the boat had no right to leave the goods, and they were there destroyed. Under such circumstances, notwithstanding the exception in the bill of lading, the carrier was held not to be exempted from liability for the loss. "He had no right," said the court, "to place these goods where he did; and having done so, and a loss having ensued, he must be held responsible for it, as being occasioned by his own negligence or misconduct."

While there is no express provision in the bill of landing in this case dispensing with

notice to the consignee, the provision that the goods shall be taken from alongside by the consignee immediately the vessel is ready to dis-
64] charge is inconsistent *with the idea of personal notice, since such a notice would necessitate a delay of one or two days in the discharge of the cargo, while the notices were being given. If the goods were not taken by the consignee the carrier was authorized to deposit them at the risk of the consignee "in the warehouse provided for the purpose," meaning, of course, the warehouse upon the pier. His obligation to give notice, if any such existed, must under the terms of the bill of lading, allowing an immediate discharge of the cargo, be cotemporaneous with such discharge, and too late to be of any avail to the consignee. Such notice appears to have been given in this case, as the libelants' broker in his testimony, to which we have been referred, says: "The invoice and bills of lading were sent down to me on the 31st of January, and the entries made out, . . . and lodged in the custom house at twenty-five minutes past two." In *Gleadell* v. *Thomson*, 56 N. Y. 194, it was said of a similar stipulation in a bill of lading, that the goods should be taken from alongside by the consignee, immediately the vessel is ready to discharge: "The landing of the goods upon the pier of the plaintiff, under the circumstances of this case, did not, we think, change his relation to the goods, and divest him of his custody of them as a carrier. The privilege to make this disposition of them was secured to him by the bill of lading, unless the consignee was ready to take the goods from the ship whenever it was ready to discharge. It was not incumbent upon the plaintiff to give notice of a readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier. They, however, remained after such deposit in his custody as carrier, subject to the modified responsibility, created by the contract, until after notice had been given to the consignees of their arrival, and a reasonable time had elapsed for their removal. Meanwhile the defendants assumed the risk of 'fire, loss or injury' to the goods, according to the contract, but the language used did not exempt the plaintiff from liability for an injury resulting from his own negligence."

The cases relied upon by the libelants do not support their contention. In the case of *The*
65] *Santee*, 7 Blatchf. 186, *a bill of lading covering a shipment of cotton, contained a clause that the cotton should be at the risk of the consignee as soon as delivered from the tackles of the vessel at the port of destination. It appeared that the consignee had proper notice of the arrival of the vessel, and of her discharge, and an opportunity by reasonable diligence to identify his cotton and receive it. The cotton was placed safely on the wharf, when discharged, and a portion of it, belonging to the libelants, was removed by some other person, but was not actually delivered by the agents of the vessel to such other party. It was held that the vessel was not liable for the loss. It is true that, in delivering the opinion, it was said the carrier was still bound to give suitable information to the consignees, to enable them to attend and receive the goods, and themselves assume and exercise that care and responsibility of which the carrier was to be relieved. But notice in this case was admitted to have been given, and the only question was whether under the bill of lading the carrier was liable after the cotton was discharged, and it was held that he was not. Nor was he "bound to watch the property after it passed beyond the vessel's tackles, to see that it was kept safe or protected from removal through mistake or design, by third persons."

In *Collins* v. *Burns*, 63 N. Y. 1, the bill of lading contained a stipulation much like the one under consideration, and it was held that the clause providing for immediate discharge in the warehouse at the risk of the consignee of fire, loss, or injury, did not exonerate the carrier for delivering goods to the wrong party, or to a drayman who was not authorized to receive them. The court of appeals, however, held expressely that the liability of defendants was that of warehousemen, and, therefore, that they were responsible only for negligence.

So in *Tarbell* v. *Royal Exch. Shipping Co.* 110 N. Y. 170, the goods were discharged from the ship and deposited on a proper wharf, and after the consignees had had three full days to remove them, it was discovered that a part had been removed from the wharf by some one without the authority of the consignees. It was held that, as the loss occurred after the lapse of a reasonable time for removal *of the [66
goods by the consignees, after notice of arrival, defendant was not liable as a common carrier, but that the defendant was negligent in omitting to take ordinary care of the goods, and allowing them to be removed without taking receipts. It was expressly held, however, that the liability of defendant as carrier terminated with the delivery of the goods upon the wharf, and that its liability arose from its negligence in delivering them to the wrong person.

It is claimed, however, that the berthing of this ship at a pier other than her own was in legal effect a deviation, which rendered the company an insurer of the cargo discharged at such pier without notice, until its actual delivery to the consignee. In the law maritime a deviation is defined as a "voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the ship insured." Bouvier, Law Dict. 417; *Hostetter* v. *Park*, 137 U. S. 30, 40 [34: 568,-572]; *Davis* v. *Garrett*, 6 Bing. 716; *Williams* v. *Grant*, 1 Conn. 487, 7 Am. Dec. 235, as, for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island, and lost her cargo in a storm (*Crosby* v. *Fitch*, 12 Conn. 410, 31 Am. Dec. 745) or where a carrier is guilty of unnecessary delay in pursuing a voyage, or in the transportation of goods by rail. *Michaels* v. *New York Cent. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415. But, if such deviation be a customary incident of the voyage, and according to the known usage of trade, it neither avoids a policy of insurance, nor subjects the carrier to the responsibility of an insurer. *Oliver* v. *Maryland Ins. Co.* 11 U. S. 7 Cranch, 487 [3: 414]; *Columbian Ins. Co.* v. *Catlett*, 25 U. S. 12 Wheat. 383 [6:

664]. In *Hostetter* v. *Park*, 137 U. S. 30 [34: 568], it was held to be no deviation, in the Pittsburg and New Orleans barge trade, to land and tie up a tow of barges, and detach from the tow such barge or barges as were designated to take on cargo *en route*, and to tow the same to the several points where the cargo might be stored, it having been shown that such delays were within the general and established usage of the trade. So, in *Gracie* v. *Marine Ins. Co.* 12 U. S. 8 Cranch, 75 [3: 492], it was held to be no deviation to land goods at a lazaretto or quarantine station, if the usage of the trade permitted it, though by the bill of lading the goods were "to be safely 67] *landed at Leghorn." See also *Phelps* v. *Hill* (1891) 1 Q. B. 605.

In this connection the findings are:

(3.) That the regular English steamship lines usually dock at their own piers, but not always, and in case of any emergency dock elsewhere, and permit each other, when the necessity arises, to use the exclusive dock of each. (7.) That for a month or more before January 31, 1883, respondent had been blocked up at its own pier, No. 39, in consequence of heavy cargoes, delays of its vessels by westerly winds and ice in the slips, and had, in consequence, been obliged to discharge two of its vessels at outside uncovered piers. (9.) That steamers of regular lines, on their arrival at the port of New York, if their docks are blocked, are not kept in the stream longer than to enable them to berth elsewhere. If kept in the stream consignors make great complaint. It was more costly to dock the Egypt at pier No. 36, but it was done to secure to the consignees a more prompt discharge and delivery of their goods. (26.) That pier No. 36 North river, was a fit and proper place to discharge the steamship Egypt at the time in question and to discharge from her libelants' goods.

If it be true that the pier of the respondent company was so blocked that the Egypt could not obtain access to it to discharge her cargo it was, so far from being a deviation, a matter of ordinary prudence to select a neighboring pier for that purpose. Had this cargo been discharged at a remote, unusual, or inaccessible spot, or upon an uncovered pier, so that it was exposed to the weather or to any unusual hazard, and a loss had been incurred, we should not have hesitated to hold the carrier liable, notwithstanding the stipulation against the consequence of negligence in its bill of lading. *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 359 [21: 634]; *The Aline*, 19 Fed. Rep. 875; *The Boskenna Bay*, 22 Fed. Rep. 662. No such question, however, is presented here. While the libel alleges that the loss occurred through the negligence of the respondent, no effort was made to prove this, and there is no finding that such was the case. Indeed, there is nothing to indicate that the Inman pier was not a perfectly proper place to 68] *discharge a cargo, or that it was not equipped with the usual appliances for the extinguishment of fires.

It is insisted, however, that libelants had a right to suppose that the Egypt would discharge her cargo at her regular pier, and that, while they might be bound to take notice of that fact, they were entitled, if she selected another pier, to a personal notice of the time and place of delivery, that an opportunity might be given them to be present and receive their consignments. But if, under the usages of trade or the necessities of the particular case, it was allowable and proper for the respondent to select another pier for the discharge of its cargo, we do not understand that its obligation to its consignees was thereby increased or modified, at least unless the libelants can show that they were actually prejudiced by such change. Practically the same questions are involved, viz. whether if she had discharged at her own wharf, the company was bound to give notice before it could relieve itself of its responsibility. The real question still is whether, if she had gone to her own wharf, and the fire had occurred under the same circumstances, the vessel would have been liable for the loss. It was for the mutual advantage of the ship and the consignees that the cargo should be unloaded at the earliest possible moment—the ship, that she might discharge herself of responsibility and take on her return cargo—the consignees, that they might secure their goods as soon as possible. The North river piers in that neighborhood were all used by steamers engaged in the Liverpool trade. The pier selected was only six hundred feet from the regular pier of the line, and inquiry at that pier would doubtless have apprised libelants, or their agent, where the Egypt was actually discharging her cargo.

In addition to this there is a finding that, upon obtaining the permits for the immediate unloading of the cargo, the respondent's customhouse broker caused a notice of the time and place of discharge to be posted on a bulletin board in the customhouse; that it is usual to post such notice, and is not usual to publish them in the newspapers. It is true there was an exception taken to this finding upon the ground that there *was no evidence in [69 support of it. The testimony, however, of the witness Ryer, the customhouse broker, was to the effect that he attended to getting out the usual papers for the respondent company to allow the discharge and to passing all their steamers through the customhouse; that, on the arrival of the Egypt, the captain brought the manifest, took the usual oath, and made out applications for the usual permits to land goods, discharge at night, and to allow the goods to remain on the wharf. "We get the permit taken out, signed by the naval officer and collector, and after the permits are all taken out, we usually post a notice where the vessel will discharge (giving copy of notice). I have no reason to suppose the notice was not posted in this case. It is done in every case. I am not positive whether it was done in this case, but it is a part of the routine of entering a vessel to do so. I have no doubt it was done." The witness evidently had no definite recollection of this particular notice, but he had no doubt that he pursued his usual course in posting it. Respondent's agent also testifies that it was always usual to put up such notice at the customhouse. The customhouse broker for the libelants, Arnold, Constable & Company, testified in this connection that the

invoice and bills of lading of the Egypt were sent down to him on January 31; that the entries were made and lodged in the customhouse at twenty-five minutes past two. "I knew where the board is where they put up notices of arrivals and the steamer's discharge. . . . That is around the corner going into the cashier's office. . . . It isn't any great distance. . . . I never look at that unless I want to find out where a vessel was discharged, a strange vessel; possibly I might look then; I have not looked there for years." While this testimony is not direct and positive to the fact sought to be proven, it creates, when aided by the ordinary presumption arising from the course of business, a strong probability that the notice was posted. The practice, even of a private office, if well established, is presumed to have been followed in individual cases, and is accepted as sufficient proof of the fact in question when primary evidence of such 70] fact is wanting. 1 Greenl. Ev. *§ 40; *Nicholls* v. *Webb*, 21 U. S. 8 Wheat. 326 [5: 628]; *Price* v. *Torrington*, 1 Salk. 285; *Champneys* v. *Peck*, 1 Stark. 404; *Pritt* v. *Fairclough*, 3 Campb. 305; *Doe* v. *Turford*, 3 Barn. & Ad. 890, 895; *Dana* v. *Kemble*, 19 Pick. 112. We think the conclusion of the court was justified by the evidence in this particular.

But, even supposing that actual notice had been given, it could not have been given before the arrival of the ship, and the names of the consignees were known, and it would then have been too late for the libelants to take their goods away. The findings are that the Egypt was entered at the customhouse at forty five minutes past one in the afternoon; that she began to discharge her cargo at half-past four, and that libelants' merchandise was discharged prior to the fire. (15) And that between the time of the arrival of the steamer and the destruction of the merchandise, there was not sufficient time in which to enter the libelants' goods at the customhouse, pay the duties thereon, and obtain the requisite permits for the removal of the same. If, then, it be true that libelants could not have removed their goods before the fire, it is difficult to see how the want of a notice could have contributed to the loss. We are clearly of the opinion that, under the custom of the port and exigencies of the service, there was no obligation to delay the discharge of the cargo until notice could be given, and a reasonable time had elapsed before the goods could be taken away. While the nineteenth finding is to the effect that libelants had, before this consignment, received from the respondent company six other consignments under bills of lading in the same form, all of which were landed and discharged on their own pier, there is nothing to indicate that libelants took any steps whatever upon the faith of such previous practice, made any inquiries as to when the Egypt was expected, or at what pier she would discharge her cargo. Indeed, while their own broker was at the customhouse attending to the entry of these goods, he did not even take the trouble to look at the bulletin to see where the Egypt was being discharged. If libelants had shown that, relying upon the previous practice, they were ready at pier No. 36 to receive the cargo, 71] or were misled by *the discharge at pier No. 39, they would have shown a much stronger title to recover. The inference is irresistible that, even if the Egypt had discharged at her own wharf, they would not have been there to receive, and could not have received their consignments, which would have been stored in the company's warehouse, and exposed to the same danger of fire—in other words, the delivery at the Inman dock did not in any legal sense contribute to the loss. There was no stipulation in the bill of lading that the Egypt would unload at No. 36, from which a duty to give notice, might be implied, if she were compelled to select another pier.

Upon the facts of this case exhibiting a necessity for a discharge elsewhere than at her own pier, and in the absence of any evidence that libelants were prejudiced by the failure of the Egypt to discharge at her usual wharf, we think there was no breach of duty on the part of respondent in this particular.

2. Another serious question, however, is presented by the proviso in the application to allow the unpermitted cargo to remain upon the wharf, viz, that it should remain "at the sole risk of owners of said steamer, who will pay the consignee or owner the value of such cargo respectively as may be stolen, burned or otherwise lost, and who will also pay all duties on cargo which may be in any way lost by so remaining."

It seems that upon the arrival of a transatlantic steamer, it is usual to apply for and obtain a general order to allow to be landed and sent to the public store (not the warehouse on the wharf) all packages for which no special permit or order shall have been received; also, a permit to allow such portion of the cargo as is unladen, but not permitted, to remain upon the wharf for forty-eight hours from the time of the granting of the above general order, at the expiration of which time they are sent to the proper general order store; and also a special license to permit the cargo to be unladen at night. These orders, licenses, and permits are granted in pursuance of the general regulations of the Treasury Department.

Granting that the request made by the company is, upon *its face, broad enough to [72 impose upon the company the responsibility for goods lost by fire, it must be construed in connection with the following stipulation upon the same subject in the bill of lading, viz: "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge. . . . The collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship. The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss or injury."

Some criticism is made upon the words "so left by consignee," libelants insisting that the word "left" implies a voluntary leaving of the cargo upon the wharf after notice of the discharge of the same has been received by the consignee. We are not inclined, however, to affix to it such a technical meaning. In view of the fact that the object of the stipulation was evidently to exempt the carrier from responsibility for fire occurring at any

time after the discharge of the cargo, and particularly during the forty-eight hours they were permitted to remain upon the wharf, which forty-eight hours, under the terms of the permit, began to run from the time of the general order to unload was granted, we think it clear that it was intended to apply during this time, whether the goods were technically "left" by the consignee or not, and that the proviso should be interpreted as if it read: "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so remaining will be at consignee's risk of fire, loss, or injury." This permission, though granted at the request of the ship owner and primarily for his benefit, is really of more value to the consignees, since a convenient opportunity is there afforded them to examine their goods, and they are saved the expense of cartage to a bonded warehouse and storage therein.

The question presented then is substantially this: A and B agree that in a certain contingency A shall assume the risk of the loss of his goods by fire. Subsequently B agrees with [73]C *that, in precisely the same contingency, he shall be responsible to A for the loss of the same goods. Waiving the question whether this means any more than that he shall be responsible so far as C is concerned, does the latter contract supersede the earlier? Unquestionably it would, if it were between the same parties. In this case, however, the first contract was made by B (the respondent) in full contemplation of the fact that it would be obliged to enter into the second, and for the special purpose of providing against it. Now, to say that, having entered into the first contract, knowing that it would have to enter into a second one wholly inconsistent with the first and intending to be bound by it, is scarcely creditable to the intelligence of its agent. Libelants, too, though parties, or rather privies to the first contract, were not parties to the second, and so far as it appears did not even know that it was or would be entered into, except as they may have known a general usage to protect officers in this manner. The position of the parties had not changed in the interval; no new consideration moved from the libelants; and while the contract was nominally made for their benefit, this gift of the collector was purely a voluntary one. Indeed, the contract seems really to have been for the protection of the collector himself. Under these circumstances it is clearly the duty of this court to harmonize these contracts, if it be possible to do so. It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party. *Hendricks* v. *Lindsay*, 93 U. S. 143 [23:855]; *Second Nat. Bank of St. Louis* v. *Grand Lodge F. & A. M.* 98 U. S. 123 [25:75]; *Keller* v. *Ashford*, 133 U. S. 610 [33:667]; *Cragin* v. *Lovell*, 109 U. S. 194 [27:903]; *Willard* v. *Wood*, 135 U. S. 309 [34:210]. No case has gone so far as to hold that, where the person for whose benefit the contract is made, has himself or by his privy in estate entered into a contract inconsistent with this, he may repudiate such prior contract, and claim the benefit of the second simply because it has become for his interest to do so. We know of no principle which authorizes one party to an agreement to vary it, even against his own interest without the consent of the other. As observed by the court of appeals of New York, in *Simson* v. *Brown*, 68 N. Y. 355: "It is not *every promise [74] made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit *as its object* and he must be the party intended to be benefited." See also *Second Nat. Bank of St. Louis* v. *Grand Lodge F. & A. M.* 98 U. S. 123 [25:75]; *Garnsey* v. *Rogers*, 47 N. Y. 233, 7 Am. Rep. 440.

The principle above announced was still further limited by the court of appeals in *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195, in which it is said that, to give a third party, who may derive a benefit from the performance of a promise an action, there must be—*first*, an intent by the promisor to secure some benefit to the third party; and, *second*, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally."

It is necessary to a correct understanding of this contract to examine somewhat in detail the circumstances under which it was entered into, and the authority under which the collector acted in prescribing its terms. By Revised Statutes, sections 2867 and 2869, general authority is given to the collector to authorize the unloading of vessels arriving within the limits of their collection districts, and to grant a permit to land the merchandise. By section 2966 the collector is authorized to take possession of such merchandise, and deposit the same in bonded warehouses, and by section 2969 all merchandise of which the collector shall take possession under these provisions shall be kept with due and reasonable care at the charge and risk of the owner. By section 2871 the collector "upon or after the issuing of a general order" (for the unloading of the cargo) "shall grant, upon proper application therefor, a special license to unlade the cargo of said vessel at night, that is to say, between sunset and sunrise," upon a bond of indemnity being given, etc., "and any liability of the master or owner of any such steamship to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license or of any general order, but such liability *shall continue until the [75] merchandise is properly removed from the dock whereon the same may be landed." There is certainly nothing here which contemplates that the owner of the vessel shall enter into any independent obligation, assuming new liabilities or expanding in any way existing liabilities, to the consignee. The object of the statute is clearly to preserve the *status quo;* to continue such liability as already exists and to preclude the ship owner from claiming that, by the action of the collector, his liability to the owner of the merchandise is impaired or restricted. In the

language of the statute, any previous liability "shall not be affected," "but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed." It is true that no mention is here made of the power of the collector to allow the unpermitted cargo to remain forty-eight hours upon the wharf, and no such power is expressly given; but by section 2989 "the Secretary of the Treasury may from time to time establish such rules and regulations, *not inconsistent with law*, for the due execution of the provisions of this chapter, and to secure a just accountability under the same as he may deem to be expedient and necessary." While there is nothing in the statute allowing any fixed time to elapse between the unlading of the goods and their removal to a bonded warehouse, the statute does not prohibit such time being allowed, and as some interval must necessarily elapse for the examination and appraisement of the goods designed for immediate delivery to the importer—duties which can most readily be performed while the goods are yet upon the wharf—and as it is for the mutual benefit of the government and consignee to allow some such interval of time to elapse, the Secretary of the Treasury is doubtless vested with a certain discretion in that particular, under the power given him by section 2989, and also by section 251, which authorizes him to make rules and regulations not inconsistent with law in carrying out the provisions of law relating to raising revenue from imports.

In pursuance of this authority the Secretary of the Treasury, on May 5, 1877, adopted certain regulations concerning the discharge of steamships, of which the following only is mater-
76] ial: *"Goods will be delivered from the docks by the inspector as fast as permits therefor are presented, and such as are discharged for which no delivery permit has been received will be sent to the general order store. The collector may, at the request of the master, agent, or owner of the vessel, allow goods landed, but not 'permitted' to remain on the docks, at the sole risk of the owner of the vessel, not longer than forty-eight hours from the time of their discharge, upon the production of evidence that the owner of the vessel assumes the risk of the goods allowed to remain and agrees to pay the duties on any goods which may be lost by so remaining. This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods that may be lost, and must be signed by the owner of the vessel or his agent duly authorized. The consent of the collector thereto must also be granted in writing. At the expiration of the forty-eight hours, no permit having been received for their delivery by the inspector, the collector shall send the goods to the general order store to have the same weighed or gauged, if required."

In this connection it must be borne in mind that the Secretary of the Treasury is an officer of the government; that his powers are limited by law; that his duty is to protect the revenues of the government and to prevent smuggling or other illegal practices, whereby the government may be defrauded of its revenue; and that he owes no duty to individuals beyond seeing that their rights are not prejudiced any further than is necessary by the action of the customs officers. He is neither the agent of the vessel nor of the importer, but stands between them, representing only the government and charged only with the collection of its revenue. The above regulation, when carefully examined, is consistent with this view. It requires the collector to allow the goods to remain upon the docks "at the sole risk of the owner of the vessel," and requires the latter to assume "the risk of the goods allowed to remain," and to agree "to pay the duty on any goods which may be lost by so remaining." It is obvious *from the [77
context that the risk referred to is the risk as between the owner of the vessel and the government, viz, the risk of paying duties upon such goods as may be lost during the forty-eight hours. The permit is granted primarily for the benefit and at the request of the vessel, which retains its lien for freight for the goods so long as they remain on the dock. The government has as yet no claim for duties against the consignee of the goods, and it is just that the owner of the vessel should assume the liability for duties. There is nothing here indicating an intention of imposing any liability upon the ship owner for the goods themselves, except so far as to protect the government from loss. The loss referred to is probably a loss by theft, to which these warehouses are peculiarly subject, since, if the goods were destroyed by fire, the consignee would, under section 2984, be entitled to an abatement or refund of duties. This construction of the ship owner's obligation is rather emphasized than otherwise by the subsequent clause of the regulation: "This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods which may be lost, etc." The risk he thus assumes is the risk of paying the duties upon goods which may be lost. There is nothing in these instructions, interpreted in the light of the statute and of the powers of the collector, to justify the inference that it was intended to impose any new or different obligation upon the owner of the vessel, with respect to the consignees of the merchandise.

In the forms prescribed, probably by the department, to carry out these regulations, however, there is an apparent departure both from the language of the statute and the Treasury regulations, in the obligation the owner of the vessel is required to assume, "to pay to the consignee or owner the value of such cargo respectively as may be stolen, *burned*, or otherwise lost, and also pay all duties on cargo which may be in any way lost by so remaining." Here the obligation to indemnify the consignee first appears and occupies the most prominent place, and is extended to goods stolen, burned, or *otherwise lost, while [78
the obligation to pay duties is mentioned rather incidentally than otherwise. Wherever, or by whomsoever these forms were prepared, we

must, for the purposes of this case, treat them as the act of the collector, who, if this contract be construed as intended for the protection of any one but the collector himself, clearly exceeded his authority in requiring the owner of the vessel to assume, as against the consignee, the risk of their being burned while upon the wharf. As the circuit court finds that "such application was in the form required by said collector, without which permit would not be granted, and the entire cargo would be sent to the public store," it cannot be treated as the voluntary act of the ship owner any further than this contract or obligation conformed to the requirements of the statute or Treasury regulations, which were designed, as we have already stated, only to preserve the previous rights of the consignee against the owner of the steamship unimpaired by the action of the collector. Beyond this it must be treated either as obtained by duress, or so plainly inconsistent with the previous agreement of the parties *inter sese* as to be of no avail to the consignee.

It is a familiar doctrine in this court that a bond or other obligation extorted by a public officer, under color of this office, cannot be enforced, and the remarks of this court in the case of *United States* v. *Tingey*, 30 U. S. 5 Pet. 115 [8:66], are pertinent in this connection. In this case the Navy Department caused a form of bond, not prescribed by law, to be prepared and transmitted to one Deblois, a person to whom the disbursement of public moneys was entrusted as purser, to secure fidelity in his official duties, with a condition that it should be executed by him with sufficient sureties before he should be permitted to remain in office, or to receive the pay or emoluments attached to the office. "The substance of this plea," said the court, "is, that the bond, with the above condition, variant from that prescribed by law, was under color of office extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office 79] of purser, and receiving its *emoluments. There is no pretence then to say that it was a bond voluntarily given, or that though different from the form prescribed by statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly then an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law."

A distinction is drawn in this class of cases between a bond compulsorily executed, as in the case under consideration, and a bond or other obligation voluntarily given to the government for which there is no statutory authority. In this latter case the bond has been held to be valid. *United States* v *Bradley*, 35 U. S. 10 Pet. 343, 358 [9:448, 454]; *United States* v. *Hodson*, 77 U. S. 10 Wall. 395 [19:937].

Upon the whole case we are of opinion:

1. That the stipulation in the bill of lading that respondent should not be liable for a fire happening after unloading the cargo was reasonable and valid.

2. That the discharge of the cargo at the Inman pier was not in the eye of the law a deviation such as to render the carrier an insurer of the goods so unladen.

3. That if any notice of such unloading was required at all, the bulletin posted in the customhouse was sufficient under the practice and usages of the port of New York.

4. The libelants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, was not prejudiced by the change.

5. That the agreement of the respondent with the collector of customs to pay the consignee the value of the goods was not one of which the libelants could avail themselves as adding to the obligations of their contract with respondent.

The decree of the circuit court is therefore affirmed.

Mr. Justice **Jackson**, with whom [80 concurred *Mr. Justice* **Field** and *Mr. Justice* **Gray**, dissenting:

I dissent from the judgment and opinion of the court in this case.

The liability of the respondent is not relieved by the provisions of section 4282 of the Revised Statutes re enacting the first section of the Act of Congress of March 3, 1851, as the fire by which the goods were destroyed did not happen "to or on board the vessel." *Morewood* v. *Pollok*, 1 El. & Bl. 743; *Salmon Falls Mfg. Co.* v. *The Tangier*, 3 Ware, 110, 21 Law Rep. 6. Nor is the question of the carrier's liability for loss of the goods controlled by any supposed policy of that enactment.

The National Steamship Company, by the contract of affreightment embodied in the bill of lading, undertook not merely to carry, but to *deliver* the thirty-six cases of merchandise in question at the port of New York *unto* the libelants in like good order and condition as received, subject to certain exceptions and conditions, designed to lessen or limit its liability and modify its duty as a common carrier.

The goods were not delivered, either actually or constructively, to the consignees, but were destroyed by fire while still in the custody and possession of the steamship company as carrier, after being landed and deposited on the Inman pier, No. 36, under a special order or permit which the steamship company applied for and obtained from the collector of the port, allowing the goods to remain upon the wharf for forty-eight hours from the time of granting the general order to discharge.

The steamship company, as a common carrier, is, upon well settled principles, responsible for this loss, unless it is relieved from liability by some special exception or express stipulation in the bill of lading, or by reason of some established or known usage at the port of New York.

The conditions and provisions contained in the bill of lading, so far as the same are material to the present controversy, are as follows:

1. "Fire before loading in the ship, or after unloading."

81] *2. "The National Steamship Company, or its agents, or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance."

3. "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury, in the warehouse provided for that purpose or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store to be subject to storage, the collector of the port being hereby authorized to grant a general order for the discharge immediately after entry of the ship."

4. "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury."

These provisions of the affreightment contract, modifying and qualifying the carrier's common law liability, must, in accordance with the well settled rule, be construed strictly. Their meaning is not to be extended by presumption so as to give the carrier protection beyond what has been stipulated for in clear and unmistakable terms. In so far as they are ambiguous or leave the intention of the parties in doubt, they are to be construed against the steamship company. *Edsall* v. *Camden & A. R. & Transp. Co.* 50 N. Y. 661; *Taylor* v. *Liverpool & G. W. SS. Co.* L. R. 9 Q. B. 546; Bishop, Cont. 411; Carver, Carriers, § 77.

Now, subjecting the terms and stipulations of the bill of lading to the test of this established rule of construction, did they clearly and expressly confer upon the steamship company the right to discharge and deposit the goods upon the Inman wharf at the risk of the consignees, without previous notice to them, or any knowledge on their part, as to when and where the steamer would be docked and its cargo landed?

It is settled by the authorities that it is the duty of the carrier, unless specially relieved from so doing by the contract of affreightment, to give due and reasonable notice to the 82] *consignee of the time and place of discharging the goods, and to properly separate the different consignments, so as to afford the consignee a fair opportunity to remove the goods, or to put them under proper care and custody.

In *Mordecai* v. *Lindsay* ("*The Eddy*") 72 U. S. 5 Wall. 481, 495 [18: 486, 489] the general rule is thus stated by this court: "Delivery on the wharf, in the case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees and the different consignments be properly separated so as to be open to inspection and conveniently accessible to their respective owners. Where the contract is to carry by water from port to port, an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf, but to constitute a valid delivery there the master should give due and reasonable notice to the consignee, so as to afford him a fair opportunity to remove the goods or put them under proper care and custody. When the goods after being so discharged and the different consignments properly separated are not accepted by the consignee or owner of the cargo, the carrier should not have them exposed on the wharf, but should store them in a place of safety, notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges, and when he has done so he is no longer liable on his contract of affreightment." This statement of the law is reaffirmed in *Ex parte Easton*, 95 U. S. 68, 75 [24: 373, 375], and is fully supported by the authorities both in this country and in England.

Thus in *McAndrew* v. *Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657, it was held that a carrier of goods, by water, may land them at a wharf at the port of destination, but not until after he has given the consignee due notice of their arrival and unlading, and afforded him a reasonable time to take charge of and secure them. In the meantime, instead of leaving them on the wharf, it is his duty to take care of them for the owners. See also to the same effect *Zinn* v. *New Jersey S. B. Co.* 49 N. Y. 442, 10 Am. Rep. 402; *The Mary Washington*, 1 Chase, Dec. 125; *The Santee*, 7 Blatchf. 186; *Kohn* v. *Packard*, 3 La. 224, 23 Am. Dec. 453; *The Tybee*, 1 Woods, *358, 361; Angell, Carriers, § 310, and Redf. Carriers, § 129. [83

In the present case, as shown by the seventeenth and eighteenth findings of fact, the carrier did not comply with the requirement of the law in giving notice of the time and place the steamer would discharge her cargo, nor did the consignees have any knowledge either of the vessel's readiness to discharge or that their merchandise would be or had been landed and deposited upon the Inman dock; and the question is whether the special conditions and stipulations of the bill of lading were intended to dispense with such notice, or can be reasonably construed to mean that the carrier was authorized to deposit the goods on the wharf at the risk of the consignees without giving them previous notice, and a reasonable opportunity to take charge of the same.

The only clauses of the bill of lading bearing upon this question are the first, third, and fourth, as above quoted.

The exemption from liability for loss by "fire after unloading," does not, by its terms, confer any authority to deposit the goods upon the wharf without notice to and at the risk of the consignees. The words, "fire after unloading," must receive a reasonable construction. They manifestly do not confer upon the carrier an unqualified discretion as to when and where the cargo may be unloaded. The steamship company could not, for instance under that provision of the bill of lading, have discharged the goods of the consignee at Brooklyn or Jersey City, and claimed exemption from liability in the event of their destruction by fire while so landed. The clause clearly contemplates, and should be confined to, a lawful unloading, made in the proper execution of the contract to deliver—such an unloading as will conform to the law or usage of the port of destination, or to the special contract of the

parties. The generality of its language in this case is to be restricted and interpreted by the subsequent and more particular provision found in the third of the above clauses, directing the disposition to be made of the goods, if the same are not taken from alongside of the vessel when it is ready to discharge. These clauses 84] do not operate to limit the carrier's *duty and obligation as prescribed by law, beyond what is clearly expressed in the terms thereof, or may be fairly implied therefrom. They do not, either singly or collectively, relieve the carrier from its duty to notify the consignees of the time and place of discharging the merchandise; nor do they authorize the carrier to deposit the goods on the wharf at the risk of the consignees without such notice.

In *The Santee*, 7 Blatchf. 186, the bill of lading contained the special clause that the articles named therein should be at the risk of the consignee or owner thereof, as soon as delivered from the tackles of the steamer at her port of destination, and that they should be received by the consignee, package by package, as so delivered. If not taken away the same day, they might be sent to a store or permitted to lie where landed, at the expense and risk of the owner or consignee. It was held by the court that, notwithstanding such special contract, it was the duty of the carrier to give reasonable notice to the consignees of the arrival and discharge of the vessel, so as to enable them to attend and receive the goods, and themselves assume and exercise that care and responsibility of which the carrier was to be relieved. The same rule is laid down in *Collins* v. *Burns*, 63 N. Y. 1; *Tarbell* v. *Royal Exch. Shipping Co.* 110 N. Y. 170; and Wheeler on Carriers, 333.

In *Tarbell* v. *Royal Exch. Shipping Co. supra*, the bill of lading on merchandise, from a foreign port contained the provision that the goods were to be delivered from the ship's deck (when the ship owner's responsibility should cease) at the port of New York, and "were to be received by the consignees immediately the vessel is ready to discharge, or otherwise they will be landed and stored, at the sole expense and risk of the consignees, in the warehouses provided for that purpose, or in the public store, as the collector of the port of New York shall direct." The court of appeals of New York held that the carrier must, if practicable, give notice to the consignee of the arrival of the goods, and that when this had been done, and the goods had been discharged in the usual and proper place, and reasonable opportunity afforded to the consignee to remove them, the liability of the car- 85] rier *as such would terminate, and, in respect to the clauses in question, the court said: "The general duty of a carrier to deliver, and of a consignee to receive, as defined in the authorities to which we have referred, is not, we think, essentially changed by the clause in the bill of lading that the goods are to be delivered from the ship's deck (when the ship owner's responsibility shall cease) or by the clause that the goods are to be received by the consignee 'immediately the vessel is ready to discharge.'"

The position taken in the opinion of the court that the clauses in the bill of lading under consideration are inconsistent with the idea of personal notice to the consignees, is not supported by the authorities, but is in direct conflict therewith.

The case of *Gleadell* v. *Thomson*, 56 N. Y. 194, cited in the opinion, is, when analyzed, essentially different from the case at bar. In that case the bill of lading contained the provision that the goods should be taken from alongside by the consignees "immediately the vessel is ready to discharge, or otherwise the privilege is reserved to the vessel *to land them on the pier*, or put them into craft, or deposit them in the warehouse designated by the collector of the port of New York, all at the expense of the consignee, and at his risk of fire, loss, or injury." It was held by the court that it was not incumbent on the carrier to give notice of readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier, and that while so deposited they were, by the terms of the contract, at the consignee's risk of fire, loss, or injury.

This decision means nothing more than that under the alternative privilege reserved to the vessel the carrier had the right to land the goods on the pier at the consignees' expense and risk of fire, loss, or injury, without giving the consignees previous notice or opportunity to take the goods from alongside the ship. The bill of lading in the case at bar contains no stipulation reserving to the vessel the privilege of landing the goods on the pier at the expense and risk of the consignees, as in *Gleadell* v. *Thomson*. The provision of the bill of lading in the present case is that the goods are to be taken from alongside *by the consignees "immediately the [86 vessel is ready to discharge, or otherwise they will be *landed by the master and deposited* at the expense of the consignees, and at their risk of fire, loss, or injury, in the *warehouse provided for that purpose or in the public store*, as the collector of the port of New York shall direct," and when deposited in the warehouse or store to be subject to storage.

If the rule laid down in *Gleadell* v. *Thomson* is sound and applicable to the case under consideration, then, upon its failure or neglect to give the consignees notice of the time and place of discharging the cargo so as to enable them to take their goods from alongside the vessel, the steamship company was bound to *land* and *deposit* the goods in the warehouse provided for that purpose or in a public store, as the collector of the port of New Yord might direct. If it failed to give the consignees proper notice and opportunity to take the goods from alongside when the vessel was ready to discharge, then the alternative obligation, by the express terms of the contract, was that the master of the steamer should *land* and *deposit* the goods in a warehouse or public store as the collector might direct. No right however was reserved in this stipulation to deposit the merchandise upon the pier at the risk of the consignees. On the contrary, the express undertaking on the part of the carrier, by this provision of the contract, was that if the goods were not

taken from alongside, the master should land and deposit them in one or the other of the designated places.

The duty on the part of the consignees to take the goods from alongside the vessel necessarily depended upon their having notice of the time and place, when and where, the vessel would discharge her cargo, and be ready to make delivery. When, therefore, the carrier proceeded with the discharge without giving such notice, the alternative stipulation of the contract, as well as its legal obligation under the law, required that the goods should be "landed and deposited" in the manner specified; and the fact that the place for depositing the consignment was specially designated and provided for in event it was not taken from 87]alongside the vessel, *clearly negatives the right of the carrier to deposit it on the wharf at the risk of the consignees. If the steamship company had, without notice to the consignees, landed and deposited the goods in a bonded warehouse, or, as directed by the general order of the collector, in public store 502-510 Washington street, then the case would have come within the rule laid down in *Gleadell* v. *Thomson*.

There is no finding of fact in this case, supporting the suggestion that the "warehouse," referred to in the third of the above quoted clauses of the bill of lading, was the covered pier or wharf on which the goods were landed. The word "warehouse," wherever used in the bill of lading, is coupled with the words "public store," and it is plainly evident that they have the same meaning. That these words are synonymous, and that "warehouse," when used alone, means a "bonded warehouse" clearly appears in the sections of the Revised Statutes relating to the collection of custom duties. Sections 2954, *et seq.* That no different meaning is given to the word "warehouse," when used in connection with the customs laws, further appears from the definition given it in the standard dictionaries.

It appears by the sixteenth finding of fact that the respondent on the afternoon of January 31, 1883, soon after the entry of the vessel, caused a notice of the time and place of discharge to be posted on a bulletin board in the customhouse; that it was usual to post such notice there, but that it was not usual to publish it in the newspapers; and the conclusion reached by this court is "that if any notice of such unloading was required at all, the bulletin posted in the customhouse was sufficient under the practice and usage of the port of New York."

This conclusion of the court cannot, for several reasons, be sustained. There is no finding of the court below of any practice or usage at the port of New York dispensing with personal notice to the consignees, nor that notice posted at the customhouse would, by any well established or known usage, charge or affect the consignees with notice. The authorities clearly establish that notice, such as 88]that posted *upon the bulletin board, must be shown to have come to the actual knowledge of the consignees in order to bind them, or relieve the carrier from the duty of giving personal notice.

In *The Middlesex*, 21 Law Rep. 14, 15, Brun. Coll. Cas. 605, 606, it was said by Curtis, *J.*: "Mere knowledge that the vessel has arrived and is discharging, at a particular wharf, gained in some casual manner by the consignee, without any act on the part of the master, to indicate a readiness to deliver, is not within the usage, which is for the master, or some agent for the vessel, to give notice to the consignees. And I do not think such casual knowledge is sufficient to impose on the consignee the duty of attending to the discharge of the vessel, and being in readiness to receive his goods as soon as they are ready for delivery. . . . It must be remembered that it is not knowledge of the arrival of the vessel and that she is discharging, but notice of the readiness of the master to deliver, which is the operative fact."

In *Kohn* v. *Packard*, 8 La. 224, 229, 23 Am. Dec. 453, the question whether notice of the arrival of a vessel published in the newspapers was binding upon the consignees, was clearly and convincingly treated by Porter, *J.*, who said: "If we understand correctly the usage as proved in evidence, it is this: that notice in the newspapers of the time and place of the landing goods from a vessel, is such notice as places the goods at the risk of the consignee. In other words, that constructive notice binds the party as effectually as personal notice would. If this be the custom, then it is one which this court is prepared to say it cannot sanction. Authorities have been read to show that the goods are to be delivered according to the usage of the port to which they are shipped. The principle may be admitted without at all affecting the conclusion to which we have come, for though the custom may regulate the delivery, it cannot dispense with it. Such would be the effect, however, of the usage relied on in numerous instances. We understand that it is of the essence of the contract of affreightment that there be an engagement to deliver the goods to the consignee. He consequently *must be informed of the time [89 and place the delivery is to be made, to enable him to receive them, and if he has not that information, the other party to the contract cannot dissolve it. Yet the custom relied on assumes that he may; for if notice in the newspapers is to bind the consignee of the goods, though he never hears of it or sees it, and if such notice confers on the master of the vessel the right to land the goods on the levee, where they are destroyed or stolen, then it follows that the custom dispenses with delivery, or anything equivalent to it. This we think custom cannot do. There must be the act of both parties to terminate the contract, or the default of one of them to authorize the other to do so."

In 1 Parsons on Shipping, p. 224, it is laid down as a general proposition that "in all cases the master is required to give notice to the consignee of the arrival of the vessel, and of his readiness to discharge the cargo, and knowledge, therefore, acquired that the vessel has arrived and will discharge her cargo at a particular wharf, is not enough. Generally if a notice in the newspapers is relied on, it must be shown that the consignee read the notice." This same rule is approved in Leggett on Bills of Lading, p. 279.

There is not only no finding by the court

below that the deposit of the goods on the Inman pier, No. 36, without previous notice to the consignees, was in accordance with any general usage of the port of New York, but, on the contrary, the court found a state of facts which established a course of dealing between the parties inconsistent with any such usage.

Thus, by the nineteenth finding, it appears that during the five years preceding the consignment in question the libelants had received six consignments of merchandise in steamships belonging to the respondent, under bills of lading substantially in the same form as the bill of lading herein, all of which were landed and discharged on pier No. 39; that during the same period the freight bills for these six consignments were sent to the libelants, each containing a reference to that pier, and that pier only, as the pier of the respondent company where the goods would be found upon their ar-[90] rival and discharge; *that this was true of the consignment to the libelants in this case, the freight bill of which was the same in form as the preceding six, and which was not received by the libelants until February 1, 1883, the day after the goods had been destroyed by fire.

It was further found by the court below:

"20. That during the said five years preceding the time of the arrival of the steamship Egypt in this case, that being the period during which the libelants had been receiving goods by the respondent's line from time to time as aforesaid, there have been two hundred and forty-one arrivals of the respondent's steamships at said port of New York coming from said port of Liverpool, and in only eight instances does it appear that the said steamships or any of them discharged at any dock other than that known as the National dock, exclusively occupied and controlled by the respondent as aforesaid, and no evidence was offered with reference to the circumstances attending the discharge of said eight vessels. As to forty-one of said steamships, evidence of the place of their discharge was not produced.

"22. That prior to the arrival and discharge of said steamship Egypt at said Inman dock as aforesaid no steamship belonging to the respondent from said port of Liverpool or elsewhere had ever been discharged at said dock owned and controlled by the Inman Steamship Company, Limited, as aforesaid.

"23. That said dock known as the National dock, being pier No. 39, North river, in the city of New York, is and was at the time of the arrival of the steamship Egpyt as aforesaid the usual and a proper place at said port of New York for the discharge of cargoes coming from said port of Liverpool in steamships belonging to the respondent company, and is and was at such time a proper place at said port of New York for the discharge of the said thirty-six packages of merchandise belonging to the libelants, and destroyed as aforesaid.

"24. That said dock known as the National dock, being said pier No. 39. North river, in the [91] city of New York, was *the dock and place ordinarily and generally, but not invariably, used at said port of New York for the discharge of cargoes coming from said port of Liverpool in steamships belonging to the respondent company.

"25. That the National dock, being pier No. 39, North river, in said city of New York, is and was at the time of the discharge of the steamship Egypt as aforesaid the dock or wharf to which consignees of cargo coming from said port of Liverpool to said port of New York in steamships belonging to the respondent company would naturally and usually go for the purpose of caring for and receiving a delivery of their consignments."

It is also admitted in the amended answer of the respondent that "there is nothing in the bills of lading which led the libelants to believe that the goods in said bills of lading were not to be landed on said National dock (No. 39) and there delivered" to the libelants.

It is not set up or claimed in the answer of the respondent that in discharging and depositing the goods, without notice to the consignees, at a different pier from that at which it was in the habit of landing and delivering other consignments to the libelants, the carrier was acting in pursuance of any established custom or usage of the port of New York. No such justification is set up; on the contrary, the answer alleges that the consignees had due and proper notice that the goods would be landed or discharged at pier No. 36. It denied the libelants' allegation that they did not have notice that the goods were not to be landed and delivered at the National dock, No. 39, and averred that the libelants did have notice that the goods carried by the Egypt were to be landed at pier No. 36, at which they were actually landed. The seventeenth finding of fact contradicts this denial and averment of the answer.

The carrier having landed and deposited the goods, not at its usual and customary place of discharge, where the consignees would naturally expect to receive their consignment, as they had always previously done, and there being an implied undertaking on the part of the carriers to discharge *at the usual wharf according [92] to the established course of dealing between the parties, the duty of giving notice that the discharge and delivery of the goods would be made at another and different place became the more imperative upon the carrier.

In Story on Bailments, section 545, it is said: "In America the rule adopted in regard to foreign voyages, although it has been matter of some controversy, seems to be that in such cases the carrier is not bound to make a personal delivery of the goods to the consignee, but it will be sufficient that he lands them at *the usual wharf or proper place of landing*, and gives due and reasonable notice thereof to the consignee. . . . But it is of the very essence of the rule that due and reasonable notice should be given to the consignee before or at the time of the landing and that he should have a fair opportunity of providing suitable means to take care of the goods and to carry them away."

So, in Addison on Contracts, section 961: "If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from

the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board, or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from further liability by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them."

The rule thus laid down is supported by *Salmon Falls Mfg. Co.* v. *The Tangier*, 3 Ware, 110, 21 Law Rep. 6; *Gibson* v. *Culver*, 17 Wend. 305, 31 Am. Dec. 297; 2 Kent, Com. 604; Maclachlan, Merchant Shipping, (4th ed.) 453, 454; *Hyde* v. *Trent & M. Nav. Co.* 5 T. R. 389; *Gatliffe* v. *Bourne*, 4 Bing. N. C. 314.

In *Gatliffe* v. *Bourne*, to a declaration on a contract by a master of a steam vessel to convey goods from Dublin to London, and to deliver the same at the port of London to the plain-[93] tiff *or his assigns, a plea was filed to the effect that after the arrival of the vessel at London defendant caused the goods to be unshipped and safely and securely landed and deposited in and upon a certain wharf, called Fenning's wharf, at the port of London, there to remain until they could be delivered to the plaintiff, said wharf being a place where goods from Dublin were customarily landed and deposited for the use of consignees, and a place fit and proper for such purposes; that while the goods were thus deposited upon said wharf and before a reasonable time for delivery had elapsed, they were destroyed by an accidental fire. This plea was held to be bad, and the carrier was charged with the loss of the goods accidentally burned while deposited on the wharf. This decision was affirmed in the Exchequer Chamber, 4 Man. & G. 643, and in the House of Lords, 11 Clark & F. 45, 7 Man. & G. 850, and 8 Scott, 604. In the report of the case before the House of Lords it is stated that no notice was given to the plaintiff that the goods were landed upon the wharf.

This case, in principle, controls the present case, unless the special clauses of the bill of lading authorize the deposit of the goods upon the Inman wharf without notice to the consignees and at their risk. The provisions of the bill of lading already considered do not confer such authority, and if it exists it must be found in the remaining clause, viz: "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so *left by consignee* will be at his or their risk of fire, loss, or injury."

This is the only clause in the bill of lading which in any way refers to a deposit of the goods upon the wharf. The court in its opinion construes this language to mean "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so remaining will be at the consignee's risk of fire, loss or injury." This construction not only gives no effect to the words "left by the consignee," but substitutes the act of the master [94] for *that of the consignee. It makes the master's act of depositing a leaving by the consignees. The words "left by the consignee" clearly contemplate the voluntary leaving, not by the master, but by the consignee, which could only occur after due notice that the goods were so deposited, and a reasonable opportunity afforded for removing them. The words import a voluntary act of leaving on the part of the consignee, that is to say, the consignee must suffer or permit the goods to remain, or omit to remove them after it has become his or their duty so to do. The consignees' duty of positive and affirmative action is not called into exercise until after they have had notice that their goods will be or have been deposited on the wharf. Until such notice and an opportunity to take charge of the goods is given to the consignees, it is a perversion of language to say that the goods are *left* by them.

Reading this clause in connection with the former it clearly appears that what the parties meant and provided for was that if the consignees were not ready to receive their goods immediately upon their discharge from the vessel, the master was to deposit them, not on the *dock or wharf*, but in the *warehouse* or *public store* at the expense and risk of the consignees; but that if the carrier availed itself of the Treasury regulations to deposit the goods on the wharf under the forty-eight hour clause, the consignees' risk and liability for loss, while so deposited, would not commence until after they had notice of such deposit and a reasonable opportunity to remove the goods. It cannot be properly said that there was or could be, on their part, any leaving of the goods so deposited until the consignees were put upon the duty of accepting delivery, or taking charge of the consignment, which would not arise until they had received notice.

This interpretation of the clause is sustained by the well considered case of *McKinney* v. *Jewett*, 90 N. Y. 267, 270, 272, where the contract provided that the carrier should not be liable as such, while the goods were "at any of their stations awaiting delivery."

But, conceding that the clause is ambiguous, the settled rules of construction do not sanction a liberal interpretation thereof in favor *of the carrier, but directly the reverse. [95] Especially is this so when, as in the present case, the steamship company has, by its action in procuring the forty-eight hour permit, itself placed a different construction upon the clause. It is well settled that the practical construction placed by parties interested upon doubtful or ambiguous terms in a contract will exercise great and sometimes controlling influence in determining its proper meaning. *Topliff* v. *Topliff*, 122 U. S. 121 [30: 1110]; *District of Columbia* v. *Gallaher*, 124 U. S. 505 [31: 526].

The general order for discharge, obtained upon the entry of the vessel, directed that the cargo, except certain perishable articles, gunpowder, neat cattle, etc., should be landed and sent to public store 502–510 Washington street. This general order was not acted on by the steamship company, but, as shown by the eleventh finding of fact, after securing the general order the respondent obtained from the collector of the port a special license,

under the provisions of section 2871 of the Revised Statutes, to unload at night, and gave bond to indemnify and save the collector harmless from any loss or liability which might occur, or be occasioned by reason of the granting of that special license. The carrier furthermore voluntarily applied to the collector and obtained a permit for the goods to remain upon the wharf for forty-eight hours from the time of granting the general order, at the risk of the owners of the steamer, and upon the agreement that they would pay to the consignees or owners the value of such cargo respectively as might be stolen, burned, or otherwise lost while so deposited.

The permit to unload at night was manifestly for the benefit and convenience of the carrier. The same is true in respect to the permit for the goods to remain on the wharf for forty-eight hours. The unloading commenced in the afternoon of January 31, after business hours, and was continued throughout the night; and even if notice had been given to the consignees, there was no reasonable time and opportunity afforded them to remove or take charge of the goods before they were destroyed by fire.

In the execution of its undertaking to deliver 96] to *the consignees at the port of New York, the carrier had no right to change or increase the risk by any departure from the express stipulations of the contract. In unloading at night for its own benefit, and in depositing the goods upon the wharf for its own convenience, the risk and liability of loss was manifestly increased and the goods having been destroyed while subjected, by the voluntary act of the carrier to this increased risk, it is liable for the loss, unless expressly exempted by some provision of the affreightment contract. It must be borne in mind, as Lord Lyndhurst expressed it in *Gatliffe* v. *Bourne*, before the House of Lords, that the contract was "to deliver the goods to the consignees" at the port of destination. Instead of making, or attempting to make, such delivery, either actually or constructively, the carrier, on a permit from the collector, deposited the goods on the wharf, thereby changing, if not increasing, the risk of loss, in a way not provided for by any stipulation of the contract.

Again, it was found by the circuit court (12) "That said general order and special license and said applications and permits and the agreements and engagements therein contained were the usual and customary ones ordinarily made and granted in such cases, and that they were made and granted under and by the authority in and by said bill of lading conferred upon the respondent and upon said collector of the port of New York by the libelants herein, and under and in accordance with the provisions of law in that behalf and the regulations of the United States Treasury Department on that subject." And further, (13) "That said applications were made and said general order and special license and permits were obtained on behalf of the respondent under the instructions and by direction of the respondent's agent in the city of New York, and all of the agreements and engagements made and entered into therein or thereby and on behalf of the respondent or the libelants were made and entered into under and pursuant to the same instructions and directions of said agent."

In the light of these findings the contract of the parties should be interpreted as though the clause in question had *read as follows: [97 "The United States Treasury having given permission for goods to remain forty-eight hours on the wharf at New York, at the sole risk of the steamship company, and upon its undertaking to pay to the consignee or owner the value of such cargo respectively as may be stolen, burned, or otherwise lost while so remaining, now it is understood that if the steamship company avails itself of this regulation, and obtains permission for the consignment to remain on the wharf for forty eight hours upon said terms, its risk and liability for losses shall only continue and remain in force until the consignee has had due notice and opportunity to remove or take charge of the goods; and if, thereafter, they are left by the consignee it will be at his risk of fire, loss, or injury." This harmonizes all the clauses, and is alone consistent with the correlative duties and obligations of the parties.

It is not material to the present case to determine whether the regulations of the Treasury Department, set out in the eleventh finding of the court below, have the force of law, and impose upon the steamship company the duty of entering into the stipulation to pay the consignees for the loss of the goods deposited on the wharf under the forty-eight hour permit. That stipulation was entered into voluntarily by the steamship company. There was no requirement in the contract of affreightment that it should obtain any such permit, and it cannot be properly said that the stipulation which it entered into in order to secure permission for the goods to remain forty-eight hours on the wharf, was inconsistent with any provision of the law or regulations of the Treasury Department. No provision of the bill of lading exempted the carrier from liability for loss by fire that might happen while the goods were deposited on the wharf under the forty-eight hour permit, and no reason appears why the carrier might not expressly undertake a liability which the law would otherwise impose upon it, until by proper notice the duty of taking care of the goods was shifted or transferred to the consignees.

But, it is said, the consignees cannot avail themselves of this promise made by the steamship company to the collector, *because [98 they are not privies thereto. This, however, ignores the above findings of fact by the court, which make the consignees parties to the arrangement. Aside from this, while it is undoubtedly the general rule that a person who is not a party to a simple contract, cannot enforce such contract at law, and that a promise made by one person to another for the benefit of a third, who is a stranger to the consideration, will not support an action by the latter (*Second Nat. Bank of St. Louis* v. *Grand Lodge F. & A. M.* 98 U. S. 123 [25: 75]), there are many exceptions to the rule, one of which, according to the New York decisions, is where the party seeking to enforce the contract was intended to be the beneficiary of the promise. *Lan-*

rence v. *Fox*, 20 N. Y. 268; *Coster* v. *Albany*, 43 N. Y. 399, 410, 412; *Garnsey* v. *Rogers*, 47 N. Y. 233, 7 Am. Rep. 410; *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

The promise made by the steamship company in the present case falls directly within the rule announced in *Vrooman* v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195, there being, first, a clear intent by the promisor to secure a benefit to the consignees; second, a privity between the two in respect to the protection of the goods, the risk of which the carrier assumed; and, third, an obligation or duty owing by the steamship company to the consignees to properly care for the goods until delivery could be made, which gave to the consignees a legal and equitable claim to the benefit of the promise. The decisions in other states are conflicting on this question.

But if an action at law would not lie upon the promise made by the respondent in obtaining the forty-eight hour permit, it by no means follows that the consignees could not successfully invoke the aid of a court of equity in enforcing the agreement. The legal rule invoked is not so rigidly or so strictly adhered to by courts of equity as by courts of law. Thus, in *Keller* v. *Ashford*, 133 U. S. 610, 625 [33: 667, 673], the mortgagee was permitted to enforce in equity a contract between the mortgagor and his grantee, by the terms of which the grantee assumed the payment of the mortgaged debt. See also *Willard* v. *Wood*, 135 U. S. 309-314 [34: 210-213]; *Norwood* v. *DeHart*, 30 N. J. Eq. 412.

99] *Now the broad principles of equity are recognized and applied by the admiralty courts, and the steamship company's agreement being, as properly held by the court below, an admiralty contract, and the consignees being the parties intended to be benefited thereby, and it being one contemplated by the parties at the time of entering into the contract of affreightment, no valid reason is seen why the consignees should not have, by this libel, the right to enforce the stipulation, voluntarily entered into by the steamship company, which agreement is not in conflict with any provision in the bill of lading.

It is true that the court below found (twenty seventh finding) that it was the intention of the parties to the bill of lading that goods remaining for forty-eight hours on the wharf, under the permit obtained on the application of the steamship company, should be at the risk of the consignee of fire, notwithstanding the agreement of the steamship company to assume such risk. This is not a good finding of fact, but is a mere conclusion of law based upon the court's construction of the clauses of the contract, above referred to, and is not binding upon this court.

The opinion of this court seems to proceed largely upon the idea that the consignees, if they had received notice, could not have removed the goods before they were destroyed; and, further, that inasmuch as they took no steps on the faith of the cargo being discharged at the usual place, they were not prejudiced by the change. These are considerations that do not control or change the rights and liabilities of the parties. The real question in cases like this, is whether the carrier has brought itself within any exemption from liability by showing that the loss was caused by the act of God, or by the public enemy, or by the shipper, or was within some excepted clause in the contract of affreightment. If this is not shown, the carrier is liable for the loss. *Clark* v. *Barnwell*, 53 U. S. 12 How. 272, 280 [13: 985, 988].

While not controverting the legal principles governing the liabilities and duties of carriers, the opinion of the court seems to imply that to some extent they should be modified *or[**100** suspended to meet the improved modern methods of rapid transportation. But I submit that long established legal principles, founded upon a wise public policy, are not to be either ignored or disregarded to meet a supposed public convenience, especially in a case like the present, where the resident managing agent of the carrier knew for at least six days before the arrival of the vessel that she would land and discharge her cargo, not at the usual place, but at the Inman pier, and thus had ample opportunity to give to the consignees, who were known to the steamship company, notice of the change. The true rule on this question is well stated by *Judge* Porter in *Kohn* v. *Packard*, 8 La. 230, 28 Am. Dec. 453, as follows: "There are inconveniences in whichever way the question is viewed. On the part of the owners of the ship, that of giving such notice of the time and place of discharge, as will enable them to bring knowledge of the fact home to the persons who are to receive the goods, or in default thereof, imposing on the former the obligation of sending the merchandise to some place of safety. But this inconvenience we think is not to be compared with that to which the latter would be subject if their property could be landed without their knowledge and be thereby lost or damaged. On the one side there is additional trouble; on the other, probably, a total loss. After the best consideration in our power, we think the conclusion we have come to is most consonant to law and will tend to promote public convenience."

The opinion of the court does not deal with that clause in the bill of lading which provides that the steamship company, or its "agents, or any of its servants, are not to be liable for any damage to any goods which is capable of being covered by insurance." The court below held that this clause relieved the steamship company from liability. This condition or provision of the bill of lading is expressed in terms so general and comprehensive as to require the shipper or consignee to insure, not only against the enumerated perils and exceptions, but against any and all malfeasance or misfeasance on the part of the carrier. It admits of grave doubt whether this provision is not so unreasonable as to be void under the principle *laid down by this court in *New York* [**101** *Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 380, 382 [21: 627, 640, 641]; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331 [28: 717]; *Phœnix Ins. Co. of Brooklyn* v. *Erie & W. Transp. Co.* 117 U. S. 312, 322, 323 [29: 873, 879]; *Inman* v. *South Carolina R. Co.* 129 U. S. 128, 139 [32: 612, 615]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 397, 455 [32: 788, 797]; Carver, Carriers (2d

ed.) § 110, and *Peek* v. *North Staffordshire R. Co.* 10 H. L. Cas. 473. In this last case the condition was that the company "shall not be responsible for loss of or injury to any marble . . . unless declared and insured according to its value," and it was held, upon full consideration, that the condition, as a whole, was unreasonable and void.

In the present case it is not necessary to determine that this clause is so unreasonable as to be void. So far as it has been considered by the courts, it has been restricted in its application. Thus, in *Taylor* v. *Liverpool & G. W. SS. Co.* L. R. 9 Q. B. 546, it was held not to cover a loss of the goods by theft, committed while they were on board, either during the voyage, or after arrival; and in *The Titania*, 19 Fed. Rep. 101, while the provision was considered valid, it was held by the court that it must be construed to refer to insurance which might be obtained in the usual course of business from the ordinary insurance companies, either in the usual form, or in the customary course of business upon special application. In that case injury from the breaking loose of a spar propeller was held not to be within the exemption.

Giving to the clause this reasonable construction, the loss in question would not have been covered by the ordinary marine policy on the cargo, which generally covers the goods while being carried aboard ship, during the voyage, and *until safely landed, and no longer*. The clause did not impose upon the consignees the duty of anticipating that the carrier would land the goods at an unusual place, and it would have been out of the usual course of business for the consignees to have sought to insure against what they did not and could not know would take place.

So, in reference to fire insurance. While it was shown by one of the witnesses that fire in-
102] surance could have been *procured on "goods lying on the wharf by the side of the ship, before they were actually taken away," the clause in question did not require that the consignees should have anticipated that their goods would be unloaded at night and deposited on the wharf. Aside from this, it is ordinarily essential in a fire insurance policy that the locality of the risk should be specified. The consignees in the present case could not have complied with this general rule without having some knowledge or information as to where their goods would be landed. The local agent of the steamship company had six days' notice of the fact that the cargo of the vessel would be landed at the Inman pier, No. 36, but that fact was not communicated to the consignees, and they had not, therefore, the data to procure ordinary fire insurance upon the goods after being landed.

It would be unreasonable, and contrary to sound principle, to allow the carrier to assert exemption under such an insurance clause without affording the consignees, by proper notice, an opportunity to effect insurance in the usual way upon their goods while deposited on the wharf. If, after being notified that their goods were deposited on a particular wharf, other than that at which their consignments were usually received, the consignees had failed and neglected to take out insurance, the clause, if valid, might have been invoked for the protection of the carrier. But under the facts of this case, to give the carrier the benefit of the clause would be to allow it to take advantage of its own neglect of a legal requirement.

I am of opinion that the decree appealed from should be reversed, and the court below directed to enter a decree in favor of the libelants; and I am authorized to state that *Mr. Justice* Field and *Mr. Justice* Gray concur in this opinion.

JOSEPH T. DUNHAM, *Appt.*, [**103**
v.
THE DENNISON MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 103 111.)

Reissued patent—enlarging the claim—patent for tag and envelope—infringement.

1. A patent cannot be reissued to include structures and improvements which were neither described nor claimed in the original patent.
2. A patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim.
3. Reissued patent No. 10,438, to Joseph T. Dunham, dated June 10, 1884, for a combined tag and envelope, is invalid, as being for an invention not claimed in the original patent.
4. The patent of November 24, 1885, No. 331,118, to Joseph T. Dunham for an improvement in envelopes, is not infringed by the defendant, for the peculiar feature of the patent is the construction of the flap so that it can be opened without tearing, but in defendant's envelope the flap cannot be opened without injury to it.

[No. 294.]

Argued March 16, 19, 1894. Decided May 26, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity, for the infringement of two patents for inventions granted by the United States to the plaintiff, Joseph T. Dunham, and brought against the Dennison Manufacturing Company. *Affirmed.*

See same case below, 40 Fed. Rep. 667.

NOTE.—*As to what reissue may cover*, see note to O'Reilly v. Morse, 14: 601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms, see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement, when patentee must; when they must join, see note to Wilson v. Rousseau, 11: 1141.

For what patents are granted; when declared void; see note to Evans v. Eaton, 4: 433.

As to assignments of patents; their construction and effect; licenses to use patents; royalties, see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

As to reissued patents for inventions, when valid; effect of issue; laches, see note to National Meter Co. v. Yonkers Water Comrs. 37: 634.

Statement by *Mr. Justice* **Gray:**

This was a bill in equity for the infringement of two patents for inventions, granted by the United States to the plaintiff; the one a reissue, dated June 10, 1884, of a patent issued May 8, 1883, for "a new and improved combined tag and envelope;" and the other an original patent, dated November 24, 1885, "for certain improvements in envelopes." Upon a hearing in the circuit court on pleadings and proofs, the bill was dismissed, for the reasons stated in the opinion of *Judge* Coxe, which was as follows:

"This is an equity action founded upon two letters patent granted to the complainant. The first, a reissue patent, No. 10,488, dated June 10, 1884, is for a combined tag and envelope; and the second, No. 331,118, dated November 24, 1885, is for an improvement in envelopes.

"The reissued patent will be first considered. The defenses are lack of novelty and invention, non-infringement, and that the reissue is void because of an unwarrantable expansion of its claims. The original patent, No. 277,245, was dated May 8, 1883. The application for the reissue was filed March 18, 1884, ten months and ten days thereafter.

104] *"The invention of the original was limited, as clearly as the drawings and the language of the description and claims could limit it, to an envelope having at one end a flap of sufficient size to cover one side of the envelope. The inventor says: 'The object of the invention is to form an envelope with an end flap covering its side, as herein described. . . . An envelope, A, preferably made of strong waterproof paper, is provided with an end flap B, of sufficient size to cover the entire envelope. An eyelet, C, is secured in that end of the envelope opposite to the one to which the flap B is attached; and the flap B is provided on its free end with an eyelet, D, which, when the flap B is folded over the envelope, rests upon the eyelet C.' He then describes the manner in which the name of the consignee is concealed by writing it on the inside of the flap, so that dealers engaged in the same business cannot ascertain the names of their rivals' customers. The name of the consignor is printed on the outside surface of the flap, where also appears the name of the city or town to which the goods are destined; and a notice to carriers that the full name of the consignee may be found on the inner surface.

"It is evident that the patentee considered this peculiar form of flap the main feature of his invention. It is also clear that an envelope which does not include a flap large enough to cover its side does not infringe the claims, which are as follows:

"'1. A combined tag and envelope, made substantially as herein shown and described, and consisting of an envelope having at one end a flap of sufficient size to cover one side of the envelope, as set forth.

"'2 In a combined tag and envelope, the combination, with an envelope, A, having a flap, B, at one end of the eyelet D in the free end of the flap, and the eyelet C in that end of the envelope opposite the one to which the flap is attached, substantially as herein shown and described, and for the purpose set forth.'

"The specification is perfectly plain. There is no ambiguity about the description, and the claims, in language equally clear, cover what is said to be the invention, and the whole thereof.

*"Soon after the patent was granted, **[105** the defendant, in the summer of 1883, commenced manufacturing tag envelopes, which the complainant insists are infringements of the reissue, but frankly admits that they do not infringe the original patent, for the reason that they do not have the flap B.

"The reason for the reissue is thus stated in the complainant's brief: 'Soon after putting the patented article on the market, complainant was informed that defendant, a corporation that had for some time manufactured in Boston and made extensive sales throughout the country of a shipping tag, was manufacturing and selling a tag envelope similar to complainant's. Complainant immediately applied to counsel for the purpose of commencing suit against defendant, and was advised by such counsel, after an examination of his letters patent and a statement of his invention and application, that his patent was defective, indefinite and ambiguous in its claims, so as to render it practically inoperative, and that he had better apply for a reissue.'

"The patentee himself states that the alleged infringing envelope of the defendant was one of the forms 'invented by him, but not shown in his patent,' and he therefore sought a reissue which would cover it.

"Turning now to the reissue, it is manifest that the effort was to discard the flap B as an element of the invention, and expand the claims sufficiently to cover an envelope, no matter what the size or shape of its flap. The invention no longer consists in 'an envelope with an end flap covering its side,' as in the original, but 'in a tag provided with means for attaching it to merchandise, and with an envelope or pocket to receive a bill or invoice of the merchandise.' The drawings are referred to as showing the invention 'in its preferred form.' The end flap is no longer 'of sufficient size to cover the entire envelope,' but it must cover it 'substantially.' The claims of the reissue are as follows:

"'1. A combined tag and envelope, substantially as described, wherein the flap which closes the mouth of the envelope is fastened down by the cord or other device which secures the tag to the merchandise, as set forth.

*"'2. A combined tag and envelope, **[106** substantially as described, the flap having an eyelet hole which, when the flap is folded down on the envelope, coincides with an eyelet hole in the envelope, whereby the cord or hook for attaching the tag may be passed through both holes, substantially as set forth.

"'3. In a combined tag and envelope, the combination, with an envelope, A, having a flap, B, at one end, of the eyelet D in the free end of the flap, and the eyelet C in that end of the envelope opposite the one to which the flap is attached, substantially as herein shown and described, and for the purpose set forth.'

"The third claim of the reissue is the same as the second of the original, but it is not contended that this claim is infringed. Claims one and two of the reissue are unquestionably broadened. They are no longer limited to a

flap of sufficient size to cover the entire envelope. Should the court hold that they are so limited, it is admitted that they are not infringed.

"It is thought that these expanded claims cannot escape the force of the repeated decisions of the Supreme Court relating to reissued patents.

"The patentee made no move until the defendant had produced its envelope, which could be sold without infringing the original patent. If he had been the first inventor of this new and improved form, he might have described and claimed it in the original patent. He did neither. He now seeks by the reissue to include structures and improvements which were neither described nor claimed in the original. This he cannot do. The defendant has acquired valuable rights which cannot be trampled upon in this manner.

"The law upon this subject is too well settled to require a citation of authorities; but the case of *Coon* v. *Wilson*, 113 U. S. 268 [28: 963], seems peculiarly applicable and controlling. Substitute the nomenclature pertaining to envelopes for that relating to collars, and the opinion in *Coon* v. *Wilson* is as applicable to this controversy as if written for the purposes of this action only: 'Although this reissue **107**] was applied for *a little over *ten* months after the original patent was granted, the case is one where it is sought merely to enlarge the claim of the original patent, by repeating that claim and adding others; where no mistake or inadvertence is shown, so far as the *extended flap* is concerned; where the patentee waited until the defendant produced *its short flapped envelope*, and then applied for such enlarged claims as to embrace the defendant's *envelope*, which was not covered by the claim of the original patent, and where it is apparent, from a comparison of the two patents, that the reissue was made to enlarge the scope of the original. As the rule is expressed in the recent case of *Mahn* v. *Harwood*, 112 U. S. 354 [28: 665], a patent cannot be lawfully reissued for the mere purpose of enlarging the claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim, and the application for a reissue is made within a reasonably short period after the original patent was granted. But a clear mistake, inadvertently committed, in the wording of the claim is necessary, without reference to the length of time. In the present case there was no mistake in the wording of the claim of the original patent. The description warranted no other claim. It did not warrant any claim covering *an envelope not provided with the flap B*.'

"The second patent in controversy, No. 331,118, dated November 24, 1885, is for an improvement in envelopes intended for mailing samples and similar matter, and for use as tags for marking goods to be shipped. The defences are abandonment, lack of novelty and invention, and non-infringement.

"The principal object of the invention, as stated in the specification, was to obviate the difficulty which existed in prior devices, which were so constructed that, in order to get at the contents of the envelope, it was necessary to untie the string or remove the fastening which secured the flap. The envelope of the patent is so constructed that the flap can be opened, when desired, and the contents inspected, without tearing the envelope, or removing or breaking the fastenings. The claims are as follows:

*"'1. An envelope having a flap, C, [**108** provided with a reinforced hole, *c'*, and having a similar hole, *c*, in the front ply of its body, and the said holes constructed to register or coincide when the flap C is folded down, whereby the end of the back ply, *b*, of the envelope body, which extends entirely across the latter, is clamped and removably secured, substantially as shown and described.

"'2. A mailing and tag envelope having a flap, C, folded over and secured down to the inner face of the front ply of the body, the said flap being also constructed to take over the free end of the back ply of the body, as shown, whereby the mouth of the envelope covered by the said flap C is secured against accidental opening, substantially as and for the purposes set forth.'

"In view of what was known when the patent was applied for, a broad construction of these claims is out of the question. A construction which would include the defendant's envelope would render the claims void for lack of novelty, for the general features of the patented envelope are shown in the patent No. 81,962, September 8, 1868, to Sigmund Ullman, and in other prior structures. If the claims are limited to the peculiar construction shown in the specification and drawings, the defendant does not infringe. In the defendant's envelope one eyelet is used, which aids the gum in fastening the flap down permanently upon the back ply of the envelope.

"A large number of exhibits have been introduced, showing the defendant's envelope. These have been changed and mutilated by the witnesses in illustrating opposing theories. But both sides apparently agree that the envelopes made by the defendant since the date of this patent are constructed with the eyeletted flap securely fastened. The complainant's brief contains this statement: 'After defendant put its tag envelope on the market, it changed the construction several times, until it finally adopted the form introduced in evidence as the infringing specimen. See complainant's Exhibit Taylor and Mayo, which was received in 1883, and also has the eyelet holes, with washers only, also complainant's Exhibit John S. *Smith, which was received in [**109** 1884, and has the washers reinforced with a short metallic eyelet, with the eyeletted end tightly gummed down; also Exhibit Alonzo B. Smith, received in 1886, with printed advertisement on front, which had the eyeletted end tightly gummed, with washers reinforced by short metallic eyelets.'

"Evidently it is not intended that the defendant's envelope shall be opened and the contents removed at the end thus securely fastened. The bill or invoice is inserted at the opposite end; the flap at that end is then fastened down, in the well known manner, by moistening the gum by which it is provided, or the flap may be tucked in between the plies. In other words, the defendant takes an ordinary envelope with the opening at one end; and at the other end, which is never intended to be opened, he puts an eyelet reinforced by washers through the front ply, a portion of the

back ply, and the flap of the envelope. The sole object of the eyelet is to provide a suitable hole into which the cord or hook which fastens the envelope to the merchandise may be introduced. The effect of the eyelet and washers is to prevent the back ply from being left free at this end. The defendant has not the object of the patent in view, and does not adopt the patented device.

"In complainant's envelope, according to the theory of his expert witness, 'the leading idea or principle of the invention is the holding down of the back ply of the envelope by the overlapping of the flap thereon, and the omission of any permanent or secure attachment of the flap to said back ply. . . . The claims are limited to this end of the back ply being left free.' This feature is entirely wanting in defendant's envelope. Instead of omitting the secure attachment, he has added the metallic eyelet and washers to the gum of the ordinary envelope. The claims must be restricted to the form and description of the patent, and thus construed they are not infringed.

"It is unnecessary to examine the other defenses presented. The bill is dismissed." 40 Fed. Rep. 667.

From the decree of the circuit court dismissing the bill the plaintiff appealed to this court.

Messrs. **Charles G. Coe** and *Arthur S. Browne* for appellant.

Mr. **Wm. W. Swan** for appellee.

110] **Mr. Justice* **Gray** delivered the opinion of the court:

The facts of this case, and the reasons against maintaining the suit, are so clearly and fully stated in the opinion delivered in the circuit court, that there is no occasion for extended discussion.

The patent of May 8, 1883, was expressly and distinctly, both in the specification and in the claims, limited to an envelope, with an opening at one end; with a flap, attached to the envelope at that end, of sufficient size to cover the whole of that side of the envelope in which the opening was; and with an eyelet in the flap, resting on an eyelet in the opposite end of the envelope, through which eyelets the flap could be secured to the envelope, and both flap and envelope be fastened to the object to be carried. The patentee thus gave the public to understand that an envelope, the flap of which did not cover its whole length, would not come within his patent, and might rightfully be made by any one. After the defendant had made envelopes with a short flap of semi-circular shape and covering little more than the opening of the envelope (which, it is admitted, did not infringe the plaintiff's patent as originally issued), the plaintiff obtained a reissue, enlarging the claims, and altering the specification throughout, so as to include an envelope with a flap of any size or shape, and to make the invention consist, not, as in the leading words of the description in the original patent, of "an envelope with an end flap covering its side," but in "a tag provided with means for attaching it to the merchandise, and with an envelope or pocket to receive a bill or invoice of the merchandise." The words of the description in the original patent were neither technical nor complicated; but they were of the simplest kind, and their meaning and scope could *not have been misunder- **[111** stood by any one who read them with the slightest attention, least of all by the patentee. To uphold such a reissue under such circumstances would be to grant a new and distinct privilege to the patentee at the expense of innocent parties, and would be inconsistent with the whole course of recent decisions in this court. *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 [26:783]; *Mahn* v. *Harwood*, 112 U. S. 354 [28: 665]; *Coon* v. *Wilson*, 113 U. S. 268 [28: 963]; *Topliff* v. *Topliff*, 145 U. S. 156 [36: 658]; *Huber* v. *Nelson Mfg. Co.* 148 U. S. 270 [37: 447]; *Leggett* v. *Standard Oil Co.* 149 U. S. 287 [37: 737]; *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.* 150 U. S. 38 [37: 989].

The patent of November 24, 1885, has clearly not been infringed by the defendant; for the peculiar feature of this patent consists in the flap being constructed so that it can be opened, and the contents taken out, without tearing the envelope or removing or breaking the fastenings; whereas in the defendant's envelope that flap is fastened down so that it cannot be opened without injury to it or to the envelope, and the contents are taken out by opening a flap, no more firmly secured than with gum, at the opposite end of the envelope.

Upon these grounds, without considering the questions of lack of novelty and invention in the several patents, the entry must be decree affirmed.

DANIEL M. MORRISON, *Plff. in Err.*,
v.
JOHN G. WATSON.

(See S. C. Reporter's ed. 111-115.)

Review of state judgment—right, not claimed.

1. In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been "specially set up or claimed" at the proper time and in the proper way.
2. Where a title, right, privilege or immunity under the Constitution or a treaty or statute of the United States, was not claimed in any form before judgment in the highest court of the state, it cannot be asserted in this court.

[No. 177.]

Argued Dec. 20, 1893. Decided May 26, 1894.

NOTE.—*As to jurisdiction in the United States Supreme Court, where Federal question arises, or where are drawn in question statutes, treaty or Constitution,* see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

IN ERROR to the Supreme Court of the State of North Carolina, to review a judgment of that court affirming the judgment of the superior court of Richmond county, in that state, in favor of the defendant, John G. Watson, in an action in the nature of ejectment, brought by Daniel M. Morrison, to recover land in that county. *Dismissed.*

See same case below, 1 L. R. A. 833, 101 N. C. 332.

Statement by *Mr. Justice* **Gray**:

This was an action, in the nature of ejectment, brought April 11, 1883, in the superior 112] court of Richmond county in *the state of North Carolina, to recover one hundred acres of land in that county.

The case certified by that court to the supreme court of the state began as follows:

"The plaintiff claimed title to the land described in the complaint by virtue of an execution sale and sheriff's deed made pursuant thereto. The defendant denied that the plaintiff was the owner of the land or that he wrongfully withheld possession thereof. He admitted being in the possession.

"The following issues were, without objection, submitted to the jury: 1st. Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint? 2d. Did the defendant at the time of the bringing of this action unlawfully withhold possession thereof? 3d. What damages is the plaintiff entitled to recover?"

The case then stated that the plaintiff gave in evidence a deed of the land from the sheriff to himself, pursuant to a sale thereof, for the price of $40, on June 9, 1879, under an execution duly issued April 5, 1879, upon a judgment rendered May 17, 1870, against the defendant, for $35, and interest from November 13, 1864, and costs, on a promissory note shown by the judgment roll to have been payable at the date last mentioned; and that the plaintiff also gave in evidence the execution, and the officer's return thereon stating that he levied it upon this land. The case also stated that "no homestead was ever allotted to the defendant."

The case then stated that "the plaintiff, for the purpose of showing that the lands of the defendant were, in June, 1879, worth less than $1000 and the amount of the judgment," introduced, "after objection by defendant and exception to its admission," evidence tending to show that fact; that the defendant also introduced evidence upon the question of the value of the land; and set forth the testimony introduced by either party; did not show that any evidence admitted was objected to by the plaintiff; and continued and concluded as follows:

"The defendant duly objected to all of the testimony in regard to the value of the land, when it was offered, for that the defendant's right to a homestead and the value of his land 113] *could only be ascertained and determined in the manner provided by law, and not in the first instance by a jury impaneled to try the question of title. The court, in deference to the opinion of the supreme court in this case, admitted the testimony. *Morrison* v. *Watson*, 95 N. C. 479.

"The counsel for the plaintiff requested the court to charge the jury: 1st. That there was no evidence that the defendants were worth in June, 1879, $1000 and the judgment, interest and costs, amounting to $83; 2d. That upon the whole evidence the plaintiff was entitled to recover. The court declined to so instruct the jury, and the plaintiff excepted.

"The court then instructed the jury that they could consider the whole evidence, and, after ascertaining the value of the land per acre in June, 1879, they should make a calculation as to its total value. The court then explained to the jury the issues, and the way in which the testimony should be considered with respect to them; and instructed them that they could consider the return on the execution in passing upon the question whether the defendant had other property than the land covered by the sheriff's deed: and that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than $1000, and the amount of the judgment, interest and costs, amounting to $83, and that the defendant had no other property which could have been sold to pay the judgment. *Miller* v. *Miller*, 89 N. C. 402.

"The jury found the first and second issues in the negative. Motion for a new trial for reception of the evidence objected to, and for refusing the instruction asked, and for error in the instruction given. Motion denied. Judgment in accordance with the verdict. Appeal by plaintiff."

The supreme court of the state, on November 12, 1888, affirmed the judgment. 1 L. R. A. 833, 101 N. C. 332. The plaintiff, on September 4, 1890, sued out this writ of error.

Messrs. **Frederic D. McKenney** and *S. F. Phillips* for plaintiff in error.

Mr. **W. W. Fleming** for defendant in error.

Mr. Justice* **Gray delivered the opin [114 ion of the court:

The ground on which it was argued in this court that the judgment of the supreme court of North Carolina should be reversed was that the debt, in execution of the judgment upon which the land was sold to the plaintiff, having been contracted before the constitution and laws of the state exempted a homestead from execution, the obligation of the contract was impaired by the statute of North Carolina, by which, as construed by the supreme court of the state, such a creditor is obliged to levy his execution, first, by sale of so much of the debtor's land as is not within the homestead exemption, and afterwards, if necessary, by separate sale of the rest of the land.

But the difficulty is that it does not appear that any objection to the constitutionality of the statute was taken by the plaintiff in the courts of the state. On the contrary, he appears to have assumed that the statute was constitutional and valid; and that, if the land, at the time of the sale on execution in June, 1879, was not worth the sum of $1083, made up of $1000 for the homestead, and $83 for the amount of the judgment, he could not recover.

At the trial, after proving his title under the sale on execution, he himself introduced, against the objection and exception of the defendant, evidence that the lands were worth less than that sum. The only instructions which the plaintiff asked, and to the refusal of which he excepted, were the specific one "that there was no evidence that the defendants" (apparently meaning the defendant's lands) "were worth" that sum, and the general one "that upon the whole evidence the plaintiff was entitled to recover." The instructions given were not excepted to, and it does not appear for what supposed error in them a new trial was moved for and refused. The plaintiff, therefore, up to the time of judgment in the trial court, does not appear to have insisted that the levy under which he claimed was valid if the estate was worth more than the sum aforesaid, as the jury found that it was. **115**] *Nor does it appear that he brought any constitutional question before the supreme court of the state. No reasons of his appeal to that court are stated in the record; and the official report of its opinion shows that no counsel for the plaintiff argued the case before that court. 1 L. R. A. 833, 101 N. C. 332, 335. Under these circumstances, the fact that in that opinion, the construction and validity of the statute were treated as settled by the ruling in the earlier case of *McCanless* v. *Flinchum*, 98 N. C. 358, and were restated by way of explanation of the defense at the trial of the present case, falls short of showing that there was any real contest at any stage of this case upon the point.

In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege or immunity claimed under the Constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been "specially set up or claimed" at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court. Rev. Stat. § 709; *Ex parte Spies*, 123 U. S. 131, 181 [31: 80, 91]; *Brooks* v. *Missouri*, 124 U. S. 394 [31: 454]; *Chappell* v. *Bradshaw*, 128 U. S. 132, 134 [32: 369, 370]; *Brown* v. *Massachusetts*, 144 U. S. 573 [36: 546]; *Schuyler Nat. Bank* v. *Bollong*, 150 U. S. 85 [37: 1008]; *Miller* v. *Texas*, *ante*, p. 812.

The judgment of the supreme court of North Carolina in this case appears by the record to have been rendered on November 14, 1888; and it is perhaps significant that this writ of error was not sued out until September 4, 1890, after that court in *Long* v. *Walker*, 105 N. C. 90, had changed its opinion as to the validity and effect of the statute.

Writ of error dismissed for want of jurisdiction.

Mr. Justice **White**, not having been a member of the court when this case was argued, took no part in its decision.

Ex parte: In Re BELVA A. LOCKWOOD. [116

(See S. C. Reporter's ed. 116-118.)

Right to practice law—not immunity of citizen—power of state court.

1. The refusal of the Supreme Court of Appeals of Virginia to admit the petitioner to practice law in that court on the ground that she is a woman, does not deny to her any privilege or immunity of a citizen of the United States.
2. The right to practice law in the state courts is not a privilege or immunity of a citizen of the United States.
3. It is for the state court to construe a statute of the state in regard to the admission of persons to practice law in its courts, and to determine whether the word "person" therein used, is confined to men, or includes women.

[No. ——.]

Submitted April 24, 1894. Decided May 26, 1894.

APPLICATION by Belva A. Lockwood for leave to file a petition for a mandamus requiring the Supreme Court of Appeals of Virginia to admit her to practice law in that court, she having applied to that court for admission to practice therein, and the court having denied her application. *Leave denied.*

The facts are stated in the opinion.

Mr. **Joseph Christian** for petitioner.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an application by Belva A. Lockwood for leave to file a petition for a mandamus requiring the supreme court of appeals of Virginia to admit her to practice law in that court. Mrs. Lockwood has been for many years a member of the bar of this court and of the supreme court of the District of Columbia, and also, she avers, of the bars of several states of the Union. Her complaint is that she recently applied to the supreme court of appeals of Virginia to be admitted to the practice of law in that court, and the court denied her application, notwithstanding it is provided by a statute of that state that "any person duly authorized and practising as counsel or attorney at law in any state or territory of the United States, or in the District of Columbia, may practice as such in the courts of this state" (Va. Code, 1887, § 3192); and she alleges that the only reason for the rejection of her application was that she is a woman. It appears that no record was made of the refusal complained of, but *she presents a certificate of the [117 clerk of that court to the effect that the application was made and rejected, though "no order was made at the time." Nothing is stated in the papers before us as to the resi-

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or constitution*, see notes to Martin v. Hunter, 4: 97, Matthews v. Zane, 2: 654, and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state constitution; to revise decrees of state courts as to construction of state laws, see note to Hart v. Lamphire, 7: 679, and to Commercial Bank of Cincinnati v. Buckingham, 12: 169.

dence of petitioner, whether in the District of Columbia or in some other state than the state of Virginia. Our interposition seems to be invoked upon the ground that petitioner has been denied a privilege or immunity belonging to her as a citizen of the United States, and enjoyed by the women of Virginia, in contravention of the 2d section of Article IV. of the Constitution and of the 14th Amendment.

In *Minor* v. *Happersett*, 88 U. S. 21 Wall. 162 [22: 627], this court held that the word "citizen" is often used to convey the idea of membership in a nation, and in that sense, women, if born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States, as much so before the adoption of the 14th Amendment of the Constitution as since; but that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the 14th Amendment, and that amendment did not add to these privileges and immunities. Hence, that a provision in a state constitution which confined the right of voting to male citizens of the United States was no violation of the Federal Constitution.

In *Bradwell* v. *Illinois*, 83 U. S. 16 Wall. 130 [21: 442], it was held that the right to practice law in the state courts was not a privilege or immunity of a citizen of the United States; that the right to control and regulate the granting of license to practice law in the courts of a state is one of those powers that was not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

Section 3192 of the Code of Virginia quoted in this application is one of twelve sections constituting chap. 154 of that code, entitled, "Of Attorneys at Law Generally." Section 3193 reads: "Every such person shall produce, before each court in which he intends to prac- [118] tice, satisfactory evidence *of his being so licensed or authorized, and take an oath that he will honestly demean himself in the practice of the law, and to the best of his ability execute his office of attorney at law; and also, when he is licensed in this state, take the oath of fidelity to the commonwealth."

It was for the supreme court of appeals to construe the statute of Virginia in question and to determine whether the word "person" as therein used is confined to males, and whether women are admitted to practice law in that commonwealth.

Leave denied.

UNITED STATES, *Libelant & Appellant*, *v.* "THE HAYTIAN REPUBLIC" ET AL.

(See S. C. Reporter's ed. "*The Haytian Republic*," 118-129.)

Pendency of suit—distinct causes of action—a libel of vessel when no bar.

1. In order that the pendency of a suit may be set up to defeat another, the case must be the same, with the same parties, the same rights asserted, the same relief demanded, founded on the same facts and the bases of relief the same.
2. Distinct causes of action need not be joined in one suit, although they exist at the same time and might be considered together.
3. A libel of a vessel in one district court for violations of the Chinese Exclusion Act and for smuggling opium, is no bar to a subsequent libel of the same vessel in another district court for similar violation of the act and offenses, committed prior to the filing of the first libel.

[No. 1136.]

Argued April 27, 1894. Decided May 26, 1894.

CERTIORARI to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court of the United States, for the District of Washington, dismissing a libel of the steamship "Haytian Republic" by the United States for violation of the Chinese Exclusion Act, and for smuggling opium. *Reversed and case remanded for further proceedings.*

Statement by *Mr. Justice* **White:**

On June 7, 1893, in the District Court of the United States for the District of Washington, the United States libeled the steamship "Haytian Republic" for violations of the "Chinese Exclusion Act," and for smuggling opium. It was averred that the violations of the Exclusion Act occurred at the following dates: 1st, September 20, 1892; 2d, October 8, 1892; 3d, October 12, 1892; 4th, October 15 and 16, 1892; 5th, November 1, 1892; 6th, November 26, 1892; 7th, December 12, 1892; 8th, December 13, 1892; 9th, January 2, 1893; 10th, January 26, 1893; 11th, February 2, 1893; 12th, March 28, 1893; 13th, May 11, 1893.

The offenses of opium smuggling, according to the libel, were committed as follows:

*November 21, 1892, at Portland, Ore [119] gon, 2,000 pounds, of the value of $22,000; December 7, 1892, at St. Johns, on the Columbia river, 1,000 pounds, of the value of $11,000.

The prayer was for the forfeiture of the vessel on account of the violations of the Exclusion Act, and for judgment for $32,000, the value of the opium, with recognition of a lien on the ship for that amount.

The Northwest Loan & Trust Company claimed the vessel, and, after due appraisement, she was bonded.

On the 6th day of July, 1893, in the District Court of the United States for the District of Oregon, the United States again libeled the same steamship for violations of the Chinese Exclusion Act and for smuggling opium. In this libel it was alleged that the violations of the Act were committed at the following dates: 1st, October 29, 1892; 2d, June 14, 1893; and 3d, June 28, 1893, all at the port of Portland, Oregon. And the opium smuggling was charged as follows:

1st, October 29, 1892, at Portland, Oregon, 1640 cans, containing 820 pounds, of the value of $9840; 2d, December 27, 1892, at St. Johns, Oregon, 1000 pounds, valued at $12,000.

The prayer of this second libel was for for-

NOTE.—*As to conclusiveness of judgment*, see note to Bank of United States v. Beverly, 11: 75.

As to judgment in admiralty, when conclusive and when may be re-examined, see note to Williams v. Armroyd, 3: 392.

As to varol evidence to explain judgment by show-

feiture of the vessel for the violations of the Exclusion Act and for judgment for $28,840, the value of the opium, with recognition of a lien on the vessel for that amount.

On the 14th of July, 1893, an amended libel was filed, charging the smuggling of opium, 1st, on July 28, 1892, Willamette river, 300 pounds of opium, of the value of $3300; 2d, on August 30, 1892, on the Columbia river, near the mouth of the Willamette river, of 800 pounds of the value of $8800; 3d, on the 2d of September, 1892, near Swan Island, 1400 pounds, worth $15,400; 4th, on the 27th of January, 1893, at Portland, Oregon, 1200 pounds, worth $11,220; and 5th, on the 22d of February, 1893, at Portland, Oregon, 900 pounds, value $9900.

The prayer of the amended libel was also for the forfeiture of the vessel, and for a decree for the penalty to the value of the opium, which was $48 620, with lien upon the vessel.

The original and amended libel claimed, there 120 fore, the forfeiture of the vessel for three violations of the Chinese Exclusion Act, the first occurring in October, 1892, and the two last after June 7th, 1893; and also sought to enforce against the vessel an aggregate penalty of $77,460 for seven acts of opium smuggling, which, they charged, had taken place at various dates between the 28th of July, 1892, and the 22d day of February, 1893.

Thus, all the offenses against the Chinese Exclusion Act, charged by these libels, except the two last, occurred prior to June 7, 1893, the date of the filing of the libel in the district court of Washington, and all the offenses of opium smuggling therein charged occurred prior to the filing of the suit in Washington.

The Northwest Loan & Trust Company appeared as claimant in the new suit. It excepted to all the averments as to violations of the Exclusion Act and smuggling which, according to the allegations, were committed before the filing of the suit in the district of Washington. Its exception, therefore, covered all the charges of smuggling opium and one of the charges of violation of the Chinese Exclusion Act. To the two averments of violation of the Act, which were not excepted to, an answer was filed.

The court sustained the exception and dismissed the libels, except as to the two charges of violation of the Exclusion Act subsequent to the filing of the suit in the Washington district. As to these, it held that the averments of the libel stated no violation of the laws of the United States.

The case was taken by appeal to the Circuit Court of Appeals for the Ninth Circuit, where the judgment of the district court was affirmed. This action of the circuit court of appeals was brought up for review under a writ of certiorari.

Mr. **Lawrence Maxwell,** *Jr., Solicitor Gen.*, for appellant:

The mere pendency in one district of a suit for forfeiture where the vessel has been released on bail, is not a bar to a libel of forfeiture subsequently filed in another district for separate and distinct offenses committed prior to the filing of the first libel.

The offenses charged in the Oregon libel were each separate and distinct causes of action from those alleged in the libel filed in the district of Washington.

Freem. Judgm. (4th ed.) § 238; *Ex parte Snow*, 120 U.S. 274 (30: 658); *The City of Mexico*, 28 Fed. Rep. 148; *Stark* v. *Starr*, 94 U. S 477 (24: 276); *Watson* v. *Jones*, 80 U. S. 13 Wall. 679 (20: 666).

But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest; there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same.

Mutual L. Ins. Co. v. *Harris*, 90 U. S. 588 (24: 737).

A stipulation in admiralty is given with reference to the particular claims set up in the libel. It is only a substitute for the vessel to the extent of the claim made in the libel.

The T. W. Snook, 51 Fed. Rep. 244; *New York & W. SS. Co.* v. *Mount*, ("*The Benefactor*") 103 U. S. 239 (26: 351); *United States* v. *Ames*, 99 U. S. 35 (25: 295).

The United States, if they had so desired, could not have intervened in the suit in the district of Washington, after the giving of the stipulation for value, and added new counts for other offenses than those contained in the original libel, because thereby the liability of the surety would be increased, and, if not absolutely discharged, the security would not extend to the new counts.

The Union, 4 Blatchf. 90; *Newell* v. *Norton*, 70 U. S. 3 Wall. 257 (18: 271); *Seeley* v. *Brown*, 14 Pick. 177; *Prince* v. *Clark*, 127 Mass. 599, 601; *Ruggles* v. *Berry*, 76 Me. 262; *The Clara*, Swab. Adm. 1, 4; *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.* 109 U. S. 578 (27: 1038).

Mr. **John H. Mitchell,** for appellee:

A second seizure and libel *in rem* against a vessel cannot be made pending seizure and proceedings thereunder in another jurisdiction, or even in the same jurisdiction, and for alleged cause or causes of forfeiture existing at the date of the first seizure.

The right of the claimant to give bond and have the vessel released is a statutory right.

This being a proceeding *in rem*, not *in personam*, the case does not come within the category of cases permitting separate suits as upon separate and distinct demands.

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ing issues litigated and decided, and grounds of decision, see note to Miles v. Caldwell, 17: 775.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

As to consequences of a nonsuit or dismissal of complaint, see note to Homer v. Brown, 14: 970.

As to autrefois acquit or convict: effect of, in criminal cases, see note to United States v. Perez, 6: 165.

As to effect of judgment beyond territorial limits of jurisdiction, see note to Darby v. Mayer, 6: 367.

As to judgments of state court, when conclusive, and when not, in another state, see note to Mills v. Duryee, 3: 411.

As to record evidence of jurisdictional facts, plea of nil debet, see note to Mills v. Duryee, 3: 411.

As to conclusiveness of record as to jurisdiction in suit on judgment of another state: fraud as plea to judgment of another state, see note to Christmas v. Russell, 13: 475.

Stark v. *Starr*, 94 U. S. 447 (24:276).

A judgment is conclusive of every point which might have been raised in pleading whether it is or is not actually put at issue and determined.

A former judgment between the same parties in which a claim was decided or was properly involved and might have been decided, is a bar to another action or suit as to such claim.

Stockton v. *Ford*, 59 U. S. 18 How. 418 (15: 895); *Barrett* v. *Failing*, 8 Or. 155; *Bellinger* v. *Craigue*, 31 Barb. 534; *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 619 (19:205); *Cromwell* v. *Sac County*, 94 U. S. 351 (24:195); *Davis* v. *Brown*, 94 U. S. 423 (24:204); *Neil* v. *Tolman*, 12 Or. 289; Freem. Judgm. § 253.

A party cannot relitigate matters which he might have interposed, but failed to do it.

Stark v. *Starr*, 1 Sawy. 275; *Young* v. *Babilon*, 91 Pa. 280; *Wright* v. *Dunning*, 46 Ill. 271, 92 Am. Dec. 257; *Nichols* v. *Dibrell*, 61 Tex. 539; *Chapman* v. *Clapman*, 59 Pa. 214; *Ferrer's Case*, 6 Coke, 7; *Gardner* v. *Buckbee*, 3 Cow. 120, 15 Am. Dec. 256.

A bond accepted by the court, upon ordering the delivery to the claimant of property seized in admiralty, is in the subsequent proceedings a substitute for the property, and a decree rendered on such a bond given with sureties by the claimant at the request and for the benefit of his firm to which the property so delivered to him belonged, bars a suit against the other partners.

United States v. *Ames*, 99 U. S. 35 (25: 295); *The Palmyra*, 25 U. S. 12 Wheat. 1 (6: 531); *The Wanata* v. *Avery*, 95 U. S. 611 (24: 464); *The Webb* v. *Barling*, 81 U. S. 14 Wall. 406 (20: 774); Williams & Bruce, Admiralty Practice, 210.

If, for any reason, whether from lack of knowledge or the existence of the causes of forfeiture or otherwise, the United States failed to include all existing antecedent causes of forfeiture in the original libel in the Washington court, it was within the power of the government, at any time before the final decree, to recall the vessel, cancel the bond or stipulation given, amend the libel, and either hold the vessel or require a new bond.

The Hero, Brown & L. Adm. 447; *The Union*, 4 Blatchf. 90; *The Duchesse de Brabant*, Swab. Adm. 264; *The Virgo*, 13 Blatchf. 255; *The Adeline*, 13 U. S. 9 Cranch, 244 (3: 719); Benedict, American Admiralty, §§ 403-407; Dunlap, Admiralty Practice, 88; Betts, Admiralty Practice, 20.

Mr. Justice **White** delivered the opinion of the court:

All question as to the correctness of the rulings below, that the two alleged violations of the Exclusion Act after June, 1893, constituted no offence against the laws of the United States, was waived in the discussion at bar.

The first question, then for consideration is, was the action of the court correct in dismissing all the charges, both as to the introduction of Chinese and as to the importation of opium prior to June 7, 1893, because of the pendency of the suit in the district of Washington?

Pretermitting all question as to whether the pendency of suits in district courts of the United States sitting in different states, is a subject-matter of the defense "other suit pending"—the issue is, "Did the suit in Washington prevent the *bringing of suit in [124 Oregon?" Both the introductions of Chinese and the importations of opium which were averred in the suit in Oregon were distinct and different acts from those charged in the libel filed in the district court of Washington. The elementary principle which governs the availability of the plea of "other suit pending" was thus stated in *Watson* v. *Jones*, 80 U. S. 13 Wall. 715 [20: 671]:

"When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interests; there must be the same rights asserted and the same relief prayed for; the relief must be founded upon the same facts, and the title, or essential basis of the relief sought, must be the same."

Tested by these principles, it is obvious that the plea of pendency of the suit in Washington was not available here. There were the same parties, but not the same rights asserted; and the claim of relief was not founded upon the same facts. In the case just cited it was said that the true test of the sufficiency of a plea of "other suit pending" in another forum was the legal efficacy of the first suit, when finally disposed of, as "the thing adjudged," regarding the matters at issue in the second suit. *Dick* v. *Gilmer*, 4 La. Ann. 520; *Bischoff* v. *Theurer*, 8 La. Ann. 15.

The efficiency of the test, thus applied, results from the fact that the elements constituting the thing adjudged, and those necessary for the plea of "other suit pending," are identical.

It is obvious that the decision of the suit in Washington would not have constituted the thing adjudged as to the matters averred in the suit in the district of Oregon. The charges were different. If the court in Washington had found that, at the times and places named, the vessel had not smuggled opium and had not illegally imported Chinese, and adjudged accordingly, such judgment would not have affected the question of whether or not similar offenses had been committed at other times and places.

It is contended, however, that although the two suits involved the assertion of different rights as the rights asserted *in the last [125 suit were in existence at the time the first suit was brought, therefore they should have been asserted in that suit, and could not be afterwards relied upon in a separate suit, in a different forum. In support of this proposition we are referred to the case of *Stark* v. *Starr*, 94 U. S. 477 [24:276], and this language is quoted from the opinion in that case:

"It is undoubtedly a settled question that a party seeking to enforce a claim legally or equitably must present to the court, either in pleading or in proof, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the

first fail. There would be no end to litigation if such a practice were permissible."

This statement, however, is qualified by the following, which is not included in the citation:

"But this principle does not require distinct causes of action—that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they existed at the same time and might be considered together."

The qualification states the elementary rule. One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other. *Crips* v. *Talcande*, 4 McCord, L. 20.

It is evident that proof showing that a particular lot of opium had been smuggled on a particular day, or a particular number of Chinese had been imported at a particular time, would have no relevancy or tendency to prove the smuggling of a different lot of opium at a different time, or the importation of a different number of Chinese at a different date.

It was conceded, in argument, that where a vessel had been bonded and then committed an offense—which made her liable to forfeiture—she could be proceeded against in a court other than where the bond was given. This admission practically involves the whole point **126**] at issue here. If the *vessel, after the bond had been given, was not in the custody of the court of first resort to the extent of preventing a second libel from being filed against her in another court for a subsequently arising offense, she was not in the custody of the court so as to prevent a seizure for an offense which existed at the time of the first libel, and which the libelants were under no legal necessity to join therein. The attempted distinction rests upon the theory that, after bonding, the vessel was in the custody of the court for the purposes of all claims existing at the time of the bonding, and out of the custody of the court as to all claims arising subsequent thereto. But if the vessel was in the custody of the court at all, it was there for all purposes, and the admission that it was not so in the custody of the first court so as to preclude proceedings against it in another forum under certain circumstances carries with it the concession that it was not in that custody to such an extent as to affect the question of proceedings elsewhere under any circumstances whatever.

It is true that, where a fraudulent appraisement has been had, or a fraudulent or illegal bond has been given, in an admiralty proceeding, the court has the power to recall the vessel for the purpose of requiring an honest appraisement and of exacting a legal bond. *United States* v. *Ames*, 99 U. S. 35 [25:295]; *The Union*, 4 Blatchf. 90; *The Favorite*, 2 Flip. 87; *The Thales*, 3 Ben. 327; 2 Parsons, Shipping, 411. This special power, however, to meet a particular contingency does not affect the general rule, or imply that the vessel, after a legal bond has been given, remains in the exclusive custody and jurisdiction of the court. *The Union*, *supra*.

It is urged that, as in the first case the issue was the forfeiture of the vessel, and this involved her entire value, and as the bond given represented that entirely, the existence of the bond in the Washington court precluded the raising of any question concerning the liability of the vessel to forfeiture elsewhere. The fallacy here lies in supposing that the bond took the place of the entire value of the vessel for any other purpose than the subject-matter of the suit in which the bond *was given [**127** The claim for forfeiture alleged in the cause wherein the bond was given was alone covered by the bond, and therefore the assertion of a right to forfeiture for another and distinct cause was not embraced in its condition, although its penalty was the full value of the vessel. The authorities are clear upon this point. In *The Wild Ranger*, decided by Dr. Lushington, the facts were these: A collision occurred between the Wild Ranger and the Coleroon. The Wild Ranger was libeled by the owners of the other vessel, who claimed £3500, and was released under bond. Subsequently she was libeled by the owners of the cargo of the Coleroon. In this last proceeding a decree of condemnation was rendered, the vessel was sold, and the proceeds of sale were paid into court. The price of the sale exceeded the sum of the damages awarded to the owners of the cargo. Pending these proceedings under the second libel, the damages due to the owners of the Coleroon were ascertained to be greater than the sum of the bond given in their case. The owners of the Coleroon thereupon claimed the balance realized by the sale of the Wild Ranger, over and above the amount which had been decreed to the owners of the cargo. Upon this state of facts Dr. Lushington thus ruled:

"In order to justify me in directing these proceeds to be paid to the owners of the Coleroon it is not sufficient that they should show that the debt is due them from the owners of the Wild Ranger. They must either prove that they have a lien upon the proceeds or produce a statute authorizing me to apply these proceeds in satisfaction of the judgment they have obtained. Now, there is no lien on these proceeds, by reason of the action being in the nature of an action *in rem*. The proceeds of the ship sold are in legal consideration the same as the ship itself; and the ship was wholly released from all claim by the owners of the Coleroon from the moment that they took bail." *The Wild Ranger*, 2 New Rep. 402, 403.

In *The T. W. Snook*, 51 Fed. Rep. 244, the Snook had been libeled by the Georgia and released under bond for $4000, double the amount of the Georgia's claim. After *the release of the Snook the Continental Insurance Company, which had paid for a loss on the cargo of the Georgia, intervened and asserted its right to be reimbursed for its expenditure out of the balance of the bond over and above the claim of the Georgia. The court (Blodgett, *J.*) said: "I do not think this application on the part of the insurance company should prevail, my reasons being briefly that at the time the bond was given on which the Snook was released no claim was made in the proceedings except for damage to the hull of the [**128**

Georgia, and, in fact, it was not until about two months after this bond had been given that the insurance company paid the loss on the cargo, and thereby acquired any right of intervention or subrogation. The sureties on the bond must be presumed to have signed it on the understanding that their liability was only to satisfy the cause of action set out in the libel, which was for the damages to the hull of the Georgia." See also *The Union*, *supra*.

There is no force in the argument that, as the suit in Washington claimed the forfeiture of the vessel and the suit in Oregon claimed the same thing, there was a practical identity between them. The fallacy results from a failure to distinguish between the right and the remedy. True, the remedy sought in Washington was the forfeiture of the vessel, and the same remedy was invoked in Oregon, but the causes of action upon which the remedy was prayed in the two cases were entirely different. As we have seen, not only identity of relief, but identity of cause of action, is essential to the plea of pending suit, and both are also necessary to the efficacy of the plea of the thing adjudged.

It is urged that, as the matters could have been joined in the Washington suit, therefore they would have been concluded by a decree rendered therein, the argument being that a judgment concludes not only the matters actually in controversy, but all those which might have been adjudged.

In support of this contention we are referred to *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204]; to *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 619 [19: 205], and other authorities. It is unnecessary to examine these in detail. The proposition which they support is 129]* well stated in an excerpt from Freeman on Judgments, quoted in the brief of counsel: "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."

If the deduction drawn by counsel from this and similar language were true, then a judgment upon one cause of action would be conclusive as to every other existing at the time, although not embraced in the suit, and although the parties were not obliged to join it herein. This would destroy the right of parties to sue separately upon distinct causes of action, and would be subversive of the entire theory of the thing adjudged. The mistake lies in construing the words "which might have been raised," as applying to a cause of action other than the cause of action embraced in the suit. In other words, the doctrine is that the thing adjudged includes not only the direct results of the cause of action which the judgment concludes, but also all things necessarily incident to and growing out of that cause which the parties might have joined in the suit. *Dowell* v. *Applegate*, *ante*, p. 463. Of course, whilst concluding that the separate causes of the action here under consideration need not have been joined in one suit, and that the suit in Washington was no bar to the suit in Oregon, we must not be considered as intimating that there could be more than one forfeiture of the vessel. The distinct charges give rise to distinct causes of action, but the forfeiture for either would have consummated the proceedings.

Judgment reversed and case remanded for further proceedings in accordance with this opinion.

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*, [130
v.
J. L. PATTERSON, County Treasurer of Gallatin County, Montana.

(See S. C. Reporter's ed. 130 134.)

Restraining collection of taxes—Federal question—property of others.

1. He who has the right to property, and is not excluded from its enjoyment, will not be permitted to use the legal title of the government to avoid his just share of state taxation.
2. The decision of the state court, that under the state statute a person must exhaust his remedy before the state board of equalization before he is entitled to bring a suit in equity to restrain the collection of taxes, raises no Federal question.
3. An injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not.

[No. 357.]

Argued and Submitted April 12, 1894. Decided May 26, 1894.

IN ERROR to the Supreme Court of the State of Montana, to review a judgment of that court, affirming the judgment of the District Court of the Sixth Judicial District of that state in favor of defendant J. L. Patterson, county treasurer of Gallatin county, Montana, in an action brought by the Northern Pacific Railroad Company, plaintiff, for an injunction to restrain defendant from selling certain lands for taxes or collecting the same and also for a decree adjudging said taxes to be void. *Dismissed.*

See same case below, 10 Mont. 90.

Statement by *Mr. Chief Justice* **Fuller:**

This was an action commenced by the Northern Pacific Railroad Company against J. L. Patterson, county treasurer of Gallatin county, Montana, for an injunction to restrain the defendant from selling certain lands, blocks, and lots for taxes which had been levied thereon in the year 1889, or collecting the same, and al-

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NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to exemption from taxation; whether a contract or not; not implied, see note to Tucker v. Ferguson, 22: 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

so for a decree adjudging said taxes to be void. The complaint set out three separate and distinct causes of action, but it is not claimed that any Federal question was presented by the allegations in respect of the second and third causes, and no error as to the ruling of the state court thereon was assigned in this court. The complaint asserted an interest in the lands in question under the Act of Congress approved July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific Coast on the Northern Route;" but insisted that the lands were not so segregated from the public domain and identified as a part of the lands granted by said Act as to extinguish all interest of the United States therein and render them taxable. And the grounds set up are thus stated in the brief of counsel: "That a grant was made to the plaintiff by said Act of July 2, 1864; that plaintiff definitely fixed the line of its road and filed a plat thereof in the office of the Commissioner **131** of the General Land Office; that the *road was duly constructed and was accepted by the president. That the lands involved are on and within 40 miles of the line of the road as definitely fixed; and that plaintiff has performed all the things and conditions upon its part to be done and performed to entitle it to the lands inuring to it under the grant; except that it has not repaid to the United States the cost of surveying these lands; that it is now, and has been at all times, ready and willing to pay such costs, and has so advised the United States, but is unable to repay such costs until the United States shall determine what lands are granted to it. That the lands have not been certified or patented to plaintiff, and that the United States have failed and refused to certify said lands, or to certify any lands in Gallatin county to plaintiff, for the reason that it is claimed that said lands are mineral, and are excepted from the grant, and that the question whether the title to said lands passed to plaintiff under said grant, and plaintiff's compliance therewith, is now in controversy and pending before the Commissioner of the General Land Office and Secretary of the Interior. That this failure to certify or patent these lands is solely because of their non-identification as granted lands. That the lands granted by said Act of Congress to plaintiff in said county have never been segregated from the public lands, or identified, and the boundaries of the specific lands granted have never been ascertained or determined.

"That plaintiff has no other right, title, claim, interest, property or possession of, in or to said lands described in the complaint, than such right, title, claim, interest, property or possession, as it obtained under said Act of July 2, 1864.

"That in 1889, the county officers of Gallatin county assessed these lands to plaintiff and proceeded to levy taxes thereon, and defendant, the county treasurer, having advertised the same for sale in satisfaction of these taxes, is about to sell them."

The complaint alleged that a sale would greatly impair the rights of the plaintiff in and to the lands, and cloud its title thereto, and cause a multiplicity of suits with reference to such title, etc. The defendant demurred on the ground that the *complaint did **[132** not state facts sufficient to constitute a cause of action, which demurrer was sustained, and plaintiff electing to stand on the complaint, judgment was entered in favor of defendant. From this judgment plaintiff appealed to the supreme court of the state, by which it was affirmed. 10 Mont. 90. Thereupon plaintiff sued out this writ of error.

Messrs. **James McNaught** and *Fred. M. Dudley* for plaintiff in error.

Mr. **W. W. Dixon**, *H. C. Cockrill*, *H. J. Haskell*, Atty. Gen. of Montana, and *Ella L. Knowles*, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The ground upon which it was asserted that these lands were not subject to taxation was that they had not been identified as lands passing to the plaintiff under its grant, because the United States had refused to certify them, and held them suspended "for the reason that it is claimed that such lands are mineral and are excepted from the grant to the plaintiff." It was said in *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 496, 505 [33:687, 692], that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation," and plaintiff does not state whether all or any part of the lands are mineral or non-mineral. If the legal or equitable title to the lands or any of them was in the plaintiff, then it was liable for the taxes on all or some of them, and the mere fact that the title might be in controversy would not appear in itself to furnish sufficient reason why plaintiff should not determine whether the lands or some of them were worth paying taxes on or not; but the ground upon which the decision of the supreme court of Montana proceeded was this: The 22d section of the statute of Montana, entitled *"An act to provide for the levy of **[133** taxes and assessment of property" (Mont. Laws Extra Sess. 15th Legislative Assembly, 1887, 82, 92) provided:

"The board of county commissioners of each county shall constitute a board for the correction of the assessment roll and the equalization of assessed value of property, and on the third Monday in the month of September, of each year, said board shall meet at the office of the county clerk, at the county seat, and may adjourn from time to time as deemed necessary. Public notice of the time and place of the meeting of said board shall be given by the county clerk by publication for at least two successive weeks, in a newspaper published in said county, if there be one, otherwise by notices posted in five public places immediately prior to the meeting of said board of equalization; but no notice of an adjourned meeting of said board shall be required. Any person feeling aggrieved by any valuation, or amount of property listed, or by any other fact appearing on such assessment, may apply to such board for the correction thereof, and if, in the opinion of said board, any valuation is too high or too low, as

compared with other valuations, by the assessor, of similar classes of property, it may equalize the same; but if such equalization results in any increase, the party affected thereby shall be given reasonable notice of the intention to increase such valuation, with opportunity to appear, which notice may be sent by mail, with postage thereon prepaid. If any person returned as refusing to render a list or to be sworn thereto, can show good cause therefor, the penalty provided may be remitted."

The court held that under this section plaintiff had an ample legal remedy which it was obliged to exhaust before the equitable powers of the court could be resorted to, and, as upon the face of the bill it appeared that the plaintiff had not applied to the board of equalization of Gallatin county for the correction or abatement of the assessment, that no jurisdiction existed under the complaint to grant the injunction. It is contended, on the other hand, that where taxes are levied upon property which is by law exempt from taxation, the statutory remedy by application to a board **134**] of review is only *cumulative and that the tax payer may at his election seek his remedy by injunction in the first instance. But it was for the supreme court of Montana to determine whether the statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no Federal question for our consideration. It is argued that the opinion in effect decides that, under the statute, the state of Montana has a right to assess and levy taxes upon the lands of the United States, and that if no application is made to the board of equalization, the sale of such public lands cannot be restrained. The plaintiff, however, in no respect represented the United States, and an injunction cannot be granted to private individuals to avert the sale for taxes of the property of others whether exempt from taxation or not.

The writ of error must be dismissed and it is so ordered.

THOMAS ST. CLAIR, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 134-155.)

Description of locality of the offense—joint indictment—act done feloniously—summoning talesmen—challenges—evidence—leading questions—nationality—proof of drowning—finding of body—exception—state statute—general verdict.

1. In an indictment for murder it is sufficient description of the locality of the offense, that it was committed on board of an American vessel, on the high seas, within the jurisdiction of the court and the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular state.
2. On the trial of an indictment charging that three defendants, acting jointly, murdered the person named, proof of the guilt of either one will authorize his conviction and the acquittal of the others.
3. It is not necessary to allege in an indictment as to every act therein charged, that it was done willfully, feloniously, and with malice aforethought, where those words are once used, and apply to all the allegations of fact which are connected together.
4. United States Rev. Stat. § 804, as to summoning talesmen, where there is a defect of jurors, is not repealed by the Act of June 30, 1879, and when at the trial such defect occurs, the court may call in talesmen from the bystanders.
5. It is not error on a criminal trial for the court to require that a juror shall be challenged or accepted and sworn as soon as his examination is ended, and before the examination of any other juror.
6. On the trial of an indictment charging three persons jointly with having committed murder, the acts, appearances and declarations of either, if part of the *res gestæ* are admissible in evidence.
7. When the answers of a witness have taken by surprise the party calling him, the court may permit such party to put leading questions to the witness.
8. The certificate of registration of a vessel and proof as to the flag carried by her, are competent evidence to show the nationality of a vessel and its owners.
9. Evidence of the captain of the vessel on which it was alleged that the murder was committed and the body thrown overboard, that he saw no other vessels for several days before or after the alleged deceased was missing, is competent to show that he was actually drowned, and was not rescued after being thrown into the sea.
10. The rule that there should be no conviction for murder, unless the body was actually found, does not apply to murder upon the high seas, where the body is rarely if ever found.
11. Where no exception was taken to a refusal of the court to give to the jury an instruction asked, the action of the court is not subject to review.
12. A state statute making exceptions to decisions of the court as to instructions to the jury unnecessary, does not control the circuit court of the United States sitting in that state.
13. A general verdict of guilty imports a conviction of the offense charged in the indictment.

[No. 1062.]

Submitted March 5, 1894. Decided May 26, 1894.

NOTE.—*As to indictment for murder; sufficiency of statement of time and place of death*, see note to Ball v. United States, 35: 377.

As to jurisdiction of state and United States courts, as to territory and offense, see note to United States v. Bevans, 4: 404.

As to confessions of accused; when evidence against him, see note to Hopt v. Utah, 28: 262.

As to threats by deceased in cases of homicide; when admissible in evidence, see note to Wiggins v. Utah, 23: 941.

As to right of trial by jury in criminal cases; right cannot be waived, see note to Hallinger v. Davis, 36: 986.

As to trial by jury; how affected by 7th Amendment to the Constitution, see note to Justices of New York v. United States, 19: 658.

As to jury, of what number; practice in regard to illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake, see note to Silsby v. Foote, 14: 394.

As to causes of challenge of jurors and their qualifications, see note to Clinton v. Englebrecht, 30: 673.

As to discharge or withdrawal of juror before verdict; effect of, see note to United States v. Perez, 6: 165.

IN ERROR to the Circuit Court of the United States for the Northern District of California, to review a judgment of conviction and sentence of Thomas St. Clair, for the murder of one Morris Fitzgerald, on the high seas, on January 13, 1893. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

In February, 1893, the grand jury, empaneled in the District Court of the United States for the Northern District of California, returned into that court an indictment charging that Thomas St. Clair, Herman Sparf, and Hans Hansen, mariners, late of that district, on the 13th day of January, 1893, with force and arms, on the high seas, and within the jurisdiction of the court, and within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state of the United States, in and on board of an American vessel, the bark Hesper, belonging to a citizen or citizens of the United States, whose name or names are or were to the grand jurors unknown, did, with a certain **136]*** instrument or weapon (the character and name of which were to the grand jury unknown), then and there held in the hands of one of the defendants (but of which particular one was to the grand jurors unknown) "then and there piratically, willfully, feloniously, and with malice aforethought strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald, several grievous, dangerous, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him the said Maurice Fitzgerald cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him the said Maurice Fitzgerald in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald in and upon the high seas aforesaid, out of the jurisdiction of any particular state of the United States of America, then and there instantly died.

"And the grand jurors aforesaid, upon their oath aforesaid, do say, that by reason of the casting and throwing the said Maurice Fitzgerald in the sea as aforesaid, they cannot describe the said mortal wounds or the character and nature of said weapon or instrument. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Thomas St. Clair, Herman Sparf, and Hans Hansen, him the said Maurice Fitzgerald at the time and place as aforesaid, upon the high seas as aforesaid, out of the jurisdiction of any particular state of the United States of America, in and upon the said American vessel, within the jurisdiction of the United States of America and of the admiralty and maritime jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, willfully, feloniously, and with malice aforethought, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided."

It was also averred that the northern district of California was the district into which St. Clair, Sparf, and Hansen were first brought after committing said offense.

The indictment was based upon section 5339 of the Revised *Statutes, providing **[137** among other things that "every person who commits murder . . . upon the high seas or in any arm of the sea, or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state; or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

On motion of the district attorney the indictment was remitted for trial to the circuit court, where the defendants were arraigned and severally pleaded not guilty. Rev. Stat. § 1039.

Subsequently the pleas of not guilty were withdrawn and the defendants jointly demurred to the indictment upon these grounds: 1. That it did not state facts constituting a public offense. 2. That it was uncertain in not showing upon what portion of the high seas the alleged offense was committed or which one of the defendants committed the alleged assault, or whether one or more of the defendants committed any of the acts alleged against them.

The demurrer was overruled, and the defendants being again arraigned pleaded not guilty.

A motion for a separate trial of the defendants was made and granted, and the trial of St. Clair was had separately.

At the beginning of the trial the accused challenged the panel of the trial jurors and the challenge was denied.

The facts in reference to the challenging of jurors are as follows:

On the 1st day of February, 1893, a day of the term of the circuit court, commencing November 28, 1892, an order was made and entered directing a venire to issue summoning fifty persons to serve as trial jurors, returnable February 14, 1893. Pursuant to that order a venire containing fifty names drawn from the regular jury box of the court was issued for those persons to act as petit or trial jurors. At the time of the drawing there were at least three hundred names in the jury *box, **[138** those a part were names remaining after previous drawings at former terms of the court, and the others were names placed therein by the proper officers just previous to the drawing of said venire to make the whole number of names up to and including the full number of three hundred. The persons whose names were contained in that venire were duly summoned, and appeared on the 14th day of February, 1893, with the exception of three, who had in the meantime been excused by the court. Thereafter, on the 2d day of March, 1893, a day of the term commencing on the 1st Monday of February, 1893, the following order was made and caused to be entered: "There being no further business to be brought before them it is ordered that the trial jury of said circuit court, for the present February term

thereof, be discharged and paid for their attendance." On the 6th day of May, 1893, the indictment against St. Clair, Sparf and Hansen was, as already stated, remitted to the circuit court from the district court.

On the 29th day of May, 1893, a day of the February term, after the discharge of the regular jury for the term, the court entered an order directing a venire to issue for fifty persons to serve as trial jurors, and returnable on Wednesday, June 7, 1893. Pursuant to that order a venire containing the names of fifty persons drawn from the regular jury box of the court was issued for those persons to serve as trial jurors in the circuit court, and to appear on the 7th day of June, 1893. At the time of the drawing last mentioned there were at least three hundred names in the jury box, but of those a part were names remaining after the last drawing, and the others were names placed therein by the proper officers just previous to the drawing of the last mentioned venire to bring the whole number in the jury box up to three hundred. The persons whose names were contained in the last mentioned venire (such as were summoned and not excused) appeared and attended the court in obedience to its summons. Thereafter on June 14, 1893, a day in the February term, the circuit judge presiding, the case against St. Clair was called for trial.

The defendant challenged and objected to the [139] general *venire and panel of jurors on the ground that the regular venire of jurors for the term had been discharged, and that court had exhausted its powers to summon a jury to act during the term after the order for a jury of February 1, 1893, and the order discharging the jury of the 2d of March, 1893; and on the further ground that the statutes had not been complied with in summoning jurors, and that at the time of the drawing of the names of the jurors the jury box had not been refilled with three hundred new names, but a portion of the names therein were names remaining after previous drawings. The court overruled the objection and denied the challenge, to which rulings of the court the defendant objected.

Thereupon twelve persons who had been drawn and summoned as aforesaid were regularly called into the jury box, but before being sworn to answer questions touching their qualifications, the attorneys for the defendant objected to and challenged the panel thus called on the ground urged against the general venire. The court overruled the objection and denied the challenge, to which the defendant excepted.

The jurors were then sworn to answer questions touching their qualifications to serve as jurors. After the first juror had been examined as to his qualifications and passed by the United States and the defendant for cause, the court announced that the juror must be sworn to try the case, unless challenged by the United States or the defendant, and that this rule would be enforced as to each subsequent juror. The defendant claimed the right to examine all of the jurors as to their qualifications before exercising the peremptory challenge, and excepted to the ruling announced by the court.

The defendant challenged each separate juror after he entered the box on the grounds that the jury had not been properly drawn as hereinbefore stated, which challenge was denied by the court, and the several rulings of the court were excepted to by him.

The names of jurors summoned having become exhausted, after only eight had been examined, accepted, and sworn, the court ordered 25 talesmen to be summoned for June 15, 1893, to serve as trial jurors in the cause. On that day the *defendant objected to the last [140] mentioned venire, and to the talesmen, on the grounds offered to the original general venire or panel. This objection and challenge were overruled by the court, and the defendant excepted.

The defendant also objected and challenged the talesmen on the ground that there was no jury regularly summoned to be filled by talesmen, and that the talesmen had not been summoned in conformity to law. This objection was overruled, and he excepted.

The defendant also objected to each separate talesmen after he entered the box and was sworn, upon the grounds last mentioned, and the objection was overruled, to which he excepted.

After a jury of twelve had been impaneled and sworn to try the case, the same objection was repeated to the entire panel sworn to try the case, and the objection having been overruled, an exception was taken.

The material facts disclosed by the evidence are so fully and accurately stated in the brief on behalf of the government that we adopt the statement of the Assistant Attorney General, as follows:

"The Hesper was making the voyage from Australia to Honolulu. It left Newcastle on the 22d of December, 1892, with a crew consisting of fourteen persons. The ship's crew was divided into two watches, one called the starboard watch, which is the captain's watch; the other called the port watch, which is the mate's watch. The watches consisted of four hours at a time, except the afternoon watch, from 4 to 8 o'clock, which is divided into two watches of two hours each. The watches relieve each other every four hours. The man at the wheel strikes a bell for the watch to come on deck at 12, 4, and 8 o'clock. A watch is always called before 8 bells, which means 12 o'clock, 8 o'clock, and 4 o'clock. Every half hour is one bell. The seamen call each other and the officers call the officers. When one watch is performing duty the other watch is supposed to be sleeping during the day or night. On the 13th day of January, 1893, the starboard watch consisted of Maurice Fitzgerald, the second mate; *Thomas St. Clair, [141] Herman Sparf, Hans Hansen and Edwin Larsen. The port watch consisted of John Lucas, first mate; Thomas Green, Jens Olsen, Henry Westerlind, and Pandy Secaria.

"On the night of the 13th of January, 1893, John Lucas, the first mate, was called out at about five minutes to 12 o'clock, by Herman Sparf. He dressed, and as he was going on deck eight bells struck for 12 o'clock. He

walked rapidly to the man at the wheel and asked where the second mate was. He called for him and received no answer. He went to the captain's cabin and reported that he could not find the second mate. The captain came on deck and inquired of the starboard watch, which had been on duty from 8 to 12 o'clock, if they knew where the second mate was who had charge of their watch; to his inquiry he received no reply. The carpenter was called on deck, and the search for the second mate was continued. The starboard watch, which had gone off duty at 12 o'clock, had gone below and was called again to the deck by the mate, and was not permitted to go to their bunks to sleep, but was required to remain on deck and go aft. The deck of the vessel was loaded with coal about ten or twelve feet high. The top of it was floored over with some hard wood and on top of that a deck was laid of two-inch planking.

"About twenty minutes past 12 o'clock the captain discovered blood on the deck; about seven or eight feet from the mainmast one spot of blood was about two and a half feet long. The next morning there was found on the edge of the gangway a narrow strip of scalp with a small piece of hair stuck together by blood attached to it. The hair was black, tinged with gray, and was recognized by the captain as the hair of the second mate, who was missing. There was also found a broom covered with blood alongside the ladder; and beneath the bunk of St. Clair, the plaintiff in error, there was found a hatchet which was greasy; and on the deck, near to where the blood was seen, there was found a wooden bludgeon. After the captain discovered the blood he called the starboard watch into the cabin. He saw blood **142**]on one of *the cheeks of Herman Sparf. The men all said they could not account for the blood on the deck; that they had heard nothing during their watch from 8 to 12. Herman Sparf said that he had seen the second mate go up the fore rigging, but had not seen him come down. The captain sent them to their bunks to go to sleep.

"Edward Larsen, a member of the starboard watch, relieved St. Clair at the wheel at 10 o'clock; the second mate was then close by the wheel when relieved by Larsen. St. Clair went forward on the deck. At that time the mate was aft. St. Clair returned and told the mate that something was carried away, and he went forward and the mate followed him. It was very dark at the time and that was the last Larsen saw of the second mate. Shortly after St. Clair and the second mate went forward Larsen heard a dog bark and a man 'holler.' At half past 10 Captain Sodergren and his wife, who were together in the cabin, heard the dog bark and two sounds like a human voice in distress. The barking of the dog and the sound of the voice were heard also by John Langlais, the ship's carpenter, and M. P. Luck, the steward, but they only fix it between 8 and 12 o'clock. Herman Sparf, who was of the starboard watch and whose place was on deck, came to the forecastle, where the port watch were sleeping, and called Jens Olsen at a quarter to 11 o'clock to give them a hand to throw the captain overboard. And about the same time he woke up Thomas Green and said something to him which Green could not understand. Green went on deck in his underclothing; as he was going on the starboard side he saw Hansen with a broom in his hand, and when he went on the deck-load he found St. Clair, Hansen, and Herman Sparf standing there. He said to St. Clair: 'What's the matter, what's the news?' St. Clair said: 'We want you to give us a hand to throw the old man overboard,' referring to the captain. So I says: 'How are you going to get him on deck?' and he says: 'One of us will let go the peak halyards and one of us will go around to the wheel and when he comes on deck then will be the time to do away with him.' So I says: 'Where's the second mate?' *He says: [**143** 'He has gone overboard; can't you see the blood on the deck?' So St. Clair says: 'What do you say?' and I says: 'Wait until I go and put a pair of pants on.'

"Jens Olsen did not go on deck when called by Sparf at a quarter to 11, and did not see St. Clair until he went on deck at 12 o'clock, when he saw him walking on the deck-load on the starboard side, aft of the mainmast.

"The hatchet, which was found under the bunk of St. Clair, was identified by Hong, the cook, as the one which St. Clair had borrowed from him at half-past 6 o'clock the evening before, to cut wood with.

"At half-past 10 o'clock, on the night of the homicide, St. Clair had on a blue serge coat, buttoned up, at the time he came back to the wheel and told the mate that something had been carried away, and he and the mate went forward together. When Captain Sodergren saw St. Clair on the deck, helping the mate to light the lamp, about a quarter after 12 o'clock, he had only a shirt on—a gray shirt; the captain saw no blood on it, and he went into the forecastle to discover whether there was blood on the men's clothing. Pandy Secaria had left St. Clair at the wheel about 9 o'clock that night; he saw him next after 12 o'clock, when the first mate was inquiring: Where is the second mate? He saw him again a few minutes later, after the starboard watch had gone below, coming out of the forecastle; he had changed his clothes; he had got a shirt on and no pants; he jumped inside the forecastle; he had a bundle of clothes in his hand and he chucked them overboard.

"Thomas Green saw St. Clair about 12 o'clock that night, or a little after, have some clothes and throw some clothes overboard. He had some clothes rolled up in a bundle and threw them overboard in front of Green. St. Clair's hands had blood on them at that time.

"After the mate had disappeared that night, and after St. Clair, Sparf, and Hansen were placed in irons, Sparf said to Edward Larsen, in Swedish, not to say anything about it. And the same night the plaintiff in error, St. Clair, had said to Thomas Green, in the forecastle, 'Say nothing about it, Tom.'"

*In the progress of the trial there [**144** were numerous exceptions by the accused in respect to the admission of evidence.

The defendant asked but one instruction, which was in these words: "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. The

jury are instructed that under the indictment in this case the defendant, St. Clair, may be found guilty of manslaughter, and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendant is guilty of manslaughter you may so find your verdict." This instruction was refused, but no exception was taken at the time to this action of the court. The court charged the jury upon the law of the case, saying among other things: "Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder." No exception was taken to the charge of the court or to any part of it.

The jury returned the following verdict: "We, the jury, find Thomas St. Clair, the prisoner at the bar, guilty." Upon that verdict the defendant, after motions for a new trial and in arrest of judgment had been overruled, was sentenced to suffer death.

Messrs. **F. J. Kierce** and **J. F. Smith,** for plaintiff in error:

The court erred in compelling the plaintiff in error, against his objection, to exercise the right of peremptory challenge immediately upon the conclusion of the examination of each juror, touching his qualifications, and in not permitting him to examine all twelve men before exercising his right of peremptory challenge.

Hunter v. *Parsons*, 22 Mich. 96; *Sterling Bridge Co.* v. *Pearl*, 80 Ill. 251; *Taylor* v. *Western Pac. R. Co.* 45 Cal. 323; *Lamb* v. *State*, 36 Wis. 424; *People* v. *Scoggins*, 37 Cal. 676; *People* v. *Jenkins*, 24 Cal. 11; *People* v. *Iams*, 57 Cal. 115.

The practice in United States courts in the matter of impaneling jurors must conform as far as may be practicable to existing laws in the particular states.

United States v. *Douglass*, 2 Blatchf. 207; *Southern Pac. Co.* v. *Rauh*, 7 U. S. App. 84, 49 Fed. Rep. 696.

Declarations of conspirators after the consummation of conspiracy are inadmissible.

People v. *Moore*, 45 Cal. 19; *People* v. *English*, 52 Cal. 212; *People* v. *Stanley*, 47 Cal. 114. 17 Am. Rep. 401; *People* v. *Aleck*, 61 Cal. 138; *People* v. *Irwin*, 77 Cal. 502.

The verdict does not find the defendant guilty of any offense whatever. The jury merely found the defendant "guilty."

United States v. *Leonard*, 2 Fed. Rep. 669; *Ball* v. *United States*, 140 U. S. 136 (35: 384).

In the trial of an indictment for murder in the first degree a verdict of guilty must specify the degree of which the defendant is convicted.

9 Am. & Eng. Enc. Law, 748; *State* v. *Burdon*, 38 La. Ann. 357; *State* v. *Foster*, 36 La. Ann. 877; *Slaughter* v. *State*, 24 Tex. 410; *People* v. *Ah Ye*, 31 Cal. 452; *People* v. *Lee Yune Chong*, 94 Cal. 379; Proffatt, Jury Trials, § 436.

Mr. **Holmes Conrad,** *Assistant Atty. Gen.*, for defendant in error:

It is not necessary that the *corpus delicti* should be proved by direct and positive evidence.

Wills, Circ. Ev. 179; *Rex* v. *Hindmarsh*, 2 Leach, C. C. 591; *United States* v. *Williams*, 1 Cliff. 20.

If the proof shows that any one or more of the defendants were guilty as charged those so proven guilty can be convicted.

Whart. Crim. Pl. & Pr. (9th ed.) §§ 312, 313.

The Act of June 30, 1879, prescribing the manner in which a jury shall be selected, does not repeal section 804, Revised Statutes, providing for special venire.

United States v. *Rose*, 6 Fed. Rep. 136; *Lovejoy* v. *United States*, 128 U. S. 171 (32: 389); *United States* v. *Loughery*, 13 Blatchf. 267.

The certificate of registry was competent evidence of the national character of the vessel to support the indictment.

United States v. *Leetzel* ("*The Mohawk*") 70 U. S. 3 Wall. 571 (18: 68).

The verdict "guilty" is assumed to refer to the indictment to which it is a response.

Whart. Crim. Pl. & Pr. § 747.

Mr. Justice **Harlan** delivered the opinion of the court:

I. The objection, upon demurrer, that indictment did not sufficiently show on what part of the high seas the offense charged was committed, is met by the averment that the offense was committed on board of an American vessel, on the *high seas, within the jurisdiction [145 of the court and within the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of any particular state of the Union. Nothing more was required to show the locality of the offense. In *United States* v. *Gibert*, 2 Sumn. 19, 86, which was an indictment for robbery on the high seas—a capital offense and piracy under the Act of 1790, 1 Stat. at L. 113, chap. 9—the point was made that the indictment was defective in not stating the particular place on the high seas at which the robbery was committed. *Mr. Justice* Story overruled the objection, observing that "the averment in the indictment that the offense was committed on the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, is sufficient certainty for all the purposes of the indictment and trial, without any other particular designation or averment of the locality of the offense. . . . The doctrine of venue in indictments at the common law is inapplicable to cases of this kind. . . . The reason of the common law for laying the venue so particularly in offenses on land does not in any manner apply to the offense on the high seas; for no jury ever did or could come from the *visne* or *visinage* on the high seas to try the cause; and no summons could issue for such a purpose."

Equally without merit is the objection that the indictment does not show which one or more of the defendants committed the alleged assault. The indictment charged that the defendants St. Clair, Sparf, and Hansen, acting jointly, killed and murdered Fitzgerald. The offense was one which in its nature might be

committed by one or more of the defendants. Proof of the guilt of either one would have authorized his conviction and the acquittal of the others. Archb. Crim. Pr. & Pl. 176; 2 How. St. Tr. 526; and *Young* v. *Rex*, 3 T. R. 105.

The only question that could arise as to the sufficiency of the indictment is suggested by the words, "and did then and there, to wit, at the time and place last above mentioned, him, the said Maurice Fitzgerald, cast and throw from and out of the said vessel into the sea **146**] and plunge, sink, and drown *him, the said Maurice Fitzgerald, in the sea aforesaid." These words, it is said, do not necessarily import that the casting and throwing the deceased into the sea was done willfully, feloniously, and with malice aforethought. But those words cannot properly be separated from those which show the nature and effect of the assault. The words immediately preceding those above quoted show that the accused did "then and there piratically, willfully, feloniously, and with malice aforethought, strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and *mortal* wounds." These words and those first above quoted are connected by the conjunctive "and," and should be construed together; and, so construed, it is clear that the words "piratically, willfully, feloniously, and with malice aforethought" refer not only to the striking and beating of the deceased, whereby mortal wounds were inflicted upon him, but to the casting and throwing of him into the sea, whereby he was drowned. Any other rule of construction would compel the pleader to indulge in too much repetition. *Heydon's Case*, 4 Coke, 41.

II. The objections made to the jury were also properly overruled. It was clearly competent for the circuit court to make the order of March 2, 1893, discharging the trial jury for that term, there being no further business to be brought before the court. The indictment having been found after the regular trial jury had been discharged, the order of May 29, 1893, directing a venire returnable June 7, 1893, for fifty persons to serve as jurors was entirely proper. The names of the persons thus summoned to appear and who appeared were drawn from the regular jury box, in which at the time were at least three hundred names. But the list of the whole body of jurors was exhausted when only eight jurors had been accepted. Thereupon the marshal was directed to summon, and did summon, twenty-five talesmen. All this was in conformity to law. By section 804 of Revised Statutes of the United States, it is provided that "when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal **147**] cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel." And this section was neither expressly, nor by implication, repealed by the Act of June 30, 1879, chap. 52, § 2, (21 Stat. at L. 43); nor did that Act "touch the power of the court whenever, at the time of forming a jury to try a particular case the panel of jurors previously summoned according to law is found for any reason to have been exhausted, to call in talesmen from the bystanders to supply the deficiency." *Lorejoy* v. *United States*, 128 U.S. 170, 173 [32: 389, 390].

III. By Rule 63 of the court below, it is provided that "in all criminal trials the designation, impaneling, and challenging of jurors shall conform to the laws of this state existing at the time, except as otherwise provided by acts of Congress or the rules of this court; but a juror shall be challenged, or accepted and sworn, in the case as soon as his examination is completed, and before the examination of another juror."

This rule was enforced at the trial of this case. After the first juror was examined as to his qualifications, the court announced that he must be sworn to try the case, unless challenged by one party or the other—the accused claiming the right to examine all the jurors as to their qualifications before being required to exercise his privilege of peremptory challenge as to any of them.

This general subject was carefully considered in *Lewis* v. *United States*, 146 U. S. 379 [36: 1015], and in *Pointer* v. *United States*, *ante*, p. 208. Referring to section 800 of the Revised Statutes, and the Act of June 30, 1879, chap. 52 (21 Stat. at L. 43, 44) we said in the latter case: "There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in *a particular case adopt [**148** the state practice in that regard. *United States* v. *Shackleford*, 59 U. S. 18 How. 588 [15: 495]; *United States* v. *Richardson*, 28 Fed. Rep. 51, 69." "In the absence of such rule or order," it was further said, "the mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses. . . . In some jurisdictions the mode pursued in the challenging of jurors is for the accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified and not subject to be challenged for cause, is presented for challenge or acceptance. But it is not essential that this mode should be adopted." Referring to certain observations of *Chief Justice* Tindal in *Reg.* v. *Frost*, 9 Car. & P. 129, 137, it was further said: "At most in connection with the report of the case, they tend to show that the practice in England, as in some of the states, was to have the question of peremptory challenge as to each juror, sworn on his *voir dire*, and found to be free from legal objection, determined as to him before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in *Frost's Case* that that mode was the only mode

that could be pursued without embarrassing the accused in the exercise of his right of challenge. The authority of the circuit courts of the United States to deal with the subject of impaneling juries in criminal cases was recognized in *Lewis* v. *United States*, subject to the condition that such rules must be adapted to secure all the rights of the accused. 146 U. S. 378 [36: 1014]."

Adhering to what was said in *Pointer's Case*, that any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of his right of peremptory challenge, must be condemned, we hold that the rule adopted by the court below is not inconsistent with any settled principle of criminal law, nor does it interfere with the selection of impartial juries.

149]*IV. Exceptions were taken, at different stages of the trial, to the admission, against the objection of the accused, of evidence as to the acts, appearance, and declarations of Sparf and Hansen. These objections seem to rest upon the general ground that the indictment did not charge St. Clair, Sparf, and Hansen as co conspirators. The evidence was not, for that reason, to be rejected. St. Clair, Sparf, and Hansen were charged jointly with having killed and murdered Fitzgerald. The acts, appearances, and declarations of either, if part of the *res gestæ*, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so interwoven with each other and with the principal fact that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence. "These surrounding circumstances constituting part of the *res gestæ*," Greenleaf says, "may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." 1 Greenl. Ev. (12th ed.) § 108. See also 1 Bishop, Crim. Proc. §§ 1083-1086. "The *res gestæ*," Wharton said, "may be, therefore, defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal rela-

150]tion to the *act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act." 1 Wharton, Ev. § 259.

V. An exception was taken to the mode in which the district attorney was permitted to examine one of the witnesses introduced by the government. The attorney announced that the answers of the witness had taken him by surprise, and asked that he be permitted to put leading questions to him. This was allowed, and we cannot say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In *Busten* v. *Carew*, 3 Barn. & C. 649, *Lord Chief Justice* Abbott well said that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice." The rule is correctly indicated by Greenleaf, when he says: "But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For, it is said, that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party." Vol. 1 (12th ed.) §§ 435, 444; Taylor, Ev. (6th ed.) § 1262a; *Reg.* v. *Chapman*, 8 Car. & P. 559; *Reg.* v. *Bull*, 8 Car. & P. 745; *Clarke* v. *Saffery*, Ryan & M. 126.

VI. At the trial below the government, after identifying *by the proper officer [151 the original register of the Hesper, which disclosed the names of its owners, but not their nationality, introduced the same in evidence, and also proved that the vessel carried the American flag. There was no direct proof as to the citizenship or nationality of the owners, and the accused objected to this evidence as immaterial and incompetent. The objection was overruled, and an exception taken. The court held the certificate of registration, and the proof as to the flag carried by the vessel, to be competent evidence in the case.

The statutes of the United States provide that vessels built in the United States, and belonging wholly to citizens thereof, may be registered; that no vessel shall be entitled to be registered, or, if registered, to the benefits of registry, if owned in whole or in part by any citizen of the United States who usually resides in a foreign country, during the continuance of such residence, unless he be a consul of the United States or an agent for and partner in some house of trade, or copartnership consisting of citizens of the United States actually carrying on trade within the United States; and that no vessel shall be entitled to be registered as a vessel of the United

States, or, if registered, to the benefits of registry, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless such person be a consul or other public agent of the United States. Rev. Stat. §§ 4132-4134.

We are of opinion that the court below did not err in holding that the certificate of the vessel's registry, and its carrying the American flag, was admissible in evidence, and that such evidence made, at least, a prima facie case of proper registry under the laws of the United States and of the nationality of the vessel and its owners. "The purpose of a register," this court has said, "is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found." *United States* v. *Leetzel* ("*The Mohawk*") 70 U. S. 8 Wall. 571 [18: 68]. The object of the above 152] evidence was, no *doubt, to meet any question that might arise as to the jurisdiction of a court of the United States to punish the particular offense charged. If the proof was unnecessary for that purpose, it could not have prejudiced the accused. If necessary, it was prima facie sufficient to establish the nationality of the vessel. A vessel registered as a vessel of the United States, is, in many respects, considered as a portion of its territory, and "persons on board are protected and governed by the laws of the country to which the vessel belongs." 1 Kent, Com. 26.

VII. One of the assignments of error questions the competency of the statement of the captain of the vessel—admitted in evidence against the objections of the accused—that during the voyage, and particularly on and for several days before and after the night Fitzgerald was missing, he saw no vessels. This evidence was clearly competent. It bore upon the inquiry whether Fitzgerald was actually drowned or was alive. If vessels were shown to have been in sight, at or near the time of the alleged murder, the jury might have been left in doubt as to whether he was rescued after being thrown into the sea. Direct and positive evidence as to the *corpus delicti* was not required. Wills, Circ. Ev. 179. When the strict rule, here claimed, was insisted upon in *United States* v. *Williams*, 1 Cliff. 20, the court expressed its approval of what was said by *Mr. Justice* Story in 2 Sumn. 19, 27—where counsel contended that there should be no conviction for murder, unless the body was actually found—namely, that "in cases of murder upon the high seas the body is rarely, if ever, found, and a more complete encouragement and protection for the worst offenses of this kind could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas." The rule is illustrated by *Rex* v. *Hinmarsh*, 2 Leach, C. C. (4th ed.) 569, which was an indictment for murder upon the high seas. The counsel for the prisoner contended that he should be acquitted on the evidence, because it was not proved that the captain, the person alleged to have been murdered, was dead, and "as there were many ships *and vessels [153 near the place where the transaction was alleged to have taken place, the probability was that he was taken up by some of them and was then alive." It was left to the jury in that case to say whether, upon, the evidence, the deceased was not killed before his body was cast into the sea.

VIII. It is assigned for error that the court refused to give the instruction asked by the accused upon the subject of manslaughter, and said to the jury that if a felonious homicide had been committed, of which they were to be the judges from the proof, there was nothing in the case to reduce it below murder.

As there was no exception taken to the action of the court in these particulars, the error alleged is not subject to review (*Tucker* v. *United States*, *ante*, p. 112) unless, as the accused contends, we are to be controlled, in such matters by section 1176 of the Penal Code of California. That section provides: "When written charges have been presented, given or refused, or when charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions." They also, by the same code, form part of the judgment roll. § 1207.

These provisions of the Penal Code of California do not control the proceedings in the circuit court of the United States sitting in that state. What is necessary to be done in a circuit court, even in civil cases, in order that its action upon any particular question or matter may be reviewed or revised in this court, depends upon the acts of Congress and the rules of practice which this court recognizes as essential in the administration of justice. Such is the result of our decisions. Rev. Stat. § 914; Act of June 1, 1872, chap. 255, § 5; *Nudd* v. *Burrows*, 91 U. S. 426 [23: 286]; *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291 [23: 898]; *Re Chateaugay Ore & I. Co.* 128 U. S. 544, 553 [32: 508]; *Southern Pac. Co.* v. *Denton*, *146 U. S. 202, 208 [36: [154 942, 945]; *Luxton* v. *North River Bridge Co.* 147 U. S. 337, 338 [37: 194]; *Lincoln* v. *Power*, *ante*, p. 224. See also *Logan* v. *United States*, 144 U. S. 263 303 [36: 429, 443].

IX. By the Revised Statutes of the United States, it is provided that "in all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *Provided*, that such attempt be itself a separate offense." § 1035. It is, therefore, contended that as the verdict was, generally, "guilty," and did not, in terms, indicate of what particular offense the accused was found guilty, the judgment should have been arrested.

This contention cannot be sustained. We said in *Pointer* v. *United States* that while the record of a criminal case must state what will

affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted together, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. *Ante*, p. 208. The indictment contained but one charge, that of murder. The accused was arraigned and pleaded not guilty of that charge. And while the jury had the physical power to find him guilty of some lesser crime necessarily included in the one charged, or of an attempt to commit the offense so charged, if such attempt was a separate offense, the law will support the verdict with every fair intendment, and, therefore, will by construction supply the words "as charged in the indictment." The verdict of "guilty" in this case will be interpreted as referring to the single offense specified in the indictment. 1 Bishop, Crim. Proc. § 1005*a*, and authorities there cited; Wharton, Crim. Pl. & Pr. § 747; *Bond* v. *People*, 39 Ill. 26. And this principle has been incorporated into the statute law of some of the states; as in California, whose Penal Code declares that a general verdict upon a plea of not guilty, of "guilty," or "not guilty," shall import a conviction or acquittal of the offense charged in the indictment. § 1151.

What has been said disposes of the objec-
155] tion to the form of *the sentence, which, of course, had reference only to the offense of which the accused was found guilty.

There are other assignments of error, but no one of them requires notice.

Upon a careful examination of the record, we do not find that any error was committed to the prejudice of the accused.

The judgment is affirmed.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* GEORGE H. McFADDEN, ET AL.

(See S. C. Reporter's ed. 155 163.)

Carrier, when liable—bill of lading.

1. A carrier is not liable on a bill of lading for property which at the time of the signing of the bill remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated.

2. A bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignees thereof the rights of the holder of such paper, and such transfer does not preclude inquiry into the transaction in which it originated.

[No. 318.]

Argued and Submitted March 22, 1894. Decided May 26, 1894.

ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of the plaintiffs, George H. McFadden *et al.*, against the Missouri Pacific Railway Company, defendant, for the value of certain bales of cotton, alleged to have been shipped from Greenville, Texas, to Liverpool, England. *Reversed, and case remanded for further proceedings.*

Statement by *Mr. Justice* **White:**

The defendants in error (plaintiffs below) sued in the circuit court of Hunt county, Texas, to recover the value of two hundred bales of cotton, alleged to have been shipped from Greenville, Texas, to Liverpool, England, the shipments having been evidenced by two bills of lading, each for one hundred bales of cotton.

On application of the defendant below, the case was removed to the Circuit Court of the United States for the Northern District of Texas. After filing the record in that court, the pleadings were amended. The amended answer set up the following, among other special defenses, on behalf of the company:

"First. That while it is true that it had issued certain bills *of lading for said cotton, [**156** said cotton had not yet in deed and in truth been delivered to it. It was the habit and the custom of defendant, and well known to plaintiffs to be such, after cottons were placed on the platforms at the compress in Greenville, before the same was compressed, it would issue bills of lading thereof to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that at the time they were so delivered to it the superintendent of the compress or the agent of the compress would check out such cotons intended and the shipper would make out a bill of lading, which would be O. K.'d by the superintendent of the compress or its agent, and afterwards it would be brought to the agent of the defendant and by him signed up, and defendant would actually receive said cotton only after it was compressed and delivered upon its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended by either the shipper or the defendant that the liability of the defendant should attach until the cotton was actually delivered upon its cars. This custom was well known to the plaintiffs, George H. McFadden & Bro. and to A. Fulton & Co., and the bills of lading were made out according to this custom by A. Fulton & Co., as herein shown, and accepted by A. Fulton & Co. according to such custom. At the time said bills of lading were made the cotton was in the hands of the compress according to the custom aforesaid, and had never been delivered to defendant, the defendant's liabil-

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NOTE.—*As to bill of lading; how far may be varied; contradicted, or explained by parol evidence; effect of*, see note to King v. The Lady Franklin, 19:455.

As to consignment; how far consignment of goods vests the property in consignee, and to whom is the carrier responsible for loss or injury, see note to Grove v. Brien, 12:1142.

As to delivery by common carrier by water, see note to Richardson v. Goddard, 16:412.

As to delivery of freight by carrier; notice of arrival; liability of carrier after arrival; carrying live stock, see note to Constable v. National SS. Co. *ante*, p. 903.

As to common carriers of live animals; duty and liability of, see note to New York, L. E. & W. R. Co. v. Estill, 37:292.

ity as a common carrier had never attached, nor had any liability attached, but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire and never came to the hands of defendant. Defendant says said cotton was placed on said platform at said compress for the purpose of being compressed by A. Fulton & Co.; that they well knew, intended, and expected said cotton should be compressed before it was shipped. Said cotton while at the compress was under the control of A. Fulton & Co. or their agent, the compress company."

The answer thereupon proceeded to set out other matters to which it is unnecessary to refer.

157] *The plaintiff replied to the amended answer and excepted to the first count, as follows:

"And they specially except to the first count in defendant's special answer, in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing."

The reply then proceeded to except to other parts of the defendant's answer.

The court sustained the plaintiffs' exception to the first count of the amended answer, to which ruling exception was reserved. Thereupon the facts were stated to be, 1st, that the bills of lading had been issued to Fulton & Co.; 2d, that they were assigned to the plaintiffs; 3d, that the value of the cotton was $8617 83 at the time it was destroyed, and that the defendant had never paid therefor.

Upon this evidence, the case was submitted to the court without a jury, and the court found for the plaintiffs and gave judgment for the value of the cotton. The case is brought here by writ of error.

Messrs. **James Hagerman** and *Joseph M. Bryson*, for plaintiff in error:

A common carrier is not liable for the loss of goods not actually received by it though bills of lading have been issued therefor, nor is he liable as a common carrier for goods actually received, but held awaiting further orders of the shipper or the doing of something with the goods, by the shipper or for his account or benefit, before shipment.

St. Louis, I. M. & S. R. Co. v. *Knight*, 122 U. S. 79 (30: 1077); *The Freeman* v. *Buckingham*, 59 U. S. 18 How. 182 (15: 341); *Friedlander* v. *Texas & P. R. Co.* 130 U. S. 416 (32: 991); *Pollard* v. *Vinton*, 105 U. S. 7 (26: 998); *King* v. *The Lady Franklin*, 75 U. S. 8 Wall. 325 (19: 455); *Watts* v. *Boston & L. R. Corp.* 106 Mass. 466; *St. Louis, A. & T. H. R. Co.* v. *Montgomery*, 39 Ill. 335; *Finn* v. *Western R. Corp.* 102 Mass. 283; *Cairns* v. *Robins*, 8 Mees. & W. 258.

It was a foreign or interstate shipment.

Wabash, St. L. & P. R. Co v. *Illinois*, 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 31; *Louisville & N. R. Co.* v. *Railroad Commission*, 19 Fed. Rep. 679; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 401 (32: 788); *Evansville & C. R. Co* v. *Androscoggin Mills*, 89 U. S. 22 Wall. 594 (22: 724); *Ogdensburg & L. C. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 123 (22: 827).

The clause in the bills of lading exempting the carrier from loss by fire was reasonable and valid.

Missouri Pac. R. Co. v. *Harris*, 67 Tex. 166; *York Mfg. Co.* v. *Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107 (18: 170); *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264 (22: 556); *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331 (28: 717); *Evansville & C. R. Co.* v. *Androscoggin Mills*, 89 U. S. 22 Wall. 594 (22: 724); *New Jersey Steam Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How. 344 (12: 465); *United States Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 348 (19:457).

There is no evidence or finding that the cotton was destroyed through the negligence of plaintiff in error, and under the terms of the bills of lading exempting the carrier from loss by fire, the burden of showing negligence was upon the defendants in error.

Western Transp. Co. v. *Downer*, 78 U. S. 11 Wall. 129 (20: 160); *Clark* v. *Barnwell*, 53 U. S. 12 How. 272 (13: 985); *Witting* v. *St. Louis & S. F. R. Co.* 10 L. R. A. 602, 101 Mo. 632; *Wertheimer* v. *Pennsylvania R. Co.* 17 Blatchf. 421; *Hall* v. *Pennsylvania R. Co.* 14 Phila. 414; *Cochran* v. *Dinsmore*, 49 N. Y. 249; *Farnham* v. *Camden & A. R. Co.* 55 Pa. 53; *Sherman* v. *Pennsylvania R. Co.* 8 W. N. C. 269; *Colton* v. *Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424; *Little Rock, M. R. & T. R. Co.* v. *Corcoran*, 40 Ark. 375; *Denton* v. *Chicago, R. I. & P. R. Co.* 52 Iowa, 161, 35 Am. Rep. 263; *Gandy* v. *Chicago & N. W. R. Co.* 30 Iowa, 420, 6 Am. Rep. 682; *Union S. B. Co.* v. *Knapp*, 73 Ill. 506; *The Emily* v. *Carney*, 5 Kan. 645; *Frank* v. *Adams Exp. Co.* 18 La. Ann. 279; *Harris* v. *Packwood*, 3 Taunt. 264; *Marsh* v. *Horne*, 5 Barn. & C. 322; *The Adriatic*, 16 Blatchf. 424; *The Saratoga*, 20 Fed. Rep. 869; *Marx* v. *The Britannia*, 34 Fed. Rep. 906; *The Barracouta*, 39 Fed. Rep. 288; *The New Orleans*, 26 Fed. Rep. 44; *French* v. *Buffalo & E. R. Co.* 2 Abb. App. Dec. 196; *Lamb* v. *Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Kallman* v. *United States Exp. Co.* 3 Kan. 205; *Kansas Pac. R. Co.* v. *Reynolds*, 8 Kan. 623; *Sager* v. *Portsmouth S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Price* v. *The Uriel*, 10 La. Ann. 413.

It cannot be persumed that the cotton was burnt through negligence of carrier.

Memphis & C. R. Co. v. *Reeves*, 77 U. S. 10 Wall. 179 (19: 909); *New Jersey Steam Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How 344 (12: 465); *Schmidt* v. *Blood*, 9 Wend. 268, 24 Am. Dec. 143; *Sherman* v. *Western Transp. Co.* 62 Barb. 150; *Gandy* v. *Chicago & N. W. R. Co.* 30 Iowa, 421, 6 Am. Rep 682; *Laing* v. *Colder*, 8 Pa. 479, 49 Am. Dec. 533; *Bankard* v. *Baltimore & O. R. Co.* 34 Md. 197, 6 Am. Rep. 321.

Messrs. **George Wharton Pepper** and *J. Bayard Henry*, for defendants in error:

The liability of the plaintiff in error as carrier attached upon the execution and delivery of the bills of lading, and prior to the destruction of the cotton by fire.

Missouri Pac. R. Co. v. *Sherwood*, 17 L. R.

A. 643, 4 Inters. Com. Rep. 240, 84 Tex. 125; *St. Louis, I. M. & S. R. Co.* v. *Knight*, 122 U. S. 79 (30: 1077); Hutchinson, Carriers (2d ed.) § 122.

Upon a proper construction of the bill of lading it appears that the exemption was not intended to attach until transit began, and the cotton while at compress was not in transit.

Sisson v. *Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

The exempting clause being in derogation of a common law liability, will be construed strictly.

Hooper v. *Wells, Fargo & Co.* 27 Cal. 11, 85 Am. Dec. 211; *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 379 (21: 640); *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 441 (32:792); *Deming* v. *Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 310; *Detroit & M. R. Co.* v. *Adams*, 15 Mich. 458.

This limitation applied only to the goods in transportation, and it was not a limitation of the carrier's liability for injuries to the goods while in its possession waiting for transportation.

Scott v. *Baltimore, C. & R. S. B. Co.* 19 Fed. Rep. 56.

The carrier, in order to bring himself within the exception, must show that it was through no fault of his that the goods were subjected to the fatal fire risk.

Steele v. *Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Ryan* v. *Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *Brown* v. *Adams Exp. Co.* 15 W. Va. 812; *Berry* v. *Cooper*, 28 Ga. 543; *Chicago, St. L. & N. O. R Co.* v. *Moss*, 60 Miss. 1003, 45 Am. Rep. 428; *Union Exp. Co.* v. *Graham*, 26 Ohio St. 595.

The contract with the defendant as common carrier was a contract made and to be performed in the state of Texas and is governed by the law of that state.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* ("*The Montana*"), 129 U. S. 397 (32: 788).

The exemption clause of the bills of lading is made void by article 2781 of the Revised Statutes of Texas.

Sherlock v. *Alling*, 93 U. S. 99 (23: 819); *American S. B. Co.* v. *Chace*, 83 U. S. 16 Wall. 522 (21: 369); *Chicago & N. W. R. Co.* v. *Fuller*, 84 U. S. 17 Wall. 560 (21: 710); *Smith* v. *Alabama*, 124 U. S. 465 (31: 508), 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 (32: 352), 2 Inters. Com. Rep. 238; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 31.

Mr. Justice **White** delivered the opinion of the court:

160] *Many questions were discussed at bar which we deem it unnecessary to notice, as we consider that the whole case depends upon the correctness of the judgment of the court below in sustaining the exception to the first defense in the amended answer. That defense averred that the cotton for which the bills of lading were issued was never delivered to the carrier; that by a custom or course of dealing between the carrier and the shipper it was understood by both parties that the cotton was not to be delivered at the time the bills of lading were issued, but was then in the hands of a compress company, which compress company was the agent of the shipper; and that it was the intention of the parties at the time the bills of lading were issued that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed, and that this custom was known to the plaintiffs and transferees of the bills of lading; and that, whilst the cotton was so in the hands of the compress company, the agent of the shipper, and before delivery to the carrier, it was destroyed by fire.

All of these allegations in the answer were, of course admitted by the exception, and, therefore the case presents the simple question of whether a carrier is liable on a bill of lading for property which at the time of the signing of the bill remained in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text-books: "The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage." Redf., Carriers, 80. "The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and until it *has become imposed upon **[161** the carrier by a delivery and acceptance he cannot be held responsible for them." Hutchinson, Carriers, 82.

This doctrine is sanctioned by a unanimous course of English and American decisions. *Hickox* v. *Buckingham*, 59 U. S. 18 How. 182 [15:341]; *King* v. *The Lady Franklin* ("*The Lady Franklin*") 75 U.S. 8 Wall. 325 [19: 455]; *The Delaware* v. *Oregon Iron Co.* 81 U. S. 14 Wall. 579 [20:779]; *Pollard* v. *Vinton*, 105 U. S. 7 [26:998]; *St. Louis, I. M. & S. R. Co.* v. *Knight*, 122 U. S. 79 [30:1077]; *Friedlander* v. *Texas & P. R. Co.* 130 U. S. 423 [32:994]; *St. Louis, I. M. & S. R. Co.* v. *Commercial U. Ins. Co.* 139 U. S. 239 [35:159]; *Barron* v. *Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Moses* v. *Boston & M. R. Co.* 24 N. H. 71; *Brind* v. *Dale*, 8 Car. & P. 207; *Selway* v. *Holloway*, 1 Ld. Raym. 46; *Buckman* v. *Levi*, 3 Campb. 414; *Leigh* v. *Smith*, 1 Car. & P. 638; *Grant* v. *Norway*, 10 C. B. 665; *Hubbersty* v. *Ward*, 18 C. B. 551; *Coleman* v. *Riches*, 16 C. B. 104. Indeed, the citations might be multiplied indefinitely.

Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill.

Of course, then, the carrier's liability as such will not attach on issuing the bill in a

case where not only is there a failure to deliver but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper. Does the fact that the plaintiffs claim to be assignees of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier confer upon them greater rights as against the carrier than those which attach under the bill of lading in the hands of the parties to whom it was originally issued and who made the agreement?

It is to be remarked in considering this question, that the averment of the answer, which was admitted by the exception, charged that the course of dealing between the parties in ac-
162]*cordance with which the goods were not delivered at the time of the issuance of the bills of lading, but remained in the hands of the compress company, which was the agent of the shipper, was known to the plaintiffs, the holders of the bills of lading. It is clear that, whatever may be the effect of custom and course of dealing upon the question of legal liability, proof of such custom and course of dealing would have been admissible, not in order to change the law, but for the purpose of charging the plaintiffs, as holders of the bills of lading, with knowledge of the relations between the parties.

That a bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignees thereof the rights of the holder of such paper, is well settled. Said this court in *Pollard* v. *Vinton, supra:*

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decision. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without endorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hand of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense.

"It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." See *King* v. *The Lady Franklin* ("*The Lady Franklin*") 75 U. S. 8 Wall. 325 [19:455].

163] *The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this court expressed surprise that the question should be raised. These views coincide with the rulings of the English courts. The cases of *Grant* v. *Norway*, 10 C. B. 665, and *Hubbersty* v. *Ward*, 8 Exch. 310, were both cases where bills of lading were issued and held by third parties. The rule was uniform in England until the passage of the Bills of Lading Act (19 Vict. chap. 3, § 3) making bills of lading in the hands of consignees or indorsees for value conclusive as to shipment.

Under these elementary principles we think there was manifest error below in maintaining the exception to the first count in the amended answer. Of course in so concluding we proceed solely upon the admission which the exception to the answer necessarily imported, and express no opinion as to what would be the rule of law if the compress company had not been the agent of the shipper, or if the goods had been constructively delivered to the carrier through the compress company, who held them in the carrier's behalf.

The judgment is reversed and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice **Jackson**, not having heard the argument, took no part in the decision of this cause.

FREDERICK PRENTICE, *Plff. in Err.*,
v.
THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 163-177.)

Recovery in ejectment.

1. In an action of ejectment to recover land, if the deed under which the plaintiff claims does not, by reason of an insufficient description, convey the land to him, he cannot recover, whatever may be the defect in defendant's title; although in a suit in equity plaintiff might have a reformation of his deed by reason of mistake in the description.
2. Where, in a deed, there is a specific description, by metes and bounds, of the lands conveyed, other words therein intended to describe generally the same land, do not vary or enlarge the specific description.

[No. 319.]

Argued and Submitted March 22, 1894. Decided March 26, 1894.

IN ERROR to the Circuit Court of the United States for the District of Minnesota, to review a judgment in favor of defendants, the Northern Pacific Railroad Company *et al.*, in an action brought by Frederick Prentice, plaintiff, being an action of ejectment, to recover the undivided half of certain land in the city of Duluth, Minnesota. *Affirmed.*

See same case below, 43 Fed. Rep. 270.

NOTE.—*As to when a judgment at law in ejectment will be joined by a bill in equity*, see note to Davis v. Tileston, 12: 366.

As to requisites of deed of land, see note to Agricultural Bank of Mississippi v. Rice, 11: 949.

As to misdescription in deeds; when it avoids them; when does not, see note to Wallace v. Penfield, 27: 147.

As to what is sufficient delivery of a deed to pass the title, see note to Tompkins v. Wheeler, 10: 903.

Statement by *Mr. Justice* **Harlan:**

164] *This action of ejectment was brought September 7, 1883, to recover an undivided half of certain lands in the city of Duluth, county of St. Louis, Minnesota. Pursuant to a written stipulation of the parties the case was tried without a jury and upon the question of title alone, and resulted—*Mr. Justice* Miller and *Judge* Nelson concurring—in a judgment for the defendants. 43 Fed. Rep 270.

The case made by the special finding of facts is substantially as follows:

The sixth section of article two of the treaty of the 30th day of September, A. D. 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi—ratified pursuant to a resolution of the United States Senate, passed on the 10th day of January, 1855, by the President on the 29th day of January, 1855—whereby those Indians ceded to the United States certain territory lying adjacent to the headwaters of Lake Superior, contained the following provision, viz: "And being desirous to provide for some of his connections who have rendered his people important services it is agreed that Chief Buffalo may select one section of land at such place in the ceded territory as he may see fit, which shall be reserved for that purpose and conveyed by the United States to such person or persons as he may direct." 10 Stat. at L. 1110.

Under the provision of the treaty and on the day of its date, Chief Buffalo, by an instrument of writing executed by him and filed in the office of the United States Commissioner of Indian Affairs at Washington, selected the land to be conveyed by the United States and appointed the persons to whom it was to be conveyed, indicating the selection and appointment, as follows: "I hereby select a tract of land one mile square, the exact boundary of which may be defined when the surveys are **165**] made, lying on the west shore of *St. Louis Bay, Minnesota territory, immediately above and adjoining Minnesota Point, and I direct that patents be issued for the same, according to the above recited provision, to Shaw-Bwaw-Skung or Benjamin G. Armstrong, my adopted son; to Matthew May-Dway-Gwon, my nephew; to Joseph May-Dway-Gwon and Antoine May-Dway-Gwon, his sons, one quarter section to each."

Matthew, Joseph, and Antoine, under date of September 17, 1855, executed and delivered to Armstrong an instrument, assigning to him their right, title, and interest under the appointment and selection of Chief Buffalo. That assignment, after referring to the treaty and the above instrument of selection and appointment, provided:

"In consideration of the premises and of one dollar to us in hand paid by the said Benjamin G. Armstrong, the receipt whereof is hereby acknowledged, we do hereby sell, assign, and transfer, jointly and severally, all our right, title, interest, equity, claim, and property in and to the said land, and all our right and equity in and to the said instrument so made by the said Buffalo, jointly and severally, and our and each of our right and equity to have patents issued to us, according to the above cited directions of the said Buffalo, and we hereby direct, jointly and severally, that patents issue to said Benjamin G. Armstrong accordingly."

This instrument of assignment was executed by Matthew, Joseph, and Antoine in the presence of and before the United States agent, and the United States interpreter.

Armstrong and wife, September 11, 1856, made, executed, and delivered to the plaintiff herein a deed of conveyance, the recited consideration being eight thousand dollars. The land so conveyed is thus described in the deed: "One undivided half of all the following described piece or parcel of land, situate in the county of St. Louis and territory of Minnesota, and known and described as follows, to wit: Beginning at a large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota Point, commencing at said rock and running east one mile, north one mile, west one mile, south one mile to the place of beginning, and being the *land set off to the [**166** Indian chief 'Buffalo' at the Indian treaty of September 30, A. D. 1854, and was afterwards disposed of by said 'Buffalo' to said Armstrong, and is now recorded with the government documents, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof," etc. This deed, sealed and delivered in the presence of a justice of the peace of Wisconsin, was acknowledged by the grantors on the day of its execution before that officer, whose official character was certified by the clerk of the circuit court of the county where the acknowledgment was made. It was not certified to have been acknowledged in accordance with the laws of Wisconsin. The deed was duly recorded in the county of St. Louis, territory of Minnesota, on the 4th day of November, A. D. 1856.

Armstrong and wife, on the 27th day of August, 1872, executed and delivered to the plaintiff a confirmatory deed, which was duly recorded in the county of St. Louis, state of Minnesota, September 2, 1872. That deed was in these words:

"Whereas on the eleventh day of September, in the year one thousand eight hundred and fifty-six, we, Benjamin G. Armstrong and Charlotte Armstrong, wife of aforesaid Benjamin G. Armstrong, conveyed by a quitclaim deed to Frederick Prentice, of Toledo, Ohio, the undivided one half part of all our interest in certain lands situated at or near the head of St. Louis bay, and intended to describe our interest in what is known as the Chief Buffalo tract, at the head of St. Louis bay, Minnesota territory, and then believing that the description in said deed would cover or was the tract that would be patented to us by the United States of America, according to said Buffalo's wishes and a contract we held from the heirs of said Buffalo, but, to definitely fix upon the land designed to be conveyed, it was stated in said deed to be the land set off to the Indian chief Buffalo at the Indian treaty of September thirtieth, in the year one thousand eight hundred and fifty-four; and, further, I, the said Armstrong, gave a contract on the tenth day of September, in the year

167]* one thousand eight hundred and fifty-six, to the said Frederick Prentice, binding ourselves and heirs to give said Frederick Prentice any further writing or instrument he might require."

"And on the first day of July, in the year one thousand eight hundred and fifty seven, I, Benjamin G. Armstrong, and Charlotte Armstrong agreed to and did sell to Frederick Prentice the other one half of said Buffalo tract, for which said Frederick Prentice paid us something over two thousand ($2 00) dollars, and since that time has paid us to our full satisfaction, for the whole property, and we agreed to and do by these presents confess payment in full for the whole of the above tract, in compliance of the first deed for the one undivided half and the carrying out of the contract to sell the balance July first, in the year one thousand eight hundred and fifty-seven, this is intended to cover the land deeded by us to the said Prentice in the deed given on the eleventh day of September, one thousand eight hundred and fifty six, and recorded in liber A of deeds, page 106, at Duluth, state of Minnesota, and the land included in the contract of the first of July, eighteen hundred and fifty-seven, and intended to cover the lands as described in patents from the United States of America to Benjamin G. Armstrong, Matthew May-Dway Gwon, Joseph May-Dway-Gwon, and Antoine May-Dway Gwon, and described as follows: To Benjamin G. Armstrong the west half of the southwest quarter and the lot number five (5) of section twenty-seven, and lot No. three (3) of section thirty-four, containing together (182 62) one hundred and eighty-two and sixty two one hundredths acres; and to Joseph May-Dway Gwon the southeast quarter of section twenty-eight, containing one hundred and sixty-acres; and Antoine May-Dway Gwon the east half of the northeast of section twenty-eight and the west half of the northwest quarter of section twenty-seven, containing one hundred and sixty acres.

"And to Matthew May-Dway Gwon the southwest quarter of section twenty two, containing one hundred and sixty acres, all of the above being in township fifty north of range fourteen west of the fourth principal meridian,

168] state of Minnesota, and *the three last named pieces of land have since been deeded by the said Matthew, Joseph, and Antoine May-Dway Gwon to Charlotte Armstrong, but previous to the date of said deeds the above named Joseph, Matthew, and Antoine May-Dway-Gwon had assigned or transferred all their right, title and interest therein to the said Benjamin Armstrong. I, the aforesaid Benjamin G. Armstrong, did sell by deed or contract to Frederick Prentice, which I, the said Charlotte Armstrong, knew at the time, but did not know but that by getting another deed or conveyance after the patents were issued we could sell the property, but am now satisfied that we had sold and assigned all our right, title, and interest to Frederick Prentice previous to our deeding to any other person or persons, and that we had no right to deed or convey to any other person or persons, as the title to the lands above described was then virtually and by right vested in the said Frederick Prentice, and that the first deed for the one half and the contract for the remaining half of said land, with the payment thereon made at the time by the said Frederick Prentice, bound us to give him good and sufficient deeds to said property whenever so demanded; and we do hereby assign and quitclaim all our right, title, and interest now or at any time held by us to all the above described property in fulfillment of our agreement with the said Frederick Prentice."

The tract of land which Chief Buffalo had designated as his selection on the day of the treaty did not correspond with the section lines when the land came to be surveyed into sections, and part of it was found to be occupied and claimed by certain Indian traders under the treaty. After a lengthy correspondence and investigation in the Department of the Interior, the relatives of Buffalo, entitled to the land reserved for them, conceded the validity of the claim of these Indian traders, and, in lieu of the lands thus held by them, received other lands adjacent to that selected by Buffalo to make up the quantity of six hundred and forty acres, but not in the form of a parallelogram, though maintaining a continuous connection.

A report of the Secretary of the Interior to to the President, *under date of Septem-[169 ber 21, 1858, and made part of the findings, contained, among other things, the following:

"Now, therefore, under all the circumstances of the case, it having been fully proved that these relatives of the Chief Buffalo acquiesce in the selection made for them by Agent Gilbert and desire that patents should issue to them for this land, and the Commissioner of Indian Affairs having recommended such approval, I have respectfully to request that you will approve the same in order that patents may issue in accordance with their request as follows, viz: To Matthew May-Dway-Gwon, S. W. ¼ sec. 22, T. 50 N., R. 14 W.—160 acres; to Antoine May-Dway Gwon, E. ½ N. E. ¼ sec. 28 and W. ½ N. W. ¼ sec. 27, T. 50 N. R. 14 W.—160 acres; to Joseph May-Dway Gwon, S. E ¼ sec. 28, T. 50 N., R. 14 W.—160 acres; to Shaw Bwaw-Skung or Benjamin G. Armstrong, W. ½ S. W. ¼ sec. 27, lot No. 3, sec. 34, lot No. 5, sec. 27, 182 62."

The patent to Armstrong, issued October 23, 1858, contained the following recitals and description of the land embraced by it:

"Whereas it appears from a return dated the twenty-seventh day of September, one thousand eight hundred and fifty-eight, from the office of Indian Affairs to the General Land Office, that there has been selected and approved for 'Shaw-Bwaw-Skung, or Benjamin G. Armstrong,' as one of the 'connections' of said Chief Buffalo, the west half of the southwest quarter and lot number five, both of section twenty seven, and lot number three of section thirty four, containing together one hundred and eighty two acres and sixty two hundredths of an acre, all in township fifty north, of range fourteen west, of the fourth principal meridian, in the state of Minnesota. Now, know ye, etc."

The parties, at the trial, entered into the following stipulation:

"It is admitted for the purpose of the trial

of the above entitled action that the land in dispute described in complaint of plaintiff herein is part of the land described and included in the patent of the United States to Benjamin 170] G. Armstrong, *dated October 23, 1858, and recorded in book 'B,' at page 500, in the office of the register of deeds of St. Louis county, Minnesota; that the defendants are in possession of the specific portions of said land described in their respective answers herein, and as respects the Northern Pacific Railroad Company it is in possession of the certain portions of said land colored blue upon the map hereto attached, and that all the defendants assert title to said respective portions derived from a certain deed made and executed by Benjamin G. Armstrong and wife to John M. Gilman, dated August 31, 1864, and recorded in the office of the register of deeds of St. Louis county, Minnesota, September 12, 1864, in book 'C' of deeds, at page 665, and from certain other deed made and executed by Benjamin G. Armstrong and wife to Daniel S. Cash and James H. Kelly, bearing date October 22, 1859, and filed for record in the office of the register of deeds in and for said St. Louis county, January 5, 1860, and thereafter recorded in book 'C' of deeds, at page 206; that the said defendants have succeeded to whatever title or right said Kelly and Cash and said Gilman obtained by virtue of said deeds, respectively, in and to the premises in dispute; that at the commencement of this suit said defendants withheld said premises and the rents, issues, and profits of the same from said plaintiff, although they had theretofore been requested to admit him to the possession of an undivided half (½) of said premises and the rents and profits thereof; that the undivided half (½) of the portion of the premises described in said complaint claimed by each of said defendants is worth fifty thousand dollars ($50,000) and upwards." The court found the facts in accordance with this stipulation.

The United States government surveys of the lands ceded by the treaty of September 30, 1854, to the United States had not been made at the date of the deed from Armstrong to plaintiff and were not made until the year following that date.

Gilman took the above conveyance without actual notice of the deed from Armstrong to plaintiff of September 11, 1856, or that plaintiff claimed an interest in the land so conveyed to him.

171] *The defendants herein claim title to the pieces or parcels of land in controversy as grantees of Gilman and under and through the deed to Gilman of August 31, 1864.

The large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota Point, described in the deed from Armstrong to Prentice, is the beginning of the boundary of the tract conveyed, is well identified, and was generally known to the few people familiar with the place, and was recognizable at the time of the trial below, and a mile square measured from that point as called for in the deed would wholly depart from the shore of St. Louis bay and would cover about one half or three fifths land, and the remainder the water of Lake Superior.

The land selected by Chief Buffalo lay upon the shore of St. Louis bay, immediately adjoining Minnesota Point, and this selection was followed as near as it could be by the patents of the United States issued to satisfy that reservation, considering the elimination from the mile square of the lands held by the traders, and the vagueness of Buffalo's description, and the necessity of conforming the final grant to the surveys of the United States.

If the lines of the course called for as east and west in the deed of Armstrong to Prentice, under which the plaintiff asserts his title, were exactly reversed, the description in that deed would include a large part of the land actually selected by Chief Buffalo and also included in the patents from the United States. But it would not include the land sued for in this action.

The instrument executed by the Chief Buffalo, dated September 30, 1854, was the only selection or appointment ever made by him under the sixth clause of the second article of the said treaty.

Chief Buffalo died in the month of October, 1855.

At the date of the deed to Prentice, of September 11, 1856, Armstrong did not have any interest in land in St. Louis county, Minnesota territory, except what he was entitled to under the Buffalo selection and appointment above referred to, and under the above assignment from the other.

*The conclusions of law found by the [172 circuit court were—

That the appointment of persons to whom the United States were to convey the section of land reserved by the above provision of said treaty, made by Chief Buffalo on the 30th day of September, 1854, was a valid and sufficient appointment under that provision, and, upon the ratification of the treaty, vested in Armstrong and the other appointees named such an interest as the treaty gave to the land so reserved;

That the patent of the United States to Armstrong and his acceptance of it was a valid execution of the treaty on that subject;

That the deed from Armstrong to plaintiff, of September 11, 1856, was, in its execution, acknowledgment, and recording, a valid and sufficient deed, and its record constructive notice of its contents;

That the description in the deed of Armstrong to plaintiff of September 1, 1856, is insufficient to convey his interest in or title to any other or different tract of land to which he might have been entitled under said treaty than the tract described therein, and that said deed is ineffectual as a conveyance to plaintiff of any interest or title except such as Armstrong had in or to the land therein described, and that plaintiff took no title under it to the land for the possession of which this action was brought;

That the quitclaim deed from Armstrong to Gilman of August 31, 1864, conveyed to the latter such interest, and no more, as Armstrong had in the land therein described at the date of said deed; and

That the plaintiff is not entitled to recover

in this action, and judgment must go in favor of the defendants for their costs and disbursements.

Messrs. **Elihu Root,** *John F. Dillon* and *Samuel B. Clarke,* for plaintiff in error:

A deed is, if possible, to be made operative in some way; and the construction should be liberal in order to effect that object and enforce the original design.

Foxcroft v. *Mallett,* 45 U. S. 4 How. 376 (11: 1018); *People* v. *Storms,* 97 N. Y. 366.

Deeds are to be read in the light of the circumstances existing at the time of their execution.

United States v. *Arredondo,* 31 U. S. 6 Pet. 740 (8: 565); 2 Devlin, Deeds, § 839; 1 Greenl. Ev. §§ 287, 288.

Deeds between private persons are to be construed against the grantor and favorably to the grantee, so that of two constructions, one of which will defeat the deed and the other make it effectual, the latter is to be taken as the true construction.

Orient Mut. Ins. Co. v. *Wright,* 68 U. S. 1 Wall. 456 (17: 505); *Garrison* v. *United States,* 74 U. S. 7 Wall. 688 (19: 277); *Noonan* v. *Bradley,* 76 U. S. 9 Wall. 394 (19: 757); *Archibald* v. *Thomas,* 3 Cow. 290; *Jackson* v. *Gardner,* 8 Johns. 394; *Colter* v. *Mann,* 18 Minn. 96; *Esty* v. *Baker,* 50 Me. 325, 79 Am. Dec. 616.

Rather than defeat a deed altogether, the court will transpose words or supply them or reject them or change them.

Hathaway v. *Power,* 6 Hill, 456; *Peck* v. *Mallams,* 10 N. Y. 532; *Pond* v. *Bergh,* 10 Paige, 140.

Monuments, courses and distances will be rejected if, when the description comes to be applied, they are found to be inconsistent with other similar particulars, or not to enclose any land, or to enclose land which the grantor did not own; and the deed, nevertheless, sustained if what is left in it is found to describe something which the grantor did own and could convey.

Wallace v. *Penfield,* 106 U. S. 260 (27: 147); *Brookman* v. *Kurzman,* 94 N. Y. 272; *Dygert* v. *Pletts,* 25 Wend. 404; *Case* v. *Dexter,* 106 N. Y. 548; *Masten* v. *Olcott,* 101 N. Y. 152; *Seaman* v. *Hogeboom,* 21 Barb. 398; *Clark* v. *Powers,* 45 Ill. 283; *Piper* v. *True,* 36 Cal. 606; *Barclay* v. *Howell,* 31 U. S. 6 Pet. 498 (8: 477); *White* v. *Luning,* 93 U. S. 524 (23: 939); *Prentice* v. *Stearns,* 113 U. S. 447 (28: 1063); *Hamm* v. *San Francisco,* 17 Fed. Rep. 121; 1 Greenl. Ev. § 301.

These principles apply as well to deeds which purport to convey merely the grantor's "right, title and interest" (such as quitclaim deeds, sheriff's deeds, etc.) as to other conveyances.

Peck v. *Mallams,* 10 N. Y. 532; *Dygert* v. *Pletts* and *White* v. *Luning, supra.*

Armstrong's interest under the Buffalo document could be assigned before the issuance of a patent and before any specific lands were located.

Doe v. *Wilson,* 65 U. S. 23 How. 457 (16: 584); *Crews* v. *Burcham,* 66 U. S. 1 Black, 352 (17: 91); *Elwood* v. *Flannigan,* 104 U. S. 562 (26: 842).

The legal title created by the Armstrong patent enured to the benefit of Prentice, Armstrong's assignee, so as to enable him to maintain the action of ejectment.

Landes v. *Brandt,* 51 U. S. 10 How. 374 (13: 460); *French* v. *Spencer,* 62 U. S. 21 How. 240 (16: 100); *Stoddard* v. *Chambers,* 43 U. S. 2 How. 316 (11: 282); *Beard* v. *Federy,* 70 U. S. 3 Wall. 491 (18: 92) *Grisar* v. *McDowell,* 73 U. 6 Wall. 380 (18: 862); *Carpenter* v. *Rannels,* 86 U. S. 19 Wall. 138 (22: 77).

Mr. **Wm. W. Billson,** for defendant in error:

The clause specifying the boundaries of the granted tract is the only descriptive clause in the deed; the subsequent reference to the derivation of Armstrong's title was for other than descriptive purposes.

Simmons v. *Fuller,* 17 Minn. 487; *Locejoy* v. *Lovett,* 124 Mass. 270; *Doe* v. *Whitney,* 147 Mass. 1; *Cassidy* v. *Charlestown Five Cent Bank,* 149 Mass. 325; *Melvin* v. *Proprietors of Locks & Canals,* 5 Met. 15, 38 Am. Dec. 384.

If the deed contains two independent and cumulative descriptions of the subject-matter of the conveyance, the second description is inferior and subordinate to the first.

Worthington v. *Hylyer,* 4 Mass. 205.

In the event of incompatibility between two such clauses, the authorities require the rejection of the latter.

Brunswick Sav. Inst. v. *Crossman,* 76 Me. 577; *Morrow* v. *Willard,* 30 Vt. 118; *Hastings* v. *Hastings,* 110 Mass. 280; *Congregational Church* v. *Walker,* 124 Mass. 69; *Zink* v. *McManus,* 49 Hun, 586; *Drinkwater* v. *Sawyer,* 7 Me. 366; *Hathorn* v. *Hinds,* 69 Me. 326; *Crosby* v. *Bradbury,* 20 Me. 61.

A precedent particular description is not to be impaired by a subsequent general description or reference.

Melvin v. *Proprietors of Locks & Canals,* 5 Met. 15, 38 Am. Dec. 384; *Weller* v. *Barber,* 110 Mass. 44; *Winn* v. *Cabot,* 18 Pick. 553; *Thatcher* v. *Howland,* 2 Met. 41; *Dana* v. *Middlesex Bank,* 10 Met. 250; *Chaplin* v. *Brodes,* 7 Watts, 410; *Cutler* v. *Tufts,* 3 Pick. 272; *Green Bay & M. Canal Co.* v. *Hewitt,* 55 Wis. 96, 42 Am. Rep. 701; *Howell* v. *Saule,* 5 Mason, 410; *Sherman* v. *McKeon,* 38 N. Y. 266; *Wilder* v. *Davenport,* 58 Vt. 642; *Barnard* v. *Martin,* 5 N. H. 536; *Woodman* v. *Lane,* 7 N. H. 241; *Flagg* v. *Bean,* 25 N. H. 49.

Such reference is sometimes regarded as controlling where it is introduced as the first descriptive clause.

Hibbard v. *Hurlburt,* 10 Vt. 173; *Morrow* v. *Willard,* 30 Vt. 118.

A clause describing the land to be conveyed by reference to its occupancy by any given person, or for specified purposes, is, if first in order, accorded a priority over an independent, specific description, but if following the specific description, is uniformly treated as inferior to it.

Roe v. *Lidwell,* 11 Ir. C. L. Rep. 320; *Spiller* v. *Scribner,* 36 Vt. 245; *Parker* v. *Kane,* 63 U. S. 22 How. 1 (16: 286); *Bratton* v. *Clawson,* 3 Strobh. L. 127; *Benedict* v. *Gaylord,* 11 Conn. 333, 29 Am. Rep. 299; *Child* v. *Ficket,* 4 Me. 471; *Marshall* v. *McLean,* 3 G. Greene, 363; *Wade* v. *Deray,* 50 Cal. 381; *Nutting* v. *Herbert,* 35 N. H. 120; *Jones* v. *Smith,* 73 N. Y. 205.

The rule that in the event of distinct, but inconsistent descriptions, that must prevail

which is most favorable to the grantee, is one to which it is inadmissible to resort, except after the failure of all other expedients for determining the intention of the parties.

Flagg v. *Eames*, 40 Vt. 16, 94 Am. Dec. 368; *Adams* v. *Warner*, 23 Vt. 411; *Clough* v. *Bowman*, 15 N. H. 504; *Esty* v. *Baker*, 50 Me. 325, 79 Am. Dec. 616; 2 Washb. Real Prop. 628; 2 Bl. Com. 380; Broom, Legal Maxims, 536.

Mr. Justice **Harlan** delivered the opinion of the court:

173] *The court below correctly interpreted the decision in *Prentice* v. *Stearns*, 113 U. S. 435 [28: 1059], as holding that the deed from Armstrong to Prentice, under which alone the latter can assert a title to the land in controversy, was an instrument designed to convey a defined tract or parcel of land, not any possible interest existing in Armstrong under the treaty with the Chippewas, the selection of Buffalo, and the appointment that the lands selected by him should be conveyed to Armstrong and other named relatives.

This question was reargued in the court below, in the present case, in the light of additional facts supposed to have been adduced.

Mr. Justice Miller in his opinion in this case, said: "We remain of the opinion we were on the former trial. The first descriptive clause of the deed from Armstrong to Prentice is of a tract of land a mile square, beginning at a large stone or rock, which, as a matter of fact, we find in the present case is now identified, and was well known at the time the deed was made. The description proceeds with the points of the compass one mile east, one mile north, one mile west, one mile south, to the place of beginning. It would be difficult, the beginning point being well ascertained, to imagine that Armstrong intended to convey any other land, or any other interest in land, or interest in any other land, than that so clearly defined. And if that description is to stand as a part of the deed made by Armstrong to Prentice it leaves no doubt where the land was; and there is no occasion to resort to any inference that he meant any other land than that. It is now found as a fact that this boundary would include a surface from one half to three fourths of which is land, and the remainder is water of Lake Superior." 43 Fed. Rep. 270.

The specific description by metes and bounds of the land conveyed by the Armstrong deed to Prentice, namely, "one undivided half of all the following described piece or parcel of land, situate in the county of St. Louis and territory of Minnesota, and known and described as follows: Beginning at a large stone or rock at the head of St. Louis River bay, nearly adjoining Minnesota Point, commencing **174**] at said rock *and running east one mile, north one mile, west one mile, south one mile to the place of beginning," does not, it is conceded, embrace the land in dispute. Indeed, the plaintiff insists, on several grounds, that that description should be rejected altogether, as inaccurate and mistaken. And he is driven to rest his claim of title to the lands in dispute upon the clause of the deed, immediately following the words, above quoted, namely, "and being the land set off to the Indian Chief Buffalo, at the Indian treaty of September 30, 1854, and was afterwards disposed of by said Buffalo to Armstrong, and is now recorded with the government documents."

But the plaintiff, although compelled to rely upon the words last quoted, insists that they mean what, in our opinion, is not justified by a fair interpretation of them. It seems entirely clear that the words in the clause beginning "*and being the land*," etc., were intended to describe, generally, what had been before specifically described by metes and bounds; that "*and being*" is equivalent to "which is," in which case this clause of general description —the specific description by metes and bounds being rejected as not embracing the land—cannot, it is conceded, be regarded as an independent description of the subject of the conveyance.

It is said that the deed should not be construed as intended to convey merely a specific tract, and thereby make it inoperative, because, at the time it was executed, Armstrong did not have any interest in a specific tract that he could convey, but only a general right, under the Buffalo document, to have land located and patented to him by the United States. Referring to the argument made by counsel in support of this view, *Mr. Justice* Miller said: "They say that the reference to the land set off to the Indian Chief Buffalo at the treaty of 1854 meant, not any definite piece of land, but any land which might come to Buffalo or his appointees, of whom Armstrong is one, by the future proceedings of the government of the United States in that case; and that, no matter where such land was found, provided it was within the limits of the land granted by the Chippewa treaty, then the deed from Armstrong to Prentice was intended to convey *such after acquired [**175** interests which were patented to the parties by the United States. We do not see anything in the whole deed or transaction between Armstrong and Prentice that points to or indicates any such construction of it. Both clauses of the description are definite as to the land conveyed, and treat it as a piece of land well described, well known, and well defined. Of course, any man endeavoring to ascertain what land was conveyed under that grant would suppose that, when he found the stone or rock, which we now, as a matter of fact find to have an existence, and can be well identified, he had bought a mile square according to the points of the compass, the southwest corner of which commenced at that rock. He would not suppose that he had bought something that might be substituted in lieu of that mile square by future proceedings of the government of the United States. And so with regard to the other description. Buffalo had made his selection, had described the land which he designed to go by that treaty, not to him, but to his relatives, whose names are given, and it was an undivided half of this land thus selected by the Buffalo chief, and not other land, or different land which might come to Armstrong, that he conveyed and intended to convey to Prentice."

After distinguishing this case from *Doe* v. *Wilson*, 64 U. S. 23 How. 457 [16: 584] and *Crews* v. *Burcham*, 66 U. S. 1 Black, 352

[17:91]. *Mr. Justice* Miller proceeded: "But in the case before us, not only had Buffalo made his selection, and designated the parties to whom the land should go, but the selection had definiteness about it to a certain extent; it was a thing which could be conveyed specifically, and which Armstrong undertook to convey specifically. It is not necessary that we resort to the supposition that Armstrong was talking about some vague and uncertain right—uncertain, at least, as to locality and as to its relation to the surveys of the United States—which he was intending to convey to Prentice, instead of the definite land which he described or attempted to describe. If such were his purpose in this conveyance, it is remarkable that he did not say so in the very few words necessary to express that idea, instead of resorting to two distinct descriptive 176]clauses, neither *of which had that idea in it, one of which is rejected absolutely by the plaintiff's counsel as wholly a mistake, and the other is too vague in its language to convey even what plaintiff claimed for it. We are not able, therefore, to hold with counsel for plaintiff that, if this conveyance does not carry the title to any lands which can be ascertained by that description in the deed, resort can be had to the alternative that the deed was intended to convey any land that might ultimately come to Armstrong under the treaty, and under the selection, and under the assignment to Buffalo." 43 Fed Rep. 276.

We are entirely satisfied with these views. It results that neither the description by metes and bounds, nor the general description of the lands conveyed by the deed under which the plaintiff claims, is sufficient to cover the lands here in dispute.

Another matter deserves notice. It is found as a fact that if the lines of the course called for as east and west in the deed of Armstrong to Prentice, under which the plaintiff asserts title, were exactly reversed, the description in the deed would include a large part of the land actually selected by Buffalo Chief and also included in the patents from the United States. But this fact is immaterial, for it is found that if the course were reversed, as suggested, it would not include the particular lands here in controversy.

The case then is this: Looking into the deed, under which the plaintiff claims title, for the purpose of ascertaining the intention of the parties, we find there a specific description, by metes and bounds, of the lands conveyed, followed by a general description which must be held to have been introduced for the purpose only of showing the grantor's chain of title, and not as an independent description of the lands so conveyed. As neither description is sufficient to cover the lands in suit, there can be no recovery by the plaintiff in this action of ejectment, whatever may be the defect, if any, in the title of the defendants. If this were a suit in equity to compel a reformation of the deed upon the ground that, by mistake of the parties, it did not properly describe the lands intended to be conveyed, 177] and if such a suit were not barred *by time, a different question would be presented upon the merits.

What has been said renders it unnecessary to consider whether the deed from Armstrong and wife to Prentice was so acknowledged and certified as to entitle it under the laws of Minnesota to record in that state, and, by such record, become legal notice of its contents to Gilman and those claiming under him.

We perceive no error in the record to the prejudice of the plaintiff in error, and the judgment is affirmed.

HARRIET A. BALKAM ET AL.
v.
THE WOODSTOCK IRON COMPANY, the ANNISTON CITY LAND COMPANY, ET AL.

(See S. C. Reporter's ed. 177-190.)

Statutes of limitation—state construction.

1. This court follows state statutes of limitation and the construction of such statutes by the state courts.
2. Where the question as to when the bar of the statute of prescription, under the laws and decisions of the state began to be operative has been construed by the court of last resort of that state, this court will follow such construction of the statute.

[No. 329.]

Argued March 28, 29, 1894. Decided May 26, 1894.

IN ERROR to the Circuit Court of the United States for the Northern District of Alabama, to review a judgment for the defendants, The Woodstock Iron Company *et al.*, in an action brought by Harriet A. Balkam *et al.*, plaintiffs, of ejectment for the recovery of certain land. *Affirmed.*

See same case below, 43 Fed. Rep. 648.

Statement by *Mr. Justice* **White:**

*The plaintiffs in error, as heirs of [178 Samuel P. Hudson, brought two suits of ejectment for the recovery of certain lands. By agreement the suits were consolidated and tried as one. After judgment on verdict in favor of the defendants, the case was brought here by writ of error.

Samuel P. Hudson, a resident of Calhoun county, in the state of Alabama, died intestate in August, 1863. At the time of his death he was seized of certain parcels of land in Calhoun county. He left a widow, Kezia A. Hudson, and several children, some of whom were minors. James F. Grant was appointed

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NOTE.—*As to jurisdiction of United States Supreme Court; it is for state courts to construe their own statutes; Supreme Court will not review their decisions except when specially authorized by statute*, see note to Commercial Bank of Cincinnati v. Buckingham, 12:169.

That state decisions govern United States courts as to state statutes, and to rules of property, see note to Clark v. Graham, 5: 334.

That state laws and decisions govern United States courts as to title and transfer of real estate by grant or devise, see note to Elmendorf v. Taylor, 6: 290, and St. John v. Chew, 6: 583.

That state decisions and laws in regard to statute of limitations govern United States courts, see note to Elmendorf v. Taylor, 6: 290.

administrator of his estate by the probate court.

The widow petitioned the court for allotment of dower, and after due proceedings, in accordance with the laws of Alabama, her right of dower in the land in controversy was duly recognized and decreed.

In January, 1866, the administrator petitioned the court to order the sale of the real estate, saving the rights of dower of the widow, in order to pay debts, alleging the insufficiency of the personalty.

To this petition the widow and heirs were made defendants, and a guardian *ad litem* was appointed to represent the minors. A day was set for the hearing; all parties, including the minor's guardian, were duly notified, and a commission was issued for the examination of certain witnesses. The caption of the interrogatories to be addressed to these witnesses recited that the answers, when taken, "were to be used in evidence before said court on the hearing of and in behalf of the application made by James F. Grant, administrator of said estate, to sell land belonging to said estate." The witnesses named appeared before the commissioners appointed by the probate court and testified as to their knowledge of the land and of the heirs and distributees, and swore that to the best of their information and [179] belief, the *personal property of the estate was insufficient to pay the debts. The caption to the answers of each of the witnesses recites that they were sworn and examined by virtue of a commission issued out of the probate court of Calhoun county, Alabama, "in the matter of the estate of Samuel P. Hudson, deceased, the application of Jamas F. Grant to sell land." The certificate of the commissioners attests "the examination of the witnesses in the above stated matter of Samuel P. Hudson, deceased, on the application of J. F. Grant, administrator to sell land." The answers of the witnesses under the commission were returned to the probate court, and were filed by the judge thereof on the 10th of February, 1866. On the 15th of February, 1866, the day set for the hearing of the petition, the following order was entered:

"Probate Court for Calhoun County, Alabama.

February 15, A. D. 1866.

"This being the day set by a former order of this court, the 9th day of January, A. D. 1866, to hear and determine upon the petition of James F. Grant, administrator of the estate of Samuel P. Hudson, deceased, for the sale of the following described lands belonging to said estate for the purpose of paying the debts of the said estate, to wit:

[Here follows a description of the real estate.]

. . . . .

"And comes the said Grant and prays that his said petition and application for the sale of the above described land be heard and determined at this term of the court, and it appearing to the satisfaction of the court that notice of the filing of said petition and of the day set for the hearing of the same had been given according to law, thereupon the court proceeds to hear and determine upon the facts of the said petition; and comes into court L. W. Cannon, as the guardian of the minor heirs of said decedent, and denies each and all of the allegations of said petition, and thereupon said administrator introduces witnesses to sustain the same, and, after hearing all the testimony in the case, the court is of opinion *that the [180] alegations of said petition are fully sustained by the evidence in the case. It is therefore ordered and decreed by the court that the above described lands, as belonging to said estate, be, and the same are hereby, directed to be sold for the payment of the debts of said estate, subject, however, to the widow's dower interest in said lands.

"It is further ordered that said lands be sold on a credit of one and two years, with interest from the date of sale.

"It is further ordered that said administrator, after advertising the sale of said lands in the Jacksonville Republican for three weeks, giving the time, place, and terms of sale, proceed to sell the said lands known as the Steam Mill tract, at Blue Mountain, and the Nunnelly place and town lots, before the courthouse door, in the town of Jacksonville, Ala.

. . . . .

"It is ordered that said land be sold at public auction to the highest bidder, and that said administrator secure the purchase money for said lands by taking notes with two good solvent sureties.

. . . . .

"A. Woods, Judge of Probate."

At the sale thus ordered, the widow, Kezia A. Hudson, purchased the reversionary interest in the lands in controversy for $450. The administrator duly reported the sale to the probate court, stating in his report that he had adjudicated to Kezia A. Hudson the "remainder after the demands of the dower interest in the land," which had been set apart as Mrs. Hudson's dower. This report was sworn to by the administrator, and on May 15, 1866, an order was passed approving the same, and ordering it to be filed. Afterwards the administrator made a formal deed to the widow, which reads as follows:

"Whereas I, James F. Grant, administrator of all and singular the goods and chattels, rights, and credits of the estate of Samuel P. Hudson, deceased, did as said administrator apply—and obtain an order from the probate court of Calhoun county, state of Alabama, for an order to sell the *real estate of which [181] the said Samuel P. Hudson died seised and possessed, subject, however, to the widow of said deceased's right of dower; and whereas said widow did apply to said court of probate to have dower allowed to her out of said lands, and prior to the time said sale was brought there was set off and allowed to Mrs. Kezia A. Hudson, widow of said deceased, the following lands, to wit:

[Here follows a description of the lands.]

. . . . .

"Now, know ye that, for and in consideration of the foregoing premises and the payment of the said sum of four hundred and fifty dollars, to me in hand paid by the said Kezia A. Hudson, the receipt of which is hereby acknowledged, I, as such administrator, have this day bargained and sold, and do by these presents bargain, sell, and convey unto the said Kezia A. Hudson, her heirs and assigns for-

ever, all the remaining interest or right which there is of the said lands; to have and to hold to the said Kezia A. Hudson, her heirs and assigns forever, but I am in no event personally liable upon the covenants of this deed.

"In witness whereof I have hereunto set my hand and affixed my seal this 9th day of April, A. D. 1866.

"J. F. Grant, [seal.]

"Administrator of Samuel P. Hudson, Deceased."

Upon which deed are the following indorsements, to wit:

"State of Alabama, }
Calhoun County. }

"I, Alexander Woods, judge of probate in and for said county, hereby certify that J. F. Grant, administrator of the estate of S. P. Hudson, deceased, who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily as such administrator on the day the same bears date.

"Given under my hand this 9th day of April, A. D. 1866.

"A. Woods, Judge of Probate.

"Filed in office April 9, 1866, and recorded April 16, 1866, and that the deed had on it fifty cents revenue stamps, this 16th day of April, A. D. 1866.

182] *"A. Woods, Judge of Probate.

"The State of Alabama, }
Calhoun County. }

"I, E. F. Crook, judge of the court of probate and *ex officio* clerk of said court, in and for said county and state, do hereby certify that the foregoing three pages, inclusive, contain a true and correct transcript of deed of J. F. Grant, administrator of estate of S. P. Hudson, deceased, to Kezia A. Hudson, as fully and as completely as appears of record in my office.

"Given under my hand at office, in the town of Jacksonville, Alabama, on this the 15th day of August, A. D. 1888.

"E. F. Crook,

"Judge of Probate and *ex officio* Clerk of said Court, Calhoun County, Ala."

On May 9, 1866, the administrator prayed the court that the estate of his intestate might be declared insolvent, and after due hearing and notice to all parties in interest, the prayer was granted.

Mrs. Hudson, the purchaser of the reversionary interest, lived at the time of the sale, with her children, on the lands bought by her. Subsequently she conveyed them to the firm of Sherman & Boynton, who in turn conveyed them to H. L. Jeffers, and he again to the Woodstock Iron Company, one of the defendants in error, which latter sold a portion of the lands to the Anniston Land & Improvement Company, and that corporation conveyed it to the Anniston City Land Company, and, as was admitted, all the purchasers went into possession at the time of their respective conveyances and held the lands openly and unequivocally as owners thereof. The property, since the sale, has become very valuable, a portion of it being within the municipal limits of the town of Anniston and the other portion adjacent thereto. Mrs. Hudson died June 26, 1879.

183] *On June 28, 1887, action was brought by the heirs of Samuel P. Hudson in the circuit court of Calhoun county to recover the lands which had been sold in the probate proceedings. In that suit the parties were the same, the lands were the same, the issues were the same, and the proof was the same as in the case now before us. Judgment was given in the circuit court in favor of the plaintiffs. This judgment, on appeal to the supreme court of Alabama, was reversed, on the ground that whatever rights the plaintiffs might have originally possessed were barred by prescription. *Woodstock Iron Co.* v. *Fullenwider*, 87 Ala. 587.

Section 2714 of the Code of Alabama provides: "Two judgments in favor of the defendant in an action of ejectment, or in an action in the nature of an action of ejectment, between the same parties, in which the same title is put in issue, *is* a bar to any action for the recovery of the land, or any part thereof, between the same parties or their privies, founded on the same title." Availing themselves of this provision of the Alabama law, the plaintiffs thereupon brought these suits in the Circuit Court of the United States for the Northern District of Alabama. As before stated, the parties, plaintiff and defendant, are the same, the issues are the same, and the proof is the same as in the case finally decided by the supreme court of the state. Under instructions from the court there was a verdict for the defendants. The instructions will be found reported in 43 Fed. Rep. 648. The facts were admitted below, and therefore the issues presented are altogether questions of law, and were all reserved by bill of exception taken during the trial below.

Mr. **J. A. W. Smith** for plaintiff in error.

Messrs. **J. J. Willett, John B. Knox** and *John M. McKleroy* for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The plaintiffs rest their case upon an attack upon the probate *proceedings, which **[184** they assert to be absolutely void, 1st, because the proof as to the necessity of the sale was not "taken by deposition, as in chancery cases;" and, 2d, because there was no order of the court authorizing the administrator to make a deed of the property to the purchaser. The first contention is based upon the language of the decree or sale, which is as follows: "And thereupon said administrator introduces witnesses to sustain the same, and after hearing all the testimony in the case, the court is of opinion, etc.; and it is urged that this statement, "the administrator introduces witnesses," necessarily imports that depositions were not "taken as in chancery cases," according to the requirement of the Alabama statute.

We are also told that the depositions which were ordered to be taken by the probate judge for the purpose of the inquiry, and which when taken were filed by him and constituted part of the probate record, cannot be considered, because the opinion makes no reference to them, and, therefore, we must presume that they do not exist; and the contention as to the deed is that it furnishes no evidence of title, because there was no specific order of the court to make it, although the sale was reported to the court and by it con-

firmed, and although the deed, when made, was returned to the probate court, certified by the judge, and by him duly put of record.

These very technical contentions are in conflic with the elementary rules by which the tan ity of probate proceedings are upheld, and are based on the terms of an Alabama statute, to which, we are told, a construction has been given by the courts of that state, which, however narrow and technical, is binding upon us.

The following provisions are found in the Alabama Code:

"2612 (3223). Civil suits must be commenced, after the cause of action has accrued, within the periods prescribed in this chapter, and not afterwards."

"2614 (3225). Within ten years. 1. . . .

"2. Actions for the recovery of lands, tenements, hereditaments, or the possession thereof, except as herein otherwise provided."

185] *" 2624 (3236). If any one entitled to bring the actions enumerated in this chapter, or make an entry on land, or defence founded on the title to real property, be, at the time such right accrues, within the age of twenty-one years, or a married woman, or insane, or imprisoned on a criminal charge for any term less than for life, he or she shall have three years after the termination of such disability to bring suit, or make entry or defence; but no disability shall extend the period of limitation so as to allow such action to be commenced, or entry or defence made, after the lapse of twenty years from the time the cause of action or right accrued; nor shall this exception extend to a married woman in respect to her separate estate."

We excerpt the following from the opinion of the supreme court of Alabama, in the case of *Woodstock Iron Co.* v. *Fullenwider:*

"The defendants, who are appellants in this court, contend, on the contrary, that all irregularities of sale and defects of title, under the admitted facts of the case, are cured by the presumptions arising from the lapse of twenty years, under the broad doctrine of prescription, now so thoroughly established in this state.

"The plaintiffs certainly had no right to sue in ejectment for these lands before the death of the widow, who was tenant for life, her possessions, so far at least as concerns the legal title in the reversion, not being adverse or hostile to the heirs, during the continuance of such particular estate.

. . . . . .

"In considering this question, we shall regard the contention of the appellees as well taken, so far as to assume that the sale of the administrator conferred no *legal* title to the reversion on the widow as purchaser under the probate proceedings in March, 1866.

"Regarding the proceedings in the probate court as void at law for the reasons stated, what, we may inquire, were the equitable rights, if any, acquired under it by the purchaser? This question has been fully settled by our past decisions. Where land of a dece-

186] dent is sold by the probate court for *the payment of debts, or for distribution, and the proceeding is void for want of jurisdiction, or otherwise, and the purchase money, being paid to the administrator, is applied by him to the payment of the debts of the decedent's estate, or is distributed to the heirs; while the sale is so far void as to convey no title at law, the purchaser nevertheless acquires an equitable title to the lands, which will be recognized in a court of equity. And he may resort to a court of equity to compel the heirs or devisees to elect a ratification or rescission of the contract of purchase. It is deemed unconscionable that the heirs or devisees should reap the fruits of the purchaser's payment of money, appropriated to the discharge of debts, which were a charge on the lands, and at the same time to recover the lands. They are estopped to deny the validity of the sale, and at the same time enjoy the benefits derived from the appropriation of the purchase money. And this principle applies to minors as well as adults. *Bland* v. *Bowie*, 53 Ala. 152; *Bell* v. *Craig*, 52 Ala. 215; *Robertson* v. *Bradford*, 73 Ala. 116. See also *Ganey* v. *Sikes*, 76 Ala. 421."

The court then proceeded to hold that, whilst the heirs of Hudson had no legal right to bring an action of ejectment pending the life estate, in view of the probate sale of the reversionary interest and the recorded title thereto, and of the payment of the price into the estate and its distribution among the creditors of the estate, the heirs had an equitable right to bring an action to remove the cloud on the title which the probate proceedings created, and inasmuch as they had failed to do so during twenty years, their right of action was barred under the doctrine of prescription. We again quote:

"Here, then, was the capacity to sue in a court of equity, so as to sweep away a cloud on the title of the plaintiffs, and, by an offer to do equity, to have the equitable title of the defendants, acquired at the void sale, divested out of them by decree of a court of chancery. A failure to exercise this right for over twenty years is such laches as authorizes the inference that the right to do so is barred in any one of the *modes in which that result may be effect-

187] ed. If the only existing right of action on the plaintiffs' part were at law—if his only laches, or slumbering on his rights, consisted in his failure to sue at law—then, as we have often said, 'the only fact open to inquiry, in such cases, would be the character of defendants' possession, either in its original acquisition, or in its continued use, as being, on the one hand, permissive and in subordination, or, on the other, hostile and adverse.' *Long* v. *Parmer*, 81 Ala. 384, and cases cited on p. 338. But the laches here imputed to the plaintiffs is the fact of having allowed the probate court proceedings to remain unassailed for over twenty years—proceedings under which, though void at law, a good equitable title to the reversion had been acquired, accompanied with possession and claim of ownership, on the part of the purchaser and her sub-vendees, during the whole of this long period."

The conclusion of the Alabama court is assailed here on the ground that it is unsound in law. Whilst, of course, as the statutes of the state of Alabama allow two actions in ejectment, the decree of the supreme court of Alabama does not constitute "the thing adjudged" in the case before us, we think the rule under which we follow state statutes of limitation

and the construction of such statutes by the state courts compels us to treat the doctrine here announced as conclusive of the present case, so far as this court is concerned. The whole subject was very fully reviewed by this court in the case of *Bauserman* v. *Blunt*, 147 U. S. 647 [37:316]. There, through *Mr. Justice* Gray, we said:

"By a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that 'the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United states, in cases where they apply.' Act of September 24, 1789, chap. 20, § 34, 1 Stat. at L. 92; Rev. Stat. 721. No laws of the several states have been more steadfastly or more often recognized by this court, from the begin-
188] ning, as rules of decision in the *courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court. *Higginson* v. *Mein*, 8 U. S. 4 Cranch, 415, 419, 420 [2: 664, 665]; *Shelby* v. *Guy*, 24 U. S. 11 Wheat. 361, 367 [6: 495, 496]; *Bell* v. *Morrison*, 26 U. S. 1 Pet. 351, 360 [7: 174, 178]; *Henderson* v. *Griffin*, 30 U. S. 5 Pet. 151 [8: 79]; *Green* v. *Neal*, 31 U. S. 6 Pet. 291, 297-300 [8: 402, 404-406]; *McElmoyle* v. *Cohen*, 38 U. S. 13 Pet. 312, 327 [10: 177, 184]; *Harpending* v. *Reformed Protestant Dutch Church*, 41 U. S. 16 Pet. 455, 493 [10: 1029, 1043]; *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 [17: 261]; *Sohn* v. *Waterson*, 84 U. S. 17 Wall. 596, 600 [21: 737, 739]; *Tioga R. Co.* v. *Blossburg & C. R. Co.* 87 U. S. 20 Wall. 137 [22: 331]; *Kibbe* v. *Ditto*, 93 U. S. 674 [23: 1005]; *Davie* v. *Briggs*, 97 U. S. 628, 637 [24: 1086, 1089]; *Amy* v. *Dubuque*, 98 U. S. 470 [25: 228]; *Mills* v. *Scott*, 99 U. S. 25, 28 [25: 294, 295]; *Moores* v. *Citizens Nat. Bank of Piqua*, 104 U. S. 625 [26: 870]; *Michigan Nat. Bank* v. *Eldred*, 130 U. S. 693, 696 [32: 1080, 1081]; *Penfield* v. *Chesapeake, O. & S. W. R. Co.* 134 U. S. 351 [33: 940]; *Barney* v. *Oelrichs*, 138 U. S. 529 [34: 1037].

"In *Patton* v. *Easton*, 14 U. S. 1 Wheat. 476, 482 [4: 139, 141], and again in *Powell* v. *Harman*, 27 U. S. 2 Pet. 241 [7: 411], this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the supreme court of the state, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in *Green* v. *Neal*, 31 U. S. 6 Pet. 291 [8: 402], a judgment of the circuit court of the United States, which had held itself bound by those cases in this court, was reversed, because of more recent decisions of the state court, establishing the opposite construction."

Nor can the case before us be saved from the operation of the rule thus stated by the contention that the supreme court of the state of Alabama has misconstrued its statutes or has adopted a rule of limitation or prescription in conflict therewith. In *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599, 603 [17: 231, 262], *Mr. Justice* Swayne, speaking for the court, thus laid down the rule:

"The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to a statute of a
*state by the highest judicial tribunal of [189
such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

These views meet every point presented here and do not in any way conflict with *Burgess* v. *Seligman*, 107 U. S. 32 [27: 364]; *Carroll County Suprs.* v. *Smith* 111 U. S. 562 [28: 519]; or *Gibson* v. *Lyon*, 115 U. S. 439 [29: 440]. None of those cases involved the question of the conclusiveness on this court of the decisions of the courts of a state as to a statute of limitations and the bar created thereby. It may be that, if the question were before us for original consideration, we should hold that the right of the heirs to sue did not arise until after the death of the holder of the life estate, and therefore that the bar of the statute would only then begin to run; but we are not at liberty to pass upon that question. When the bar of the statute of prescription, under the laws and decisions of the state of Alabama, began to be operative has been construed by the court of last resort of that state. Necessarily the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whether legal or equitable. Those questions were purely within the province of the supreme court of Alabama. In deciding them it passed upon its own statutes of limitations or the doctrine of prescription as applied by it, and we are obliged to apply and enforce their conclusions.

To indorse the position of the plaintiffs in error, we should be compelled at the same time to disregard the elementary rules by which decrees of probate are sanctioned and upheld, on the ground of a technical construction which, it is asserted, we are compelled to adopt because of the decisions of the state court of Alabama, and to depart from the settled rule under which this court adheres to the decision of state courts of last resort in construing statutes of limitation or enforcing the doctrine of prescription. In other words, the success of the *plaintiffs' case depends upon our [190
adhering to the rule by which we follow the construction of state courts in a state matter on the one hand and departing from it on the other.

Judgment affirmed.

Mr. Justice **Jackson** not having heard the argument, took no part in the decision of this cause.

THE NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

ALBERT L. BABCOCK, as Administrator of the Estate of HUGH M. MUNRO, deceased.

(See S. C. Reporter's ed. 190 203.)

Action for death—direction to jury—safety of employé—error—defective pilot plow.

1. In an action in the United States circuit court, against a railroad company, for damages for the death of an employé, where the death occurred out of the state in which the action is pending, the right to recover is governed by the *lex loci* and not by the *lex fori*.
2. Where the engineer of a railroad company notified the master mechanic that the pilot plow of the engine was broken and in a dangerous condition, and was afterwards required to run the engine without having opportunity to examine whether it had been repaired, and while so running it in a severe snow storm, the engine was derailed by the snow by reason of the defective condition of the plow, and the engineer was killed, the evidence as to whether the engine had been repaired being conflicting, it was not error for the trial court, in an action against the company to recover damages for his death, to refuse to direct the jury to find a verdict for the defendant.
3. In an action against a railroad company for damages for death of an employé an instruction to the jury that if the defendant failed to discharge any duty imposed by law upon it for the safety of the employé and such negligence was the cause of his death, the plaintiff is entitled to recover, is not erroneous, where it could not have misled when considered in connection with the rest of the instruction given.
4. It is not error in the trial court to refuse to give to the jury a charge which is not materially variant from the charge already given.
5. Where the cause of action for the death of the engineer of a railroad company, upon which the plaintiff relied, was the defective condition of the pilot plow by reason of which the engine was derailed by the snow, it was not error for the trial court to refuse to instruct the jury, that unless they find that it was customary for the defendant company to send a snowplow in advance of the train and that the accident occurred by reason of the failure to send such snowplow in advance, the defendant is entitled to a verdict.

[No. 328.]

Submitted March 28, 1894. Decided May 26, 1894.

ERROR to the Circuit Court of the United States for the District of Minnesota, to review a judgment in favor of plaintiff, Albert L. Babcock, as administrator of Hugh M. Munro, deceased, in an action brought by him against the Northern Pacific Railroad Company, defendant, to recover damages for the killing of said Munro, by the negligence of said defendant, in the territory of Montana. *Affirmed.*

Statement by *Mr. Justice* **White:**

The plaintiff below, who was the administrator of the estate of Hugh M. Munro, sued in the District Court of the Fourth Judicial District of Minnesota to recover $25,000 damages for the killing of Munro on the 10th day of January, 1888, at or near a station known as Gray Cliff on the Northern Pacific Railway in the territory of Montana. The complaint contained the following allegations:

*"That on the said 10th day of Janu- [191 ary, 1888, the said Hugh M. Munro, now deceased, was in the employ of the said defendant corporation within the territory of Montana in the capacity of locomotive engineer for hire and reward by the said defendant paid, and that the duty of running a locomotive engine upon said defendant's line of railway within said territory was by said defendant assigned to said Hugh M. Munro on the said 10th day of January, 1888, and the defendant directed and ordered the said Hugh M. Munro to run a certain locomotive engine, the property of said defendant, known as engine No. 161, over and upon its said railway in said territory; that prior to and at the time the said orders were so presented to said Munro there had been and then was a severe snow storm in progress, and defendant's line of railway over and upon which said Munro was so ordered to run said engine was covered with drifting snow theretofore accumulated thereon and then fast accumulating, notwithstanding which the said defendant corporation did willfully, improperly, negligently, and carelessly refuse and neglect to send a snowplow ahead of said engine No. 161 to clear the snow and ice from said defendant's said track which had accumulated and was accumulating thereon by reason of said storm, so as to render the passage of said engine No. 161 safe and proper.

"That there was attached to the forward part of said engine No. 161 a certain attachment known as a pilot plow, an appliance constructed thereon for the purpose of clearing the railway of snow and ice accumulated thereon and render safe the passage of the engine to which said plow was attached over and upon said railway of defendant.

"That on the said 10th day of January, 1888, the said defendant corporation knowingly, willfully, negligently, and carelessly allowed to be and remain upon said engine No. 161, attached thereto as aforesaid, a certain pilot plow, the iron braces, bolts, and rods of which were broken, imperfect, and insufficient, by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, allowing the said pilot to raise up and ride over *obstructing [192 snow and ice instead of cutting through the same, as was the intention of its construction, rendering the running of said engine upon said railway dangerous, and that the said defendant

NOTE.—*As to master's duty to furnish suitable and safe machinery and appliances; and liability to servant for their being insufficient and out of repair*, see note to Richmond & D. R. Co. v. Elliott, 37: 728.

As to responsibility of master to servant for carefulness and competency of coservants, see note to Wabash R. Co. v. McDaniels, 27: 605.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

As to liability of railroad companies to switchmen or brakemen for injuries while coupling cars; violation of rules, see note to Kohn v. McNulta, 37: 150.

As to trespassers or persons on track of railroads; duty of railroad company towards them, see note to Mitchell v. New York, L. E. & W. R. Co. 36: 1064.

well knew of the broken, defective, and dangerous condition of said engine No. 161 at the time the said Hugh M. Munro was so ordered to run the same upon and over said railway, notwithstanding which the said defendant corporation did negligently and carelessly furnish to said Hugh M. Munro said engine with the said broken and imperfect pilot plow attached thereto to run over and upon its said line of railway.

"That while said Hugh M. Munro was running said engine in performance of his duty as such engineer and pursuant to the orders of said defendant corporation, and before daylight on said 10th day of January, 1888, near Gray Cliff, in said territory of Montana, the said engine struck an accumulation of snow and ice which said defendant had carelessly and negligently allowed to accumulate upon its said railway track, and the pilot plow of said engine, by reason of its broken, loose, and imperfect condition aforesaid, did ride upon said accumulation of snow and ice, thereby derailing said engine and throwing the same from said railway track, whereby the said Hugh M. Munro was instantly killed.

. . . . . .

"That the law of the territory of Montana governing actions for recovery of damages for causing death was on the 10th day of January, 1888, and now is sections 13 and 14 of title II of said chapter 1 of the first division of Code of Civil Procedure of the territory of Montana; which said sections of said law of said territory are in the words and figures following, viz:

"'Section 13. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, or a guardian for the injury or death of his ward.

"'Section 14. Where the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for dam-
193]ages *against the person causing the death or if such person be employed by another person who is responsible for his action, then also against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just.'"

The case was removed to the Circuit Court of the United States for the District of Minnesota, where an answer was filed by the defendant, denying the averments of the complaint, and alleging that the death of Munro was caused solely by his negligence and carelessness, and not by the negligence of the defendant or any of its servants or employés.

There was a verdict and judgment below in favor of the plaintiff for $10,000. To review that judgment this writ of error is sued out. The errors assigned are as follows:

"First. The court erred in charging the jury as follows: 'Did it fail to discharge any duty which the law imposed upon it for the safety of its employé, the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover.'

"Second. The court erred further in charging the jury as follows: 'The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or, at least, that the defendant had not used reasonable care in clearing its track, and that when the engineer in that condition arrived at this cut, two miles from Gray Cliff, the snow had accumulated to such an extent that the engine was thereby derailed, and that it was this negligence which caused the death.'

"Third. The court erred further in charging the jury as follows: 'Many states have different laws. The law in this state until recently was that only $5000 could be given in a case of death. It has lately been increased to $10,000.'

"Fourth. The court erred further in charging the jury as follows: 'If you believe from all the evidence in the case that the plaintiff is entitled to recover, then it is for you to determine what compensation you will give for the death of the plaintiff's intestate. The law of Montana limits it to such an amount as you think it would be proper under *all [194 circumstances of the case, and that is the law which will govern in this case.'

"Fifth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'You, the jury, are instructed to find a verdict for the defendant.'

"Sixth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The laws of Minnesota limit the amount of damages to be recovered in this case to five thousand dollars.'

"Seventh. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The court instructs the jury that unless they find that it was customary for defendant company to send a snowplow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snowplow in advance, they will find for the defendant.'

"Eighth. The court erred further in refusing to give to the jury the following request tendered by defendant's counsel: 'The court instructs the jury that unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect, and insufficient, and that by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilot plow of said engine, by reason of its said broken, loose, and imperfect condition, did ride upon the accumulated snow and ice at said cut, and that thereby the said engine was thrown from the track, the jury will find for the defendant.'"

Messrs. **Jas. McNaught, A. H. Garland** and **H. J. May,** for plaintiff in error:

Allegations of negligence, where the action is brought by an employé, must be more specific than when a passenger is plaintiff, and though a general charge of negligence

might be sufficient where the passenger is plaintiff, negligence cannot be proven under it when an employé is plaintiff.

Clark v. *Chicago, R. & Q. R. Co.* 15 Fed. Rep. 588; *Waldhier* v. *Hannibal & St. J. R. Co.* 71 Mo. 514, 2 Am. & Eng. R. Cas. 146; *Buffington* v. *Atlantic & P. R. Co.* 64 Mo. 246; *Capital Bank* v. *Armstrong*, 62 Mo. 59; *Chapman* v. *Callahan*, 66 Mo. 299; *Carson* v. *Cummings*, 69 Mo. 325; *Columbus, C. & I. R. Co.* v. *Troesch*, 68 Ill. 545; *Batterson* v. *Chicago & G. T R. Co.* 49 Mich. 184, 8 Am. & Eng. R. Cas. 123.

A servant who has a reasonable opportunity to inform himself of the defects, is presumed, by remaining in the company's employ, to have assumed the risks of such defects.

Pierce, Railroads, 379; Thomp. Neg. 1008; *Houston & T. C. R. Co.* v. *Fowler*, 56 Tex. 452, 8 Am. & Eng. R. Cas. 504.

The party had his selection as to the forum; that being so, it is but right and proper he should have only the remedy afforded by the law of the forum of his selection.

Whart. Conf. L. §§ 479, 747, 754; Gould, Pl. (2d ed.) 104-112, 131, *et seq.*; Story, Conf. L. § 556, *et seq.*; *Nonce* v. *Richmond & D. R. Co.* 33 Fed. Rep. 429; *Mostyn* v. *Fabrigas*, 1 Smith, Lead. Cas. 1037.

Messrs. **Reuben C. Benton** and *Frank Healy*, for defendant in error:

Having given notice to the company, the employé had the right, after a sufficient time had elapsed to make the repairs, to assume that the repairs had been made.

Hough v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Greene* v. *Minneapolis & St. L. R. Co.* 31 Minn. 248, 47 Am. Rep. 785; *Little Rock & Ft. S. R. Co.* v. *Duffey*, 35 Ark. 602, 4 Am. & Eng. R. Cas. 637; Shearm. & Redf. Neg. § 96; Thomp. Neg. 1009, 1010.

Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

Dennick v. *Central R. Co. of N. J.* 103 U. S. 11 (26: 439); *Herrick* v. *Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771.

Mr. Justice **White** delivered the opinion of the court:

For convenience, we shall consider the various assignments of error without regard to their numerical order.

The third, fourth, and sixth assignments involve the same question, and may be decided upon together.

The plaintiff's intestate was an engineer in the employ of the defendant corporation in the territory of Montana, and the accident by which he lost his life occurred there. The law of the territory of Montana at the time provided as follows:

"Where the death of a person not being a minor is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is respon [197] sible for his action, then also *against such other person. In every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just." Section 14, title II, chapter I, first division of the Code of Civil Procedure of the Territory of Montana.

Under the law of Minnesota, when the death occurred, the limit of recovery in case of death was $5000, but at the time of the trial of the case in the court below this limit had been increased to $10,000 by amendment of the Minnesota statutes.

The question which those assignments of error present is, was the amount of damage to be controlled by the law of the place of employment and where the accident occurred, or by the law of the forum in which the suit was pending? In the case of *Herrick* v. *Minneapolis & St. L. R. Co.* reported in 31 Minn. 11, 47 Am. Rep. 771, which involved the question of whether the courts of Minnesota would enforce and apply to a suit in that state for a cause of action originating in Iowa a law of the state of Iowa making railroad corporations liable for damages sustained by its employés in consequence of the neglect of fellow servants, the court said:

"The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action;* while all that pertains merely to the *remedy* will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be *ex contractu* or *ex delicto*.

"The defendant admits the general rule to be as thus stated, but contends that as to statutory actions like the present, it is subject to the qualification that, to sustain the action, the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text-writers—notably, Rorer on Interstate Law—seem to lay *down this rule, but the authorities [198] cited generally fail to sustain it.

. . . . . .

"But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see noth-

ing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

This opinion of the supreme court of Minnesota is in accord with the rule announced by *Chief Justice* Marshall in *The Antelope*, 23 U. S. 10 Wheat. 66 [6: 268]; In referring to that case in *Texas & P. R. Co.* v. *Cox*, 145 U. S. 593 [36: 829], the court said, "the courts of no country execute the penal laws of another. But we have held that that rule cannot be invoked as applied to a statute of this kind, which merely authorizes a civil action to recover damages for a civil injury." The rule thus enunciated had been adopted in previous cases, and has since been approved by this court. *Smith* v. *Condry*, 42 U. S. 1 How. 28 [11: 35]; *The China* v. *Walsh*, 74 U. S. 7 Wall. 53, 64 [19: 67, 71]; *Dennick* v. *Central R. Co. of N. J.* 103 U. S. 11 [26: 439]; *National Steam Nav. Co.* v. *Dyer* ("*The Scotland*"), 105 U. S. 24, 29 [26: 1001, 1003]; *Huntington* v. *Attrill*, 146 U. S. 670 [36: 1128]. Indeed in *Texas & P. R. Co.* v. *Cox*, *supra*, *Mr. Chief Justice* Fuller, speaking for the court, said: "The question, however, is one of general law, and we regard it as settled in *Dennick* v. *Central R. Co. of N. J.*"

199] *The contract of employment was made in Montana, and the accident occurred in that state, while the suit was brought in Minnesota. We think there was no error in holding that the right to recover was governed by the *lex loci*, and not by the *lex fori*.

The fifth error assigned is the refusal to instruct the jury to find a verdict for the defendant.

The evidence tended to show that Munro was an engineer in the employ of the railroad company at the town of Livingston; that, as such engineer, he was driving engine No. 161 some time in the latter part of December; that whilst driving the engine he discovered that an appliance known as the "pilot-plow," which was attached to the engine, was out of order, and in a dangerous condition. The purpose of such a plow is to push the snow from the track, and if not properly braced, as stated by one of the witnesses, it is likely to "rise up and ride over the drift, instead of going through it, and the natural result would be to throw the engine trucks from the tracks." After Munro discovered that the plow was defective, he called the attention of the foreman of the shop and master mechanic to its condition. On or about the 2d of January, Munro was taken sick and did not pursue his occupation until January 9, when he reported for duty. At about twelve o'clock that night, while a severe snow storm was raging, Munro was sent for, by messenger, to take out a passenger train. The train was delayed in getting away from Livingston, and left that place about two o'clock in the morning drawn by engine No. 161, with Munro in charge as engineer. At a place called Gray Cliff the engine, in passing through a cut, capsized, and Munro was killed.

There was no conflict of evidence as to the fact that the plow was defective some two weeks before the accident, when Munro so stated to the foreman and master mechanic, but there was a conflict upon the question whether or not it had been subsequently repaired. Testimony was adduced by the plaintiff tending to show that the necessary repairs had not been made, and that at midnight on the 9th, when the engineer was called upon to take charge of the engine, the *condition of the plow was quite as defective as it had been some two weeks before, when the engineer had made his report of its condition to the foreman. On the other hand, the defendant offered testimony which tended to show that the repairs had been made. It was proven that, at the time Munro was called upon to take charge of the engine, on the night of the 9th, the round-house was so full of steam that the engine could not have been critically examined by him. The presence of this steam was due to the fact that there was no heating apparatus in the round-house, and, therefore, steam was allowed to escape therein, in order to prevent the engines from freezing. There was some evidence that the effect of the defective pilot plow would be to throw the train from the track whenever the engine struck an accumulation of snow which had been in any way impacted, the resistance of the snow having the effect of pushing the defective plow up and thus derailing the engine. On the other hand, there was other evidence that such a result could not have followed from the defect in the plow. [200

Under this condition of proof it is clear that the instruction was rightfully refused. The obligation of the employer to furnish to his employé sound implements is established. *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 218 [25: 612, 615]; *Union Pac. R. Co.* v. *Snyder*, *ante*, p. 597. And the fact that the engineer, when called upon at midnight on the 9th to perform duty, took the engine out under the conditions surrounding it in the roundhouse, implies no assumption by him of the risk of defective machinery. The proof showed, or tended to show, that notification by the engineer to the foreman and master mechanic of the existence of the defect was given some ten or twelve days before the accident, and that at the time there was an impression created in Munro's mind that it was to be remedied. It also shows that work of this character was usually done in the shops at Livingston, over which the foreman presided and in which the engine lay when the notice was given. From the time of the notice up to the time when the engineer was called upon to use the engine he was not on duty, but was absent on sick leave. As the employé had *given notice of the defect to the proper officer whose duty it was to make the repairs, and the impression had been conveyed to him that these would be made, he had a right to assume that they had been made, and to act upon that assumption. The mere fact of his taking the engine out at midnight under the circumstances did not of itself, unsupported by other proof, imply an assumption by him of the risk resulting from the dangerous and defective condition of the attachment to the engine. *Hough* v. *Texas & P. R. Co.* 100 U. S. 225 [25: 617]. [201

The first assignment of error is, we think, without merit. The language of the charge complained of is: "Did it [the defendant company] fail to discharge any duty which the law imposed upon it for the safety of its employé,

the plaintiff's intestate? If it did, and if such negligence was the cause of the death of the engineer, Munro, then the plaintiff is entitled to recover." Separated from the context this general language might have misled, but when considered in proper connection with the rest of the instruction given, it could not have done so.

The eighth error assigned was to a refusal of the court to give the following charge: "The court instructs the jury that unless they find that the defendant carelessly and negligently furnished to the deceased engineer a plow attached to his engine, the iron bolts and rods of which were broken, imperfect and insufficient, and that by reason of which condition the said plow was loose and insufficiently secured to the pilot of said engine, and that when the said engine struck the snow at the cut, as testified to, the pilotplow of said engine, by reason of its said broken, loose, and imperfect condition, did ride upon the accumulated snow and ice at said cut, and that thereby the said engine was thrown from the track, the jury will find for the defendant." The charge which the court gave was substantially as requested, and correctly stated the law. It was as follows: "The court instructs you that unless you find that the defendant negligently and carelessly furnished to the deceased engineer a plow attached to his engine, the iron bolts and 202] rods of which were broken, *imperfect, and insufficient, and by reason of said imperfect condition, when the engine struck the snow at the cut, as testified to, the engine and tender were derailed by reason thereof, which caused the accident in question, then the defendant would be entitled to a verdict. The claim is that the snow had accumulated to such an extent in that cut that when the engine struck it, the plow being in the condition in which it was, it was unable to clear the track, the accumulation of snow being so great, and that, as described by some witnesses, it rode up and threw the engine off the track from the fact that the front trucks of the engine could not ride over it. I instruct you that unless the cause of this derailment and the throwing over of the engine was the imperfect condition of this plow, that it could not clear the cut from the snow which had accumulated there, but the engine was thrown over and thereby death ensued—unless this is found to be true to the satisfaction of the jury, the defendant would be entitled to a verdict." We can see no material variance between the charge requested and the charge which was given.

The seventh error assigned is to the refusal of the court to instruct the jury "that unless they find that it was customary for defendant company to send a snowplow in advance of the trains running east from Livingston during storms of this character, and that unless, further, the accident occurred by reason of the negligent and careless failure of the defendant to send such snowplow in advance, they will find for the defendant." This instruction was, of course, justly refused, because it implied that the defendant was entitled to a verdict, if, contrary to its custom, it had not sent a snowplow in advance of the train, without reference to the defective condition of the pilotplow, which was the cause of action upon which the plaintiff relied. Indeed, although the petition charged negligence on the part of the defendant in failing to send a snowplow ahead of the train, the action, as stated in the complaint, was predicated upon the defect in the machinery, or pilotplow—the failure to send the snowplow being alleged as a mere incident or remote cause of damage. And this distinction was elucidated *with great [203 clearness in the charge of the court. It nowhere indicated that there could be any liability on the part of the defendant arising from the failure to send a snowplow ahead of the train, as a distinct and substantive cause of action. It referred to the failure to send a snowplow ahead of the train merely as the reason why it was necessary to have the pilotplow attached to the engine. The court said: "The charge in this complaint is that this death was caused by the derailment of the engine, which took place because the plow was out of repair as described, or at least that the defendant had not used reasonable care in clearing its tracks, and that when the engineer with the engine in that condition arrived at this cut, two miles from Gray Cliff, the snow had accumulated to such an extent that the engine was thereby derailed, and that it was this negligence on the part of the defendant that caused the death." In other words, throughout the whole charge, the court instructed the jury that the liability, if any, must result from the defective condition of the machinery or pilotplow of the engine; and where it referred to the failure to send a snowplow ahead of the train as an act of negligence, treated it as negligence giving rise only remotely, and not proximately, to the injury; the proximate cause being the defective machinery, and the remote the accumulation of snow, which rendered the use of the engine unsafe because of the defect in the pilotplow attached thereto.

Judgment affirmed.

Mr. Justice **Jackson** not having heard the argument, took no part in the decision of this cause.

THE COVINGTON & CINCINNATI [204 BRIDGE COMPANY, *Plff. in Err.*,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 204-223.)

Bridge connecting states of Ohio and Kentucky —power of state to regulate toll—interstate commerce.

1. The Kentucky law of 1890 fixing rates of toll and fare over the bridge of The Covington & Cincinnati Bridge Co., spanning the Ohio river and connecting the states of Ohio and Kentucky,

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NOTE.—*As to power of Congress to regulate commerce*, see note to Gibbons v. Ogden, 6: 23, and to Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress; how far exclusive, see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute when invalid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to Harmon v. Chicago, 37: 216.

is an attempted regulation of commerce which it is not within the power of the state to make.

2. A state has no power to regulate tolls upon a bridge connecting such state with another state; Congress alone has such power.

4. Whether two states can, in the absence of legislation by Congress, fix, by reciprocal action, the rates of toll and fare over a bridge connecting such states, this court does not decide in this case.

3. A bridge across waters between two states and connecting such states, is an instrument of interstate commerce and traffic across it is interstate commerce.

[No. 1025.]

Argued Jan. 26, 29, 30, 1894. Reargued April 25, 1894. Decided May 26, 1894.

IN ERROR to the Court of Appeals of the State of Kentucky, to review a judgment of that court, affirming the judgment of the criminal court of Kenton county, in that state, adjudging the defendant, The Covington & Cincinnati Bridge Company, guilty of the offenses charged in an indictment against that company, for collecting illegal tolls upon the bridge of that company across the Ohio river between the states of Kentucky and Ohio, and imposing a fine upon defendant. *Reversed, and case remanded for further proceedings.*

Statement by *Mr. Justice* **Brown:**

This was an indictment found by the grand jury of Kenton county, Kentucky, against the defendant Bridge Company for demanding and collecting illegal tolls, refusing to sell tickets at the rates required by law, and for failing to keep an office for the sale of tickets at its bridge in said county.

The Covington & Cincinnati Bridge Company was incorporated under an act of the legislature of Kentucky, approved February 17, 1846, the third section of which required the confirmation of the act by the state of Ohio, before the corporation should open its books **206**] for subscription; *and the eighth section of which declared that "the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon, with their goods, carriages, or animals of every description or kind; provided, however, that the said company shall lay before the legislature of this state a correct statement of the costs of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping the said bridge in repair, and of the other expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of the said bridge shall not exceed fifteen per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

By an act of the legislature of Ohio, enacted March 9, 1849, this company was made a body corporate and politic of that state, "with the same franchises, rights, and privileges, and subject to the same duties and liabilities," as were specified in its original incorporation; and with a further proviso that "nothing herein contained shall be construed to take away the jurisdiction of this state to the center of the said bridge, nor in anywise to acknowledge the jurisdiction of the commonwealth of Kentucky this side of the said center."

On March 20, 1850, this act of confirmation was amended by the legislature of Ohio by granting the company "power to enter upon any lands in the city of Cincinnati, from low-water mark in the Ohio river northwardly, not exceeding one hundred feet in width, to Front street, and appropriate the same" for passageways and abutments, etc.

The original act of incorporation was amended by the legislature of Kentucky by the following amongst other subsequent acts:

1. By act of February 23, 1856, authority was given to increase the capital stock from $300,000 to $700,000, with power in the city of Covington to subscribe for and purchase $100,000.

2. By act of February 6, 1858, the company was authorized *to issue preferred stock [**207** under certain restrictions, such stockholders to receive dividends of 6 per cent.

3. By act of February 5, 1861, the capital stock was increased to $1,000,000, one half of such amount in preferred stock, and to pledge the revenues of the company for the payment of dividends upon such preferred stock to the extent of 15 per cent per annum.

4. By act of January 21, 1865, the capital stock was increased to $1,250,000, the additional $250,000 being preferred stock, the holders of which should enjoy all the benefits, privileges, and immunities to which the holders of the existing stock were entitled.

By the sixth section of this act the legislature reserved the right to change, alter, or amend the original charter, "but not so as to abridge or injure legal or equitable rights acquired thereunder."

5. By act of February 25, 1865, the above sixth section was repealed.

6. By Act of Congress of February 16, 1865, the bridge was declared to be a lawful structure and post road for the conveyance of the mails of the United States. 13 Stat. at L. 431.

The bridge was completed and opened for travel January 1, 1867.

On March 31, 1890, the legislature of Kentucky passed another act amendatory of the act of incorporation, and out of which this prosecution arose, providing that it should be unlawful for any person or corporation to charge, collect, demand, or receive for passage over the bridge spanning the Ohio river, constructed under such act of incorporation, any toll, fare, or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the eighth section of the act of incorporation. The second section provided that the company should sell passage tickets over their bridge at these rates, entitling the holder to passage either way over said bridge; and by the third section, the company was required to keep an office within the county of Kenton constantly open *for the sale of [**208** such tickets; and keep conspicuously posted a schedule of the tolls fixed in pursuance of the act.

The company failing to conform to this last mentioned act, this indictment was filed May

9, 1890. Defendant demurred thereto, and the case was submitted upon this demurrer and a statement of facts, showing the cost of the bridge structure and offices to have been $1,855,462.36; the per cent. of net earnings on cost for first 23 years, 4.82; the per cent of net earnings on cost for the year 1889, 6.14; the estimated per cent of net earnings on cost for 1890, $4\frac{9}{10}$, under the charges fixed by the directors; the estimated percentage of net earnings on cost for the year 1890, under the act of which complaint was made $1\frac{4}{10}$. The court sustained the demurrer and dismissed the indictments upon the ground that the act of 1890 impaired the obligation of the contract contained in the eighth section of the original act. The commonwealth appealed to the court of appeals, by which the judgment of the court below was reversed, and the case remanded with directions to overrule the demurrer, and for further proceedings. The case was thereupon remanded to the lower court and submitted without a jury. The court adjudged the defendant guilty, and imposed a fine of $1000, from which judgment the defendant again appealed to the court of appeals, which affirmed the judgment of the court below, and certified, at the request of the appellant, the following questions as arising under the Constitution and laws of the United States:

1. Whether the act of 1890 was within the constitutional inhibition of laws impairing the obligation of contracts.

2. Whether such acts were in violation of the exclusive power of Congress to regulate commerce among the states.

3. Whether said act was in violation of the 14th Amendment, prohibiting the taking of private property without due process of law.

Defendant thereupon sued out a writ of error from this court.

Messrs. **Lawrence Maxwell, Jr.,** *Solicitor General,* **Wm. M. Ramsay,** *James W. Bryan, John F. Fisk* and *Charles H. Fisk,* for plaintiff in error:

The bridge of the plaintiff in error, being an instrumentality of interstate commerce, lying partly in two states, it is not competent for the legislature of Kentucky to regulate it by prescribing tolls for the transit and passage of persons and property thereover from one state to another.

Wabash, St. L. & P. R. Co. v. *Illinois,* 118 U. S. 557 (30: 244), 1 Inters. Com. Rep. 31.

The question of the reasonableness of the rates is not material. If the legislature of Kentucky can fix the tolls at all, the amount will rest in its discretion.

Gloucester Ferry Co. v. *Pennsylvania,* 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382.

A bridge is an instrument of commerce within the meaning of the Constitution.

Pensacola Teleg. Co. v. *Western U. Teleg. Co.* 96 U. S. 1 (24: 708); *Western U. Teleg. Co.* v. *Texas,* 105 U. S. 460 (26: 1067); *Western U. Teleg. Co.* v. *Pendleton,* 122 U. S. 347 (30: 1187), 1 Inters. Com. Rep. 306; *Mobile County* v. *Kimball,* 102 U. S. 691 (26: 238); *California* v. *Central Pac. R. Co.* 127 U. S. 1 (32: 150), 2 Inters. Com. Rep. 153; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641 (34: 295); *Decker* v. *Baltimore & N. Y. R. Co.* 30 Fed. Rep. 723.

The plaintiff in error is engaged in the business of interstate commerce, because its bridge extends from one state to another, and every passage thereover of persons or property is necessarily from one state to another.

Budd v. *New York,* 143 U. S. 517 (36: 247); 4 Inters. Com. Rep. 45; *Munn* v. *Illinois,* 94 U. S. 113 (24: 77); *Chicago, B. & Q. R. Co.* v. *Iowa,* 94 U. S. 155 (24: 94); *Philadelphia & R. R. Co.* v. *Pennsylvania* ("*State Freight Tax*") 82 U. S. 15 Wall. 232 (21: 146).

If it is competent for the legislature of Kentucky to fix tolls for this bridge, the acts of 1890 prescribe rates which are in conflict with the contract contained in the original charter of the company.

Stone v. *Yazoo & M. V. R. Co.* 62 Miss. 607, 52 Am. Rep. 193; *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Philadelphia, W. & B. R. Co.* v. *Bowers,* 4 Houst. (Del.) 506; *Sloan* v. *Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397; *Hamilton* v. *Keith,* 5 Bush, 458; *Atty. Gen.* v. *Chicago & N. W. R. Co.* 35 Wis. 425.

If it is to be presumed, in the absence of proof, that the bridge company failed to file, or delayed in filing, the reports called for by the eighth section of the charter, such failure or delay does not work a forfeiture of its right to collect tolls under its charter.

Georgia R. & Bkg. Co. v. *Smith,* 128 U. S. 174 (32: 377); *Stanley* v. *Colt,* 72 U. S. 5 Wall. 119 (18: 502); *Goldsborough* v. *Orr,* 21 U. S. 8 Wheat. 217 (5: 600); *Philadelphia, W. & B. R. Co.* v. *Howard,* 54 U. S. 13 How. 307 (14: 157).

Messrs. **Wm. J. Hendrick,** Atty. Gen. of Kentucky, and **Wm. Goebel,** for defendant in error:

The business or employment of the bridge company is not commerce, and the acts of 1890 are not regulations of commerce. Those acts are regulations of charges for the use of artificial facilities constituting mere local aids to commerce, and affect commerce only incidentally. Such facilities do not require, nor admit of, uniformity of regulation. Congress not having legislated on the subject, it was competent for the state to do so. A state having power to impose charges for the use of such facilities, it has also power to determine what the charges shall be.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 616; *Mobile County* v. *Kimball,* 102 U. S. 691 (26: 238); *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382; *Newport & C. Bridge Co.* v. *United States,* 105 U. S. 470 (26: 1123).

Congress has never attempted to regulate the operation of bridges or ferries, nor the tolls or fares on either. These matters Congress has left to the states, and the states always have regulated and controlled them.

Keokuk N. L. Packet Co. v. *Keokuk,* 95 U. S. 80 (24: 377); *Hass* v. *Oliver,* 119 U. S. 549 (30: 487); *Ouachita & M. R. Packet Co.* v. *Aiken,* 121 U. S. 444 (30: 976), 1 Inters. Com. Rep. 379; *Escanaba & L. M. Transp. Co.* v. *Chicago,* 107 U. S. 678 (27: 442); *Conway* v. *Taylor,* 66 U. S. 1 Black, 603 (17: 191).

If, by virtue of its original charter, the corporation was exempt from legislative control of its tolls, it lost the exemption by reason of

the amendment to its charter, approved January 21, 1865.

Gibbs v. *Consolidated Gas Co.* 130 U. S. 408 (32: 984); *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 583 (28: 1088); *Shields* v. *Ohio*, 95 U. S. 319 (24: 357); *Miller* v. *New York & E. R. Co.* 21 Barb. 513; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13 (26: 961).

Whatever power is dependent solely upon the grant of the charter, is abrogated by the repeal of the law which granted these special rights.

Com. v. *Essex Co.* 13 Gray, 239; *Miller* v. *New York*, 82 U. S. 15 Wall. 498 (21: 104); *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 454 (21: 204); *Maine Cent. R. Co.* v. *Maine*, 96 U. S. 499 (24: 836); *Union Pac. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700 (25: 496); *Hill* v. *Glasgow R. Co.* 41 Fed. Rep. 610.

There being no consideration for the act, it was a mere gratuitous concession which the state might at any time recall or disregard.

Christ Church v. *Philadelphia County*, 65 U. S. 24 How. 301 (16: 604); *Tucker* v. *Ferguson*, 89 U. S. 22 Wall. 574 (22: 816); *Louisville Gas Co.* v. *Citizens Gas Light Co.* 115 U. S. 683 (29: 510).

The bridge company failed to perform an express duty, which was, by the terms of its charter, made a condition of the exemption from legislative control of tolls, which it claims. By failing to perform the condition, it waived and lost the alleged exemption dependent upon it.

Rich v. *Atwater*, 16 Conn. 419; *Voorhees* v. *Jackson*, 35 U. S. 10 Pet. 471 (9: 499); *Auditor* v. *Haycraft*, 14 Bush, 284.

The state need not accept any substitute for performance of the condition.

Maine Cent. R. Co. v. *Maine*, 96 U. S. 499 (24: 836); *Atty. Gen.* v. *Petersbury & R. R. Co.* 28 N. C. 461.

The power to fix or regulate tolls or other charges for the use of property clothed with a public interest is a power of government, continuing in its nature; and when that power has been by the state delegated to a corporation, it may be resumed at will unless the state has unequivocally contracted not to do so. There was no such contract in the original charter of the Covington & Cincinnati Bridge Company.

Stone v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Stone* v. *Illinois Cent. R. Co.* 116 U. S. 347 (29: 650); *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 560 (7: 955); *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet 420 (9: 773); *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 (21: 888); *Bailey* v. *Magwire*, 89 U. S. 22 Wall. 215 (22: 850); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Gordon* v. *Appeal Tax Court*, 44 U. S. 3 How. 133 (11: 529); *Piqua Branch of Bank of Ohio* v. *Knoop*, 57 U. S. 16 How. 369 (14: 977); *Proprietors of Passaic & H. River Bridges* v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall 116 (17: 571); *Home of the Friendless* v. *Rouse*, 75 U. S. 8 Wall. 430 (19: 495); *Ruggles* v. *Illinois*, 108 U. S. 526 (27: 812); *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174 (32: 377).

The fixing of a maximum of rates in a charter does not make a contract, nor deprive the legislature of the power subsequently to regulate and reduce the rates.

Com. v. *Easton Bank*, 10 Pa. 442; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174 (32: 377).

The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority, as circumstances may require.

Munn v. *Illinois*, 94 U. S. 113 (24: 77); *Ruggles* v. *Illinois*, 108 U. S. 526 (27: 812); *Dow* v. *Beidelman*, 125 U. S. 680 (31: 841), 2 Inters. Com. Rep 56; *Minneapolis & E. R. Co.* v. *Minnesota*, 134 U. S. 467 (33: 985), 3 Inters. Com. Rep. 224; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 (36: 176); *Budd* v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45.

The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S 659 (24: 1036); *Pennsylvania R. Co.* v. *Canal Comrs.* 21 Pa. 9.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the power of a state to regulate tolls upon a bridge connecting it with another state, without the assent of Congress, and without the concurrence of such other state in the proposed tariff.

The right of the commonwealth of Kentucky to prescribe a schedule of charges in this instance is contested, not only upon the ground that such regulation is an interference with interstate commerce, but upon the further ground that it impairs the obligation of the contract contained in the original charter of the company.

The power of Congress over commerce between the states and the corresponding power of individual states over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the states with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarkation between the powers belonging exclusively to Congress, and those in which the action of the state may be concurrent. The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.

The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just [210 sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways and canals between points in the same state, and regulate the tolls

for the use of the same (*Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall. 456 [22:678]), and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the state—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries. *Veazie* v. *Moor*, 55 U. S. 14 How. 568 [14: 545]; *United States* v. *The Montello*, 78 U. S. 11 Wall. 411 [20: 191]; 87 U. S. 20 Wall. 430 [22: 391]. This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The states may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society for Savings* v. *Coite*, 73 U. S. 6 Wall. 594 [18: 897]; *Provident Inst. for Savings* v. *Massachusetts*, 73 U. S. 6 Wall. 611 [18: 907]; *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 632 [18: 904]; *Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall. 456 [22: 678]; *Ashley* v. *Ryan*, *ante*, p. 773.

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the states (*United States* v. *De Witt*, 76 U. S. 9 Wall. 41 [19: 593]; *Patterson* v. *Kentucky*, 97 U. S. 501 [24: 1115]) nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a state. *License Tax Cases*, 72 U. S. 5 Wall. 462 [18: 497]. The remarks of the *Chief Justice* in this case contain the substance of the whole doctrine: "Over this" (the internal) "commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a busi-
211] ness within a state is plainly *repugnant to the exclusive power of the state over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States. *Allen* v. *Newberry*, 62 U. S. 21 How. 244 [16: 110]. But later adjudications have ignored this distinction as applied to those waters. *The Belfast* v. *Boon*, 74 U. S. 7 Wall. 624, 641 [19: 266, 271]; *Rodd* v. *Heartt* ("*The Lottawanna*") 88 U. S. 21 Wall. 558, 587 [22:654, 665]; *Lord* v. *Goodall, N. & P. SS. Co.* 102 U. S. 541 [26: 224].

Under this power the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on. *Trade Mark Cases*, 100 U. S. 82 [25: 550].

Within the *second* class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots (*Cooley* v. *Philadelphia Port Wardens*, 53 U. S. 12 How. 299 [13: 996]; *Pacific Mail SS Co.* v. *Joliffe*, 69 U. S. 2 Wall. 450 [17: 805]; *Ex parte McNiel*, 80 U. S. 13 Wall. 236 [20: 624]; *Wilson* v. *McNamee*, 102 U. S. 572 [26: 234]) quarantine and inspection laws and the policing of harbors (*Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 203 [6: 23, 71]; *New York* v. *Miln*, 36 U. S. 11 Pet. 102 [9: 648]; *Turner* v. *Maryland*, 107 U. S. 38 [27: 370]; *Morgan's L. & T. R. & SS. Co.* v. *Louisiana Board of Health*, 118 U. S. 455 [30: 237]) the improvement of navigable channels (*Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238]; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678 [27: 442]; *Huse* v. *Glover*, 119 U. S. 543 [30: 487]) the regulation of wharfs, piers, and docks (*Cannon* v. *New Orleans*, 87 U. S. 20 Wall. 577 [22: 417]; *Keokuk N. L. Packet Co.* v. *Keokuk*, 95 U. S. 80 [24: 377]; *Northwestern U. Packet Co.* v. *St. Louis*, 100 U. S. 423 [25: 688]; *Cincinnati, P. B. S. & P. Packet Co.* v. *Catlettsburg*, 105 U. S. 559 [26: 1169]; *Pittsburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691 [27: 584]; *Ouachita & M. R. Packet Co.* v. *Aiken*, 121 U. S. 444 [30: 976], 1 Inters. Com. Rep. 379), the construction of dams and bridges across the navigable waters of a state (*Wilson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7: 412]; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205 [28: 959]; *Pound* v. *Turck*, 95 U. S. 459 [24: 525]), and the establishment of ferries. *Conway* v. *Taylor*, 66 U. S. 1 Black, 603 [17: 191].

Of this class of cases it was said by *Mr. Justice* Curtis in *Cooley* v. *Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 318 [13:996, 1004]: "If it were *admitted that the existence [**212** of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution, and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of Congressional regulations." See also *Sturges* v. *Crowninshield*, 17 U. S. 4 Wheat. 192, 193 [4: 547, 548]. But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the state. *Pennsylvania* v. *Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421 [15: 435]. As matter of fact, the building of bridges over waters dividing two states is now usually done by Congressional sanction. Under this power the states may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the *third* class—of those laws wherein the jurisdiction of Congress is exclusive. *Brown* v.

Houston, 114 U. S. 622 [29: 257]; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 [31: 700], 1 Inters. Com. Rep. 823. Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the states. That, while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was 213] first laid down *in *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 [18: 745], and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one state to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn* v. *Illinois*, 94 U. S. 113 [24: 77], in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property "affected with a public interest," and that from time immemorial in England, and in this country from its first colonization, it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. That the decision does not necessarily imply a power in the states to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the *Chief Justice* (p. 135) in delivering the opinion of the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce than the dray or the cart by which but for them grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the state may exer- 214] cise all the powers of government *over them, even though in so doing it may operate upon commerce outside its immediate jurisdiction.' The principle of this case has been recently affirmed in *Budd* v. *New York*, 143 U. S. 517 [36: 247], 4 Inters. Com. Rep. 45, and reaffirmed in *Brass* v. *North Dakota*, *ante*, p. 757, though not without strong opposition from a minority of the court.

In the next case, viz, that of the *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 [24: 94], was a bill filed by the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of chages for the transportation of freight and passengers on the different railroads of this state." The complainant was also the lessee of the Burlington & Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Platsmouth on the Mississippi river, in Iowa. The case was held to be covered by *Munn* v. *Illinois*, the road, like the warehouse in that case, being situated within the limits of a single state. "Its business," said the *Chief Justice*, "is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as interstate commerce, and, until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without, may be indirectly affected." In short, the case was treated as one of internal commerce only.

In the next case, viz, *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 [24: 97], it was held that under the constitution of Wisconsin, providing that all acts creating corporations within the state "may be altered or repealed by the legislature at any time after their passage," the legislature had a right to prescribe a maximum of charges to be made by the Chicago & Northwestern Railway Company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside *and carried with- [215 out. The vital question is not discussed at any length, but it was held that, until Congress acted with reference to the relations of this company to interstate commerce, it was within the power of the state of Wisconsin to regulate its affairs so far as they were of a domestic concern. These three cases were cited with approval in *Ruggles* v. *Illinois*, 108 U. S. 526 [27: 812], in which the power of a state to limit the amount of charges by a railroad company for fares and freight was recognized.

A similar principle, though under quite a different state of facts, was involved in *Hall* v. *De Cuir*, 95 U. S. 485 [24:547], which concerned an act of the legislature of Louisiana, requiring those engaged in the transportation of passengers among the states to give all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in parts of the vessel, without distinction on account of race or color. The act was held to be a regulation of interstate commerce, and, therefore, unconstitutional and void. In *Stone* v. *Farmers Loan & T. Co.* ("*Railroad Commission Cases*") 116 U. S. 307 [29: 636] it was held that the right of a state to limit the charges of a railroad company for the transportation of persons or property within its jurisdiction could not be granted away by its legislature unless by words of positive grant or words equivalent in law;

and that a statute which granted to a railroad company the right from time to time to fix and regulate the tolls and charges by them to be received for transportation did not deprive the state of its power to act upon the reasonableness of the tolls and charges so fixed and regulated. It was held that the state might, "beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." "Nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic. . . . The commission is in express terms prohibited by the Act of March 15, 1884, from interfering with **216**]*the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of property taken up without the state and delivered within, nor of such as may be taken within and carried without." The court studiously avoided committing itself upon the question of the power of the commission over interstate commerce.

The prior cases were all reviewed, and the subject exhaustively considered in the *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 [30:244], 1 Inters. Com. Rep. 31, in which there came under review a statute of Illinois enacting that if any railroad company should, within that state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in that case made such discrimination in regard to goods transported over the same road or roads, from Peoria, Illinois, and from Gilman, in Illinois, to New York; charging more for the same class of goods carried from Gilman than from Peoria, the former being 86 miles nearer the city of New York than the latter, this difference being in the length of line in the state of Illinois. The court held that such transportation was commerce among the states, even as to that part of the voyage which lay within the state of Illinois, and that the regulation of such commerce was confided to Congress exclusively, under its power to regulate commerce between the states, and that the statute in question, being intended to regulate the transmission of persons or property from one state to another, was not within that class of legislation which the states may enact in the absence of legislation by Congress. In delivering the opinion of the court *Mr. Justice* Miller cited the prior cases, and said that it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce, which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by Congress upon the same subject. He further observed that "the great question to be decided, **217**] and *which was decided, and which was argued in all those cases, was the right of the state in which the railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others; and the case of *Munn* v. *Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehouse business in Chicago, . . . free from the question of continuous transportation through the several states, . . . and the question how far a charge made for a continuous transportation over several states, which included a state whose laws were in question, may be divided into separate charges for each state, in enforcing the power of the states to regulate the fares of its railroads, was evidently not fully considered." The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the states might regulate the charges for interstate traffic, they must be considered as overruled. See also *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 [31:700], 1 Inters. Com. Rep. 823. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the Wabash case, and to that doctrine we still adhere.

The real question involved here is whether this case had been distinguished from the Wabash case. That involved the right of a single state to fix the charge for transportation from the interior of such state to places in other states. This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of Congress or such other state, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The *first* question must be answered in the affirmative upon the authority of *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 [29:158], 1 Inters. Com. Rep. 382, in which the state of Pennsylvania attempted to tax the capital stock of a corporation whose entire business *consisted in ferrying passengers and **[218** freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and, inasmuch as it appeared that the ferry boats were registered in New Jersey, and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that state. "Congress alone," said the court (p. 204), "therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating for its own interests and products and against those of other states." If, as was intimated in that case, interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless

of the distance from which it comes or to which it is bound, before or after crossing such state line—in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons which influenced this court to hold in the Wabash case that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

With reference to the *second* question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 189 [6: 23 68], to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said 219]to be engaged in*commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two states are not instruments of commerce between such states in such sense as to exempt them from state control. In *Conway* v. *Taylor*, 66 U. S. 1 Black, 603 [17: 191], a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferriage, nor does it follow that because a state may authorize a ferry or bridge from its own territory to that of another state, it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. It is true the states have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of *Congress [220 for the construction of bridges over navigable waters, and by the seventh section of the Act of September 19, 1890 (26 Stat. at L. 426, 454), it is made unlawful to begin the construction of any bridge over navigable waters, until the location and plan of such bridge have been approved by the Secretary of War, who has also been in frequent instances authorized to regulate the tolls upon such bridges, where they connected two states. So, too, in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365 [27: 419], it was held that a state had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the state, for boats which they owned and used in conveying from a landing in the state passengers and goods across a navigable river to another state. It was said that "the levying of a tax upon vessels or other watercraft, or the exaction of a license fee by the state within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran* v. *New Orleans*, 112 U. S. 69 [18: 653], that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow boats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between *the states; but it would scarcely be [221 consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and

to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the state, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single state, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two states without involving a liability of controversies of a serious nature. For instance, suppose the agent of the Bridge Company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the state of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky, who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky [222] to Ohio should be entitled to a *free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one state to make the charge for foot passengers very low and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 217 [29: 158, 166], 1 Inters. Com. Rep. 382: "freedom from such imposition does not of course imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress." Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the commonwealth of Kentucky in this case is an attempted regulation of commerce which it is not within the power of the state to make. As was said by *Mr. Justice* Miller in the Wabash case: "It is impossible to see any distinction in its effect upon commerce of either class between a statute which regulates the charges for transportation and a statute which *levies a [223] tax for the benefit of the state upon the same transportation."

The judgment of the court of appeals of Kentucky is, therefore, reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice **Fuller**, *Mr. Justice* **Field**, *Mr. Justice* **Gray** and *Mr. Justice* **White** concurred in the judgment of reversal, for the following reasons:

The several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state, or between two adjoining states, subject to the paramount authority of Congress over interstate commerce.

By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each state, and authorized to fix rates of toll.

Congress, by the Act of February 17, 1865, chap. 39, declared this bridge "to be, when completed, in accordance with the laws of the states of Ohio and Kentucky, a lawful structure;" but made no provision as to tolls; and thereby manifested the intention of Congress that the rates of toll should be established by the two states. 13 Stat. at L. 431.

The original acts of incorporation constituted a contract between the corporation and both states, which could not be altered by one state without the consent of the other.

COVINGTON & CINCINNATI ELE- [224
VATED RAILROAD & TRANSFER &
BRIDGE COMPANY, *Plf. in Err.*,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 224.)

State law fixing tolls on interstate bridge.

The Kentucky law of 1890 fixing the tolls and fare over the bridge connecting that state and Ohio and spanning the Ohio river at Cincinnati, is in conflict with the interstate commerce clause of the Constitution.

[No. 1043.]

Argued Jan. 26, 29, 30, 1894. Reargued April 25, 1894. Decided May 26, 1894.

IN ERROR to the Court of Appeals of the State of Kentucky, affirming the judgment

NOTE.—*As to interstate commerce; regulation of; power of Congress, how far exclusive*, see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

of the criminal court of Kenton county, in that state, adjudging the defendant the above-named Bridge Company guilty, and imposing a fine for taking illegal tolls and fares on the bridge spanning the Ohio river, between the states of Kentucky and Ohio, contrary to a law of Kentucky. *Reversed, and case remanded for further proceedings.*

Messrs. **Wm. H. Jackson** and *W. H. Wadsworth* for plaintiff in error, on both arguments.

Messrs. **Wm. Goebel** and **Wm. J. Hendrick,** Atty. Gen. of Kentucky, for defendant in error, on both arguments.

Mr. Justice **Brown** delivered the opinion of the court:

This case differs from the last only in the fact that the plaintiff in error was not incorporated until 1886, and subsequently to a general law of the state declaring that all charters and grants of or to corporations shall be subject to amendment or repeal at the will of the legislature. Conceding that these words became a part of its charter, and hence that no contract was impaired by the legislation of 1890, such legislation is still open to the objection found to exist in the former case, that it is in conflict with the interstate commerce clause of the Constitution.

The judgment of the court of appeals of Kentucky is, therefore, reversed, and the case remanded to that court for further proceedings.

Mr. Chief Justice **Fuller,** *Mr. Justice* **Field,** *Mr. Justice* **Gray** and *Mr. Justice* **White** concurred in the judgment of reversal, for the like reasons as in the case of *Covington & C. Bridge Co.* v. *Kentucky, ante,* p. 962.

225] UNITED STATES, *Appt.*, *v.* ILLINOIS CENTRAL RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 225-244.)

Suit by United States—state law—public land—execution of trusts.

1. After the United States has laid out a piece of public land in Chicago, into streets and lots, and public ground, and recorded a plat thereof, and has sold all the lots to individuals, its interest ceases, and it cannot afterwards maintain a suit to restrain the diversion of such public ground from the public purpose to which it was so dedicated to private uses; but such public ground passed by the state law to the city.
2. When a resort is made by individuals or the government to the mode provided by the statute of a state where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation be given to the instrument of conveyance as is there designated.
3. If the government, charged with the duty of disposing of a tract of public land within a state, chooses to proceed under the provisions of a particular statute of that state, the same legal effect should be given to its proceeding as in case of an individual proprietor.
4. The United States possess no jurisdiction to control or regulate, within the state, the execution of trusts or uses created for the benefit of the public, or of particular communities or bodies therein; the jurisdiction in such cases is with the state or its subordinate agencies.

[No. 331.]

Argued March 29, 30, 1894. Decided May 28, 1894.

APPEAL from the decree of the Circuit Court of the United States for the Northern District of Illinois, sustaining a demurrer to and dismissing an information or bill in equity in which the United States were complainants, and the Illinois Central Railway Company *et al.*, defendants, the object of which was to prevent the continuance of encroachments in the future upon certain property in Chicago, and to preserve it open to the public uses for which it was dedicated by the United States. *Affirmed.*

See same case below, 33 Fed. Rep. 730.

The facts are stated in the opinion.

Mr. **Lawrence Maxwell,** *Jr.*, *Solicitor Gen.* for appellant:

One who dedicates property to public uses is entitled in a court of equity to enforce the trusts declared by the dedication, whether he accompanied the dedication with a transfer of the fee to the municipality or retained the fee in himself.

Warren v. *Lyons City,* 22 Iowa, 351; *Barclay* v. *Howell,* 31 U. S. 6 Pet. 498 (8: 477); *Hardy* v. *Memphis,* 10 Heisk. 127.

The demurrer admits the allegation of the bill that the fee of the public ground is in the United States, and that allegation must be taken as true. If, however, the court may consider the effect of a conveyance of the lots marked on the plat with reference to the plat and assume that the government had not expressly reserved title in itself to the streets and public grounds, the government would clearly still be the owner in fee of the east half of the ground bordering the lake.

Banks v. *Ogden,* 69 U. S. 2 Wall. 57 (17:818); *Harris* v. *Elliott,* 35 U. S. 10 Pet. 25 (9: 333).

The government has only this remedy to protect itself against the threatened invasion of its reversionary interest, and it is obliged to act promptly to prevent the claim of title by adverse use or estoppel being set up.

Williams v. *First Presbyterian Soc.* 1 Ohio St. 478.

The United States have in this respect the rights of a private person who has made a dedication.

United States v. *Chicago,* 48 U. S. 7 How. 185 (12: 660).

Messrs. **Benjamin F. Ayer** and **John S. Miller,** for appellees:

The plat in this case has all the force of an express grant. It operates by way of estoppel, and concludes the former owner and all claiming under him from asserting title.

Matthiessen & H. Zinc Co. v. *La Salle,* 117

NOTE.—*As to dedication of lands for public purposes,* see note to Cincinnati v. White, 8: 452.

As to dedication of land to public use, what will constitute, see note to Morgan v. Chicago & A. R. Co. 24: 743.

Ill. 411; *Chicago* v. *Rumsey*, 87 Ill. 348; *Gebhardt* v. *Reeves*, 75 Ill. 301; *Hunter* v. *Middleton*, 13 Ill. 50; *Illinois & M. Canal Trustees* v. *Harens*, 11 Ill. 554; *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387 (36: 1018).

The title of the United States has been completely devested. The sale of the lots as delineated on the plat and with reference to it, was in law an effectual dedication of the streets and public grounds for municipal uses.

Pollard v. *Hagan*, 44 U. S. 3 How. 212 (11: 565).

The tract ceased to be a part of the national domain, and the title to so much of it as had been dedicated to public use became vested in the state, unless by force of the state statute the fee passed to the city, or unless, upon common law principles, the conveyance of the lots carried the fee to the purchasers.

Banks v. *Ogden*, 69 U. S. 2 Wall. 57 (17: 818); *Hamilton* v. *Chicago, B. & Q. R. Co.* 124 Ill. 235; *Bissell* v. *New York Cent. R. Co.* 23 N. Y. 61; *New Orleans* v. *United States*, 35 U. S. 10 Pet. 662 (9: 573); *Goodtitle* v. *Kibbe*, 50 U. S. 9 How. 471 (13: 220); *Hallett* v. *Beebe*, 54 U. S. 13 How. 25 (14: 35); *Mumford* v. *Wardwell*, 73 U. S. 6 Wall. 423 (18: 756); *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57 (21: 798); *Van Brocklin* v. *Anderson*, 117 U. S. 151 (29: 845).

When the ground was dedicated to public use, all the littoral rights appurtenant to it were dedicated with it. The incidents necessarily followed and were subject to the nature and condition of the principal estate.

Potomac S. B. Co. v. *Upper Potomac S. B. Co.* 109 U. S. 672 (27: 1070); *Barney* v. *Keokuk*, 94 U. S. 324 (24: 224); *New Orleans* v. *United States*, 35 U. S. 10 Pet. 662 (9: 573); *Barclay* v. *Howell*, 31 U. S. 6 Pet. 498 (8: 477); *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431 (8: 452); *Godfrey* v. *Alton*, 12 Ill. 30, 52 Am. Dec. 476; *Brooklyn* v. *Smith*, 104 Ill. 429, 44 Am. Rep. 90; *Cook* v. *Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; 2 Dill. Mun. Corp. § 634.

Mr. Justice **Field** delivered the opinion of the court:

This is an appeal on the part of the United States from a decree of the circuit court sustaining a demurrer to an information or bill in equity, in which they were complainants and the Illinois Central and other railroad companies were defendants. The information charges that encroachments are made or threatened upon property of the United States, and the object of the information, so far as contended on the present appeal, is to prevent their continuance in the future, as to one particular parcel of property and to preserve it open to the uses for which it was dedicated by the United States. That property consists of land situated on the shore of Lake Michigan, being part of fractional section ten in Chicago, lying between Lake Michigan on the east and block twelve of the plat of Fort Dearborn addition to Chicago on the west.

The several parties named as defendants appeared to the information, and the Illinois Central Railroad Company and the Michigan Central Railroad Company demurred to it on the ground that it does not state such a case as entitles the United States to the relief prayed or show any right of interference on their part, either in law or in equity, respecting the matters referred to, or allege any violation, contemplated or threatened, of any right, legal or equitable, of the United States.

Upon the hearing of the several cases known and spoken of together as the "*Lake Front Case*," before the circuit court of the United States at Chicago on the 23d of February, 1888, this demurrer was argued, and was sustained, "except as to that part of the information which alleges, in substance, that the Illinois Central Railroad Company claims the absolute ownership of, and threatens to take possession of, use and occupy the outer harbor of Chicago," the opinion of the court *being "that the [234 general government, upon the showing made by it, has no title to any of the streets or grounds described in said information, and has no standing in court, except so far as it seeks to protect the said harbor against obstructions that would impair the public right of navigation, or interfere with any plan devised by the United States for the development or improvement of the outer harbor." *Illinois* v. *Illinois Cent. R. Co.* 33 Fed. Rep. 730. Afterwards, on the 23d of August, 1890, the attorney of the United States was granted leave to amend the information by striking out whatever related to the outer harbor and the encroachments alleged to have been made, or threatened in the navigable waters of the lake; and, at the same time, an order was entered by the district judge sustaining the demurrer to the information as amended, and directing that it be dismissed, "without prejudice to the United States, however, to hereafter institute any appropriate action or proceedings for the purpose of enforcing any rights they may have in the navigable waters of the lake or outer harbor of Chicago;" and thereupon an appeal was prayed and allowed to the supreme court."

From the decree of the circuit court in the Lake Front case, rendered in February, 1888, appeals were taken to the Supreme Court of the United States by the Illinois Central Railroad Company and the city of Chicago, and they were argued and decided at its October term, 1892. *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387 [36:1018]. The United States did not appear and participate in the argument on the appeal. As they were never a party to those suits in the court below and never appealed from the decree, they were dropped as a party in the designation of the title of the case. The questions involving the title and right of the parties embraced in the cases, considered under the general designation of the *Illinois Central Railroad Company* v. *State of Illinois*, to the navigable waters of the harbor of Chicago and in the Lake Front property, and the encroachments on the harbor by the railroad company, and the validity of the Act of April 16, 1869, granting submerged lands in the harbor, were fully considered and settled as between the state and the city of *Chicago on the one part, and [235 the Illinois Central Railroad Company on the other.

The appeal now before the court is the one taken by the United States from the decree of

the circuit court rendered on the 23d of August, 1890, sustaining the demurrer to the information. The amendment allowed to the information consisted in striking out that part to which the demurrer was not sustained, and was made in order that the demurrer might go to the entire information. The only contention now urged by the Solicitor General, on behalf of the appellants, is that the information is good to the extent that it seeks to restrain the appellees from diverting the public ground designated as such, on the plat of the Fort Dearborn addition to the city of Chicago, from the supposed public easement to which it was dedicated. The Solicitor General states that on this branch of the case the information proceeds upon the theory that the United States, being the owners of the land in question, and having dedicated it to a public purpose, are entitled to enjoin its diversion from that public purpose to private uses. It will, therefore, be unnecessary for the disposition of the appeal to consider any other position originally taken by the United States in the information.

As early as 1804 a military post was established by the United States south of Chicago river, upon the southwest fractional quarter of section ten, and was subsequently occupied by troops until its sale many years afterwards. In 1819, Congress passed an Act authorizing the sale by the Secretary of War, under the direction of the President, of such military sites belonging to the United States as may have been found or had become useless for military purposes. And the Secretary of War was authorized, on the payment of the consideration agreed upon into the Treasury of the United States, to execute and deliver all needful instruments conveying the same in fee. And the Act declared that the jurisdiction which had been specially ceded to the United States for military purposes, by a state, over such site or sites should thereafter cease. 3 Stat. at L. 520. Subsequently, in 1824, upon the request of the Secretary of War, the south-
236] west *quarter of this fractional section ten, containing about fifty-seven acres, and on which Fort Dearborn was situated, was reserved from sale for military purposes by the Commissioner of the General Land Office. The land thus reserved continued to be used for military purposes until 1837. In that year, under the direction of the Secretary of War, it was laid off by his authority into blocks, lots, streets, alleys and public ground, as an addition to the municipality of Chicago, and called the "Fort Dearborn addition to Chicago," and in June, 1839, a plat thereof was made and acknowledged by his agent and attorney and recorded in the recorder's office of the county of Cook. On that plat a part of the ground situated between Lake Michigan on the east and block twelve on the west is designated as "public ground forever to remain vacant of buildings." It bears also a further declaration in these words, viz: "The public ground between Randolph and Madison streets and fronting upon Lake Michigan is not to be occupied with buildings of any description." Subsequently, and for some years, several lots designated and shown on the plat were reserved from sale and remained in the military occupation of the government, but eventually, in 1845 or soon afterwards, all of them were sold and conveyed by the United States to divers persons "by and according to said plat and with reference to the same."

The statute of Illinois of February 27, 1833, then in force for the making and recording of town plats (Ill. Rev. Stat. 833, p. 599) provided that every donation or grant to the public, marked or noted as such on the plat, should be deemed in law a sufficient conveyance to vest the fee simple title, and that "the land intended to be for streets, alleys, ways, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended." The plat in such cases had all the force of an express grant and operated to convey all the title and interest of the United States in the property for the uses and purposes intended. *Matthiessen & H. Zinc Co.* v. *LaSalle*, Ill. 411, 414, 415; *Chicago* v. *Ramsey*, 87 Ill. 117, 348; *Gebhardt* v. *Reeves*, 75 Ill. 301; *Ill*
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nois & M. Canal Trustees v. *Havens*, 11 Ill. 554.

It is stated in the information that the United States never parted with the title to the streets, alleys, and public grounds designated and marked on the plat, and that they still own the same in fee simple "with the rights and privileges, riparian and otherwise, pertaining to such ownership, subject to the use and enjoyment of the same by the public."

But we do not think this position is tenable. A title to some of the streets may have continued in the government so long as the title to any of the adjoining lots remained with it, but not afterwards without disregard of the statutory regulations of the state and its provisions for the transfer of the title. When a resort is made by individuals or the government to the mode provided by the statute of a state where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation given to the instrument of conveyance as is there designated. The language of the statute is clear, "that the land intended for streets, alleys, ways, commons, or other public uses in any town or city or addition thereto shall be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended."

The interest in and control of the United States over the streets, alleys, and commons ceased with the record of the plat and the sale of the adjoining lots. Their proprietary interest passed, in the lots sold, to the respective vendees, subject to the jurisdiction of the local government, and the control over the streets, alleys, and grounds passed by express designation of the state law to the corporate authorities of the city.

In 1854, the validity of the survey and plat made of Fort Dearborn reservation was recognized in Congress in an Act for the relief of one John Baptiste Beaubien (10 Stat. at L. 81, chap. 172), by which the Commissioner of the General Land Office was authorized to issue a patent or patents to Beaubien for certain lots designated and numbered on the survey and plat of the Fort Dearborn addition to Chicago, *made under the order of the Secretary [238

of War. And it is averred, as already stated, in the information that all the lots were sold and conveyed by the United States to divers persons "by and according to the said plat and with reference to the same."

It was the intention of the government to have a plat made conformably to the provisions of the statute and it is plain, from its inspection that all the essential requisites were followed. Nor is any reason suggested why a different effect should be given to the plat and its record in this case from that of similar plats made and recorded by other land proprietors. And if, as we have already said, the government, charged with the duty of disposing of a tract of public land within a state, chooses to proceed under the provisions of a particular statute of that state, it is clear that the same legal effect should be given to its proceeding as in case of an individual proprietor. The effect of the recording of the plat in this case was therefore to vest in the city of Chicago the legal title to the streets, alleys and public ground in Fort Dearborn addition, and after its execution the record and sale of the abutting property the United States retained no interest in them, legal or equitable. That interest was as completely extinguished as if made by an unconditional conveyance in the ordinary form.

Again, the sale of the lots was, in law, an effectual dedication of the streets and public grounds for municipal uses, and, as observed by counsel, the purchasers of the lots acquired a special interest in the streets and public grounds on which their lots abutted, and the United States could make no disposition of them after the sale inconsistent with the use to which they had been dedicated.

The only parties interested in the public use for which the ground was dedicated are the owners of lots abutting on the ground dedicated, and the public in general. The owners of abutting lots may be presumed to have purchased in part consideration of the enhanced value of the property from the dedication, and it may be conceded they have a right to invoke, through the proper public authorities, the 239] protection *of the property in the use for which it was dedicated. The only party interested, outside of abutting owners, is the general public, and the enforcement of any rights which such public may have is vested only in the parties clothed with the execution of such trust, who are in this case the corporate authorities of the city, as a subordinate agency of the state, and not the United States.

The United States possess no jurisdiction to control or regulate, within a state, the execution of trusts or uses created for the benefit of the public, or of particular communities or bodies therein. The jurisdiction in such cases is with the state or its subordinate agencies. The case of *New Orleans* v. *The United States*, 35 U. S. 10 Pet. 662 [9: 573], furnishes an illustration of this doctrine. In that case the United States filed a bill in the district court for an injunction to restrain the city of New Orleans from selling a portion of the public quay, or levee, lying on the bank of the Mississippi river, in front of the city, or of doing any other act which would invade the rightful dominion of the United States over the land or their possession of it. The United States acquired title to the land by the French treaty of 1803. By it Louisiana was ceded to the United States, and it was shown that the land had been appropriated to public uses ever since the occupation of the province by France. It was contended that the title to the land, as well as the domain over it during the French and Spanish governments, were vested in the sovereign, and that the United States by the treaty of cession of the province of Louisiana had succeeded to the previous rights of France and Spain. The land and buildings thereon had been used by both governments for various public purposes. The United States had erected a building on it for a customhouse, in which, also, their courts were held.

It was argued on behalf of the city that the sovereignty of France and Spain over the property, before the cession, existed solely for the purpose of enforcing the uses to which it was appropriated, and that this right and obligation vested in the state of Louisiana, and did not continue in the United States after the state was formed. It was therefore contended that the *United States could neither [240 take the property, nor dispose of it or enforce the public use to which it had been appropriated. A decree was rendered in the district court in favor of the United States, and an injunction granted as prayed, but on appeal to the supreme court it was reversed, and it was held that the bill could not be maintained by the United States because they had no interest in the property. Upon the question whether any interest in the property passed to the United States under the treaty of cession, the court said, speaking through *Mr. Justice* McLean:

"In the second article of the treaty, 'all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices, which are not private property,' were ceded. And it is contended, as the language of this article clearly includes the ground in controversy, whether it be considered a public square or vacant land, the entire right of the sovereign of Spain passed to the United States.

"The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the Federal jurisdiction, nor can it be enlarged under the treaty making power.

"If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alien it, as other lands, there can be no doubt that it passed under the treaty to the United States, and they have a right to dispose of it the same as other public lands. But if the King of Spain held the land in trust for the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes, was this right passed to the United States under the treaty?

"That this common, having been dedicated to the public use, was withdrawn from commerce, and from the power of the king rightfully to alien it has already been shown; and

also, that he had a limited power over it for certain purposes. Can the Federal government exercise this power? If it can, this court has the power to interpose an injunction or 241] interdict *to the sale of any part of the common by the city if they shall think that the facts authorize such an interposition.

"It is insisted that the Federal government may exercise this authority under the power to regulate commerce.

"It is very clear that, as the treaty cannot give this power to the Federal government, we must look for it in the Constitution, and that the same power must authorize a similar exercise of jurisdiction over every other quay in the United States. A statement of the case is a sufficient refutation of the argument.

"Special provision is made in the Constitution for the cession of jurisdiction from the states over places where the Federal government shall establish forts or other military works, and it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.

"The state of Louisiana was admitted into the Union on the same footing as the original states. Her rights of sovereignty are the same, and, by consequence, no jurisdiction of the Federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust and prevent what they shall deem a violation of it by the city authorities.

"All powers which properly appertain to sovereignty, which have not been delegated to the Federal government, belong to the states and the people."

The decree of the district court was accordingly ordered to be reversed and annulled.

This doctrine of the supreme court in the New Orleans case is decisive of the question pending before us in the present case and must control the decision.

It was also held in the Lake Front case that the ownership in fee of the streets, alleys, ways, commons, and other public ground on the east front of the city bordering upon Lake Michigan, in fractional section ten, was a good title, the reason assigned being that by the statute of Illinois the making, acknowledging, 242] and recording *of plats operated to vest the title in the city in trust for the public uses to which the grounds were applicable. *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387-462 [36: 1018-1046].

It follows from these views that the United States have no just claim to maintain their contention to control or interfere with any portion of the public ground designated in the plat of the Fort Dearborn reservation. The decree dismissing the information will therefore be affirmed; and it is so ordered.

The Chief Justice, having been of counsel in the court below, took no part in the consideration and decision of this case on appeal.

Mr. Justice **Brewer** dissenting:

I am unable to concur in the views expressed by the court in this case. I agree that the United States have no governmental interest or control over the premises in question; that as a sovereign they have no right to maintain this suit; that by the act of dedication they parted with the title, and that, in accordance with the statute of the state in respect to dedication, the fee passed to the city of Chicago, to "be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended." I agree that the only rights which the United States have are those which any other owner of real estate would have under a like dedication; but I think the law is that he who grants property to a trustee, to be held in trust for a specific purpose, retains such an interest as gives him a right to invoke the interposition of a court of equity to prevent the use of that property for any other purpose. Can it be that, if the government, believing that the Congressional Library has become too large for convenient use in this city, donates half of it to the city of Chicago, to be kept and maintained as a public library, that city can, after accepting the donation for the purposes named, give away the books to the various lawyers for their private libraries, and the government be powerless to restrain such disposition? Do the donors of libraries or the grantors of real estate in trust for specific purposes though parting with the title, lose all right to invoke the aid of a court of equity to *compel the [243 use of their donations and grants for the purposes expressed in the gift or deed? I approve the opinion of the supreme court of Iowa, in the case of *Warren* v. *Lyons City*, 22 Iowa, 351, 355, 357. In that case the plaintiffs had years before platted certain land as a site for a city, and on the plat filed by them there was a dedication of a piece of ground as a "public square." After the city had been built up on that site the authorities, for the purposes of gain, and under the pretended authority of an act of the legislature, attempted to subdivide the public square into lots and to lease them to individuals for private uses. A bill was filed by the dedicators to restrain such diversion of the use, and a decree in their favor was affirmed by the supreme court. I quote from the opinion:

"Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant cannot be used for another, and that the grantor retains still such an interest therein as entitles him in a court of equity to insist upon the execution of the trust as originally declared and accepted. *Williams* v. *First Presbyterian Society*, 1 Ohio St. 478; *Barclay* v. *Howell*, 31 U. S. 6 Pet. 498 [8: 477]; *Webb* v. *Moler*, 8 Ohio, 548; *Brown* v. *Manning*, 6 Ohio, 298, 27 Am. Dec. 255.

And again, after picturing the injustice which in many cases would result by permitting such a diversion, the court adds:

"Such a doctrine would enable the state at pleasure to trifle with the rights of individuals, and we can scarcely conceive of a doctrine which would more effectually check every disposition to give for public or charitable purposes. No, it must be, that if the right vested in the city for a particular purpose the legislature cannot vest it for another; that, when the dedicator declared his purpose by the plat, the land cannot be sold or used for another and different one; that while the corporation took the premises as trustee, it took them with

the obligations attached as well as the rights conferred; that while the legislature might give the control and management of these squares and parks to the several municipal corporations, it cannot authorize their sale and use for a purpose foreign to the object of the grant.

[*244] "Without quoting, we cite the following cases: *Waterlow* v. *Cowen*, 4 Paige, 510. 27 Am. Dec. 80; *Lade* v. *Shepherd*, 2 Strange, 1004; *Com.* v. *Alburger*, 1 Whart. 469; *Pomeroy* v. *Mills*, 3 Vt. 279, 23 Am. Dec. 207; *Abbott* v. *Mills*, 3 Vt. 521, 23 Am. Dec. 222; *Adams* v. *Saratoga & W. R. Co.* 11 Barb. 414; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 [3: 162]; *Godfrey* v. *Alton*, 12 Ill. 29, 52 Am. Dec. 476; Sedgw. Stat. & Const. L. 343, 344; *Haight* v. *Keokuk*, 4 Iowa, 199; *Grant* v. *Davenport*, 18 Iowa, 179; *LeClercq* v. *Gallipolis*, 7 Ohio, 217, 28 Am. Dec. 641; *Indianapolis* v. *Croas*, 7 Ind. 9; *Rowan* v. *Portland*, 8 B. Mon. 232; *Augusta* v. *Perkins*, 3 B. Mon. 437.

I do not care to add more, but for these reasons withhold my assent to the opinion.

I am authorized to say that *Mr. Justice* **Brown** concurs in this dissent.

JOHN RIGGLES ET AL., *Appts.*,
v.
HANNAH ERNEY ET AL.

(See S. C. Reporter's ed. 244-256.)

Parol agreement as to lands.

If a parol agreement for the sale of lands and the division of the proceeds be made, and one party thereto relying on such agreement and the promise of the other to perform his part, has, done acts in part performance of such agreement, to the knowledge of the other party, which have altered the relation of the parties so as to prevent their restoration to their former condition, such other party cannot interpose the statute of frauds as a defence against the performance of the part of the agreement to be performed by him.

[No. 335.]

Argued April 2, 3, 1894. Decided May 26, 1894.

APPEAL from a decree of the Supreme Court of the District of Columbia, affirming the decree of the General Term of the Supreme Court of that District, affirming a decree of the Special Term of that court, dismissing a suit in equity for the specific performance of an oral contract for the sale of land, on the ground that the statute of frauds presented an insurmountable barrier to relief, the suit being brought by John Riggles *et al.*, plaintiffs, against Hannah Erney *et al.*, defendant. *Reversed, and case remanded for further proceedings.*

Statement by *Mr. Justice* **Brown**:

This was a bill in equity for the specific performance of an oral contract for the sale of land.

The bill made substantially the following case: Thomas Riggles, ancestor both of plaintiffs and defendant, died in 1863, leaving a will in which he made the following devises:

[*245] "I will and devise that my house and premises which I now occupy, situated in the city of Washington in the District of Columbia, being lot number seven (7) and part of lot number eight (8) in square number one hundred and ninety-nine (199) together with all the household and kitchen furniture and other personal property that may be on said premises at the time of my decease shall be and remain in the possession of my wife, Catharine Rig-

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NOTE.—*As to contracts; performance; when excused by nonperformance of other party or his prevention of performance*, see note to United States v. Peck, 25: 46.

As to how far fraud or illegal consideration will avoid contract, see note to Armstrong v. Toler, 6: 468.

As to parol evidence of previous negotiations; when admissible to affect a written contract, see note to Union Mut. L. Ins. Co. v. Mowry, 24: 674.

As to what laws are void as impairing obligation of contracts, see note to Fletcher v. Peck, 3: 162.

As to statute of frauds, what is sufficient note or memorandum under, see note to Barry v. Coombe, 7: 255.

As to when specific performance decreed, and when refused, see notes to Hepburn v. Dunlop, 4: 65, Colson v. Thompson, 4: 253, and Brashier v. Gratz, 5: 822.

That plaintiff must show performance, or readiness to perform, and offer to perform; decree against subsequent purchaser, see note to Colson v. Thompson, 4: 253, and to Pratt v. Carroll, 3: 627.

That title may be made any time before decree; necessary parties to action; objection to; unnecessary parties; when objection made, striking out parties, see note to Hepburn v. Dunlop, 4: 65, and to Morgan v. Morgan, 4: 242.

As to laches of plaintiff; change of circumstances; time, when material, see note to Pratt v. Carroll, 3: 627, and to Hepburn v. Dunlop, 4: 65.

As to time or excess of price not a bar to action for specific performance, see note to Brashier v. Gratz, 5: 822.

As to when court will decree conveyance of land situated beyond its territorial jurisdiction, see note to Oakey v. Bennett, 13: 563.

Specific performance of a parol agreement to convey or exchange land, when decreed.

Specific performance of a parol agreement to convey realty will be decreed where work provided for as the consideration for the conveyance has been done and a deed has been executed by defendants, but they have refused to deliver it. Brophy v. Hagan, 12 Pa. Co. Ct. 365.

Specific performance will be decreed of a verbal agreement for the exchange of lands, where the plaintiff has executed it by conveying his property and payment of the money and delivery of possession, and the defendant has given plaintiff possession of the property in exchange, but refuses to give conveyance. Brennan v. Brennan, 50 N. Y. S. R. 260.

An oral agreement by several tenants in common, to convey to one another in such a way that the interest of a deceased tenant shall vest in the survivors until at the death of the last one the entire estate shall vest in a designated person, executed by all but the sole survivor, will be specifically enforced as to the original shares of all the others. Murphy v. Whitney, 69 Hun, 573.

Specific performance of an oral contract for the conveyance of land may be decreed where the deed was fraudulently so made as to omit part of the land included in the contract. McDonald v. Yungbluth, 46 Fed. Rep. 830.

Payment of the price is not such part performance of a contract for the sale of land as will jus-

gles, during her lifetime, for the benefit of herself and our four children, named Thomas, Catharine, Maria, and Hannah Riggles, respectively; and, after the death of my said wife, the said house and premises to remain in the hands of my executor, hereinafter named, to be by him used for the benefit of the above named four children until the youngest one of them surviving shall become twenty one years of age; provided, that when the said Thomas shall arrive at twenty-one years of age, and when either of the said daughters shall be married, then, and in either such case, the benefit arising from said property shall be exclusively for the use of such of said daughters as may then be unmarried; and after the death of my said wife, and the said youngest child shall attain the age of twenty-one years, then the said house and premises I will and bequeath unto my son Thomas Riggles, with the express provision that such of my aforenamed daughters as may then be unmarried shall be taken care of by my said son Thomas; and, in case the said Thomas Riggles shall depart this life before the said three sisters, then the said house and premises to be sold, and the proceeds be divided equally among the said three sisters or the survivors of them.

"Item: I will and devise that all the lots of ground belonging to me situate in square numbered one hundred and seventy nine (179) in said city of Washington which may remain unsold and disposed of by my said executor at such time and in such manner as his discretion may dictate as most for the advantage of my wife and children aforenamed, and the amounts that may be realized therefrom, after paying all necessary expenses of my wife and family, be by 246] him* invested at his discretion for the benefit of my said wife and four children or as many of them as shall remain unmarried; and after the death of my said wife, and our four children shall have attained the age of twenty-one years if any of said property in square one hundred and seventy-nine remains unsold, and also any surplus that may then remain from the proceeds of said square one hundred and seventy-nine, to be divided between my other children, John, James, and William Riggles, and my daughters, Mary Ann Miller and Sarah Turton; and it is farther my wish and desire that should the residue remaining from the sale of my lots in square one hundred and seventy-nine be more than the value of said house and premises I now occupy in square one hundred and ninety-nine, then, and in that case, I wish and devise that my son Thomas and my said daughters Catharine, Maria and Hannah Riggles shall receive from the proceeds of square one hundred and seventy-nine, such portion of such proceeds as make all their shares alike or equal to each other and to the shares of my other children."

Under this will, John B. Turton subdivided square 179, sold portions of the same and died, leaving lots from 1 to 42 and from 61 to 80, inclusive, unsold and subject to a deed of trust executed by him to secure the repayment of certain moneys borrowed. Such moneys, as well as the proceeds of the lots sold, were alleged to have been appropriated to the support of the widow and her four children.

In 1873, the widow and her four children, Thomas, Maria, Catharine, and Hannah, desiring to have the property in square 179 sold for the purpose of a partial division of the estate, and for the purpose of paying certain indebtedness they had incurred, as well as certain taxes and assessments upon the homestead, it was proposed and agreed that, notwithstanding the devises in the will, the entire estate should be equally divided between the widow and the children of the testator; that the lots in square 179 should be at once sold for the payment of the incumbrances, taxes, and assessments upon the whole realty and of

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tify its enforcement in equity. Salfield v. Sutter County Land Imp. & R. Co. 94 Cal. 546.

An oral contract by a father to purchase land and hold the title until his son is able to pay the purchase price from the proceeds of crops, and then to give the son the deed, which contract was fully performed by the son in his lifetime by the payment of the price (except a small balance which was paid after his death) abandoning his plans of going west, and settling on the farm—will be specifically enforced in favor of his heirs, representatives, or assigns. Putnam v. Tinkler, 83 Mich. 628.

An executory agreement to convey lands in consideration of support and maintenance will be specifically enforced in favor of one who has taken possession of the lands, and has fully performed his part of the contract in reliance thereon. Denlar v. Hile, 123 Ind. 68.

To justify specific performance of a parol contract to sell land, the contract must have been so far executed that a refusal to complete it would operate as a fraud upon the purchaser and place him in a situation in which he could not be adequately compensated in damages. Gallagher v. Gallagher, 31 W. Va. 9.

Part performance must consist of something more than simply paying a part of the purchase money; and the party seeking specific performance must show that he has performed on his part, or, having performed in part only, is ready to perform the rest, although the latter may be implied from the filing of the bill. Martin v. Patterson, 27 S. C. 621.

A purchaser seeking to compel the execution of a parol contract for the sale of land, and to take it from the operation of the statute of frauds by averment of part performance, must establish by clear and definite testimony, not only the contract itself, but also the acts claimed to have been in part performance. Allen v. Young, 88 Ala. 338; Gallagher v. Gallagher, 31 W. Va. 9.

Equity cannot enforce a parol contract for the sale or exchange of land, without admission or clear proof of its terms. Boggs v. Bodkin, 5 L. R. A. 245, 32 W. Va. 546.

Equity will enforce a verbal promise by a father to his son, in consideration of love and affection, to give him land and make him a deed therefor, if the son, induced by such promise, has taken possession of the land and expended on it labor and money in improvements. Frame v. Frame, 5 L. R. A. 323, 32 W. Va. 463.

A parol contract to convey land when the vendor's title is acquired will be enforced specifically against his widow and children at the suit of his personal representatives, where the vendee, who has been in possession, paid part of the purchase money and made valuable improvements, is willing to perform on his part. *Re* Simmon's Estate, 140 Pa. 567.

the indebtedness of the widow and her four 247] children, and that the net proceeds* should be divided between the widow and *all* the children, and that the homestead should be retained for the use and occupation of the widow and her four children until her death, and the death or marriage of her daughters, when the said homestead property should be sold and the proceeds divided among all the children of the testator.

In pursuance of this arrangement, a deed was executed, whereby all the parties in interest conveyed to John Riggles and George W. Evans the remaining lots in square 179 in trust to sell and dispose of the same, to pay and discharge all taxes and assessments due upon the lots in both squares, and after paying and discharging all liens, taxes and assessments upon all the property, to distribute the remainder of the proceeds between the widow and children in equal proportions, share and share alike, and "that the said deed was made and executed by all of the parties, including the defendant Hannah Erney (who executed the said deed as Hannah Riggles) upon the distinct agreement and condition that whenever under the said will and testament that the said property in square 199 should be sold, the proceeds of such sale should be applied and distributed in the same manner." The trustees, Riggles and Evans, proceeded under this arrangement, sold the lots in square 179, from time to time, paid the liens and incumbrances upon the property, as well as taxes and assessments; paid and discharged the indebtedness contracted by the widow and her four children, including defendant Hannah Erney, for their maintenance, and also advanced to the widow the further sum of $500, the said payments on account of the said homestead property, and of the maintenance and support of the widow and her four children, amounting to nearly $3000. After such payments, the trustees divided the remainder of the proceeds among all the children of the testator; the share so paid to each of the devisees being over $3000, and such distribution being made strictly in pursuance of the original agreement.

That the period has arrived when the lots in square 199 should be sold, and the proceeds 248] divided; that the widow is* dead, as well as three of her four children, leaving Hannah Erney sole survivor of such devisee; that plaintiffs have applied to defendant Hannah to carry out this agreement, but she refuses to acknowledge it, and claims that, under the provisions of the will, she, as the sole survivor of the devisees of the lots in square 199, is entitled to all of said property and the proceeds thereof. Plaintiffs further averred that her agreement to sell the homestead property was the only consideration for the appropriation to the widow and her four children of the proceeds of sale of the property in square 179; that under the will defendant and her co-devisees were not entitled to any portion of such property except for their current support, while the daughters were unmarried, and that plaintiffs by making the agreement gave the defendant Hannah and her co-devisees $18,000—much more than the entire value of the homestead property; that it was the intention of the testator that in the ultimate division of the estate all the children should have an equal share: that such intention was recognized and was the basis upon which the agreement was made, and that the distribution of the proceeds of the sales of square 179 was in partial execution of such intention and agreement.

The prayer of the bill was that defendants Hannah and her husband might be enjoined from disposing of the property in square 199 until the rights of the parties could be definitely settled, and that such property might be sold and the proceeds distributed upon the basis of the agreement.

Defendant Hannah Erney in her separate answer admitted signing the deed for the sale of the remaining lots in square 179, but denied there was any agreement or condition that the homestead should be sold and the proceeds divided in the same manner.

Replication was filed, proofs taken, and, the case coming on to be heard in the court below, the bill was dismissed upon the ground that the statute of frauds presented an insurmountable barrier to relief. Plaintiffs appealed to the general term, by which the decree of the special* term was affirmed. [249 and the plaintiffs appealed to this court.

Mr. **Jas. G. Payne,** for appellants:

Part performance of a parol contract will take the contract out of the statute of frauds.

Madd. Ch. Pr. 378; Roberts, Stat. Fr. 153; 2 Story, Eq. Jur. § 759; 3 Pom. Eq. Jur. § 1405; *Lester* v. *Foxcroft*, 1 Lead. Cas. Eq. 557; *Caldwell* v. *Carrington*, 34 U. S. 9 Pet. 89 (9: 62); *Neale* v. *Neale*, 76 U. S. 9 Wall. 1 (19: 580); *Williams* v. *Morris*, 95 U. S. 444 (24: 360); *Bigelow* v. *Armes*, 108 U. S. 10 (27: 631); *Potter* v. *Jacobs*, 111 Mass. 32; *Green* v. *Jones*, 76 Me. 563; *Woodbury* v. *Gardner*, 77 Me. 68; *Rhodes* v. *Rhodes*, 3 Sandf. Ch. 279; *Farwell* v. *Johnston*, 34 Mich. 343; *Malins* v. *Brown*, 4 N. Y. 404; *Bennett* v. *Abrams*, 41 Barb. 620; *Murphy* v. *Whitney*, 69 Hun, 573; *Watkins* v. *Watkins*, 24 Ga. 402; *Howe* v. *Rogers*, 32 Tex. 219; *Warren* v. *Warren*, 105 Ill. 568; *Parkhurst* v. *Van Cortland*, 14 Johns. 15, 7 Am. Dec. 427; *Neale* v. *Neale*, 1 Keen, 672; *Seaman* v. *Aschermann*, 51 Wis. 678; *West Virginia Oil & O. L. Co.* v. *Vinal*, 14 W. Va. 637; *Laverty* v. *Moore*, 33 N. Y. 658.

Specific performance of parol agreements, performed in part, may be decreed against parties acquiring the land or interests in the land after the making of the agreement.

Van Dyne v. *Vreeland*, 11 N. J. Eq. 370; *Gupton* v. *Gupton*, 47 Mo. 37; *Twiss* v. *George*, 33 Mich. 253; *Davison* v. *Davison*, 13 N. J. Eq. 246; *Caldwell* v. *Carrington*, 34 U. S. 9 Pet. 89 (9: 62).

Mr. **Edwin B. Hay,** for appellees:

The statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance.

Barry v. *Coombe*, 26 U. S. 1 Pet. 640 (7: 295).

To authorize a decree for the specific performance of a parol agreement within the statute, on the ground of part performance, it is indispensable, not only that the acts which are alleged to be part performance, but the con-

tract itself, as stated in the bill, should be established by clear and definite proof.

Smith v. *Crandall*, 20 Md. 482; *Mundorff* v. *Kilbourn*, 4 Md. 459.

Every agreement, to merit the interposition of a court of equity in its favor, must be plain, just, reasonable, bona fide, certain in all its parts, mutual, etc.

Wadsworth v. *Manning*, 4 Md. 59; *Crane* v. *Gough*, 4 Md. 316; *Vansant* v. *Roberts*, 3 Md. 139; *Waters* v. *Howard*, 8 Gill, 275; *Hall* v. *Hall*, 1 Gill, 383; *Owings* v. *Baldwin*, 8 Gill, 347; *Stoddert* v. *Tuck*, 5 Md. 18; *Allen* v. *Burke*, 2 Md. Ch. 534; *Beard* v. *Linthicum*, 1 Md Ch. 345; *Hopkins* v. *Roberts*, 54 Md. 316.

Evidence of knowledge of agreement must be certain.

2 Stark. Ev. 598.

An agreement must be unequivocally proven by the complainant; the defendant cannot supply such an essential want.

King v. *Thompson*, 34 U. S. 9 Pet. 204 (9: 102).

The contract must be clear and definite, and the acts done should be equally clear and definite, and solely with the view of the agreement being performed.

Shepherd v. *Berin*, 9 Gill, 32; *Knoll* v. *Harvey*, 19 Wis. 99; *Lester* v. *Kinne*, 37 Conn. 9; *Jacobs* v. *Peterborough & S. R. Co.* 8 Cush. 223; *Purcell* v. *Coleman*, 71 U. S. 4 Wall. 513 (18: 435); *Wheeler* v. *Reynolds*, 66 N. Y. 227; *Pike* v. *Petters*, 71 Ala. 98; *Horn* v. *Ludington*, 32 Wis. 73; *Blanchard* v. *McDougal*, 6 Wis. 167, 70 Am. Dec. 458; *Tiernan* v. *Gibney*, 24 Wis. 190.

If the terms of the agreement are uncertain or ambiguous, or not made out by satisfactory proof, a specific performance will not be decreed.

Story, Eq. Jur. § 764; *Colson* v. *Thompson*, 15 U. S. 2 Wheat. 336 (4: 253); *Elliot* v. *Hele*, 1 Vern. 400; *Bromley* v. *Jefferies*, 2 Vern. 415; *Emery* v. *Wase*, 5 Ves. Jr. 849; *Luckett* v. *Williamson*, 37 Mo. 388; *Anter* v. *Miller*, 18 Iowa, 405.

The payment of purchase money or a considerable part of it is not such a part performance as takes the case out of the statute.

Cuppy v. *Hixon*, 29 Ind. 522.

If nothing has been done but the alleged payment of the purchase money, that can be recovered back, and thus the purchaser be placed *in statu quo*.

Cuppy v. *Hixon*, *supra*; *Eastburn* v. *Wheeler*, 23 Ind. 305; *Clinan* v. *Cooke*, 1 Sch. & Lef. 40; *Cronk* v. *Trumble*, 66 Ill. 428; *Ann berta Lodge* v. *Leverton*, 42 Tex. 18; *Horn* v. *Ludington*, 32 Wis. 73; *Hartwell* v. *Black*, 48 Ill. 301; Story, Eq. Jur. §§ 760-762.

Specific performance of an agreement cannot be decreed if the conditions are altered.

Waters v. *Howard*, 8 Gill, 262.

And where there is anything by reason of the change of circumstances in regard to the property that makes it unconscionable that the party should have execution of the contract, a court of equity will withhold its aid.

Inglehart v. *Vail*, 73 Ill. 63.

Although the answer confesses the parol agreement, if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a competent bar.

Blagden v. *Bradbear*, 12 Ves. Jr. 461; *Luckett* v. *Williamson*, 37 Mo. 388; *Williams* v. *Shipley*, 67 Md. 373; *Mundorff* v. *Kilbourn*, 4 Md. 464; *Purcell* v. *Coleman*, 71 U. S. 4 Wall. 513 (18: 435); *Williams* v. *Morris*, 95 U. S. 444 (24: 360); *Bigelow* v. *Armes*, 108 U. S. 10 (27: 631); *Grafton* v. *Cummings*, 99 U. S. 100 (25: 366); 1 Story, Eq. Jur. 8, 757.

Mr. Justice **Brown** delivered the opinion of the court:

The sole question is whether the plaintiffs have made out such a case as entitles them under the statute of frauds to a specific performance of the alleged agreement for the sale of the homestead property in square 199, and an equal division of the proceeds.

Thomas Riggles, the ancestor, was possessed of two parcels of land in Washington, viz: Certain lots in square 199, containing the homestead, worth from six to eight thousand dollars, and a large number of lots in square 179, then unimproved, and worth about forty thousand dollars.

*The lots in square 199, the homestead, [252 he left to his widow for life, for the benefit of herself and her four children; after her death, to his executors, for the benefit of his four children until the youngest should become of age, and then to his son Thomas, charged with the care and support of the unmarried daughters by his second wife; and in case of the death of Thomas before his sisters, the property was to be sold and the proceeds equally divided among these sisters.

The lots in square 179 were also charged with the maintenance and necessary expenses of his wife and her four children during her life, and after her death, with the support of the children, until the youngest should become of age. The executor was given power to dispose of all of 179 if, in his discretion, it should become necessary to apply the same to such use, and any surplus that should remain was to be divided among testator's children by his first wife; but should such residue remaining from 179 be more than the value of the homestead property, the children by the second wife should receive from such proceeds such portions as to make their shares alike or equal to each other, and the shares of the other children.

Thomas Riggles, Jr., son of the second wife, died December 27, 1883; Catharine Riggles, widow, died November, 1884. Hannah Riggles Erney, by the death of her brother and sisters, is the sole survivor of the children of the second wife, and entitled to the homestead under the will.

Plaintiffs' testimony tended to show that, at a meeting of the widow and all the heirs of the estate in June, 1873, it was agreed that the entire estate should be equally divided among the widow and children; that the lots in square 179 should be immediately sold, and the net proceeds, after payment of incumbrances, taxes and assessments upon the whole estate, should be divided between the widow and all the children; and that the homestead lots in square 199 should be retained for the use of the widow and her children until her death, or the death or marriage of the daughters, when this property should also be sold,

and the proceeds divided among all the children. This agreement, so far as it concerned 253] lots in 179, *was carried out; so far as it concerned square 199 it was denied and the statute pleaded.

But if the contract was made, as claimed, the sale and division of proceeds of the lots in square 179 was a part performance of such contracts under the decisions both of this court and of Maryland. The case of *Caldwell* v. *Carrington*, 34 U. S. 9 Pet. 86 [9: 60], is not dissimilar. This was a bill filed by Carrington's heirs in the Circuit Court for the District of Kentucky, claiming certain lands in that state, under a parol agreement, by which Carrington agreed with Williams for an exchange of lands which Carrington owned in Virginia for certain military lands in Kentucky. Williams took possession of the lands in Virginia and sold a part of them. The bill prayed that the heirs of Williams should be decreed to convey the military lands in Kentucky. This court held that, although the statute of frauds avoids parol contracts for lands, yet the complete execution of the contract in this case by Carrington, by conveying to Williams the lands he had agreed to give him in exchange, prevented the operation of the statute. See also *Galbraith* v. *McLain*, 84 Ill. 379; *Paine* v. *Wilcox*, 16 Wis. 202. So in *Neale* v. *Neale*, 76 U. S. 9 Wall. 1 [19: 590], a parol gift of land was made to a donee, who took possession, and, induced by the promise of the donor to give a deed of it, made valuable improvements on the property. It was held that the donor, having stipulated that the expenditure should be made, this should be regarded as a consideration or condition of the gift, and a specific performance was decreed. To same effect is *Hardesty* v. *Richardson*, 44 Md. 617, 22 Am. Rep. 57. So in *Bigelow* v. *Armes*, 108 U. S. 10 [27: 631]. Armes proposed in writing to Bigelow to exchange his real estate for Bigelow's with a cash bonus. The latter accepted in writing. Armes complied in full; Bigelow in part only. It was held to be unnecessary to determine whether the written memorandum was sufficient, as it was the duty of the court, in view of the full performance by Armes, to decree performance by Bigelow. There are other cases in this court in which the evidence was deemed insufficient to justify a decree for specific performance, but the principle of the cases above cited have never been 254]*questioned. *Colson* v. *Thompson*, 15 U. S. 2 Wheat. 336 [4: 253]; *Purcell* v. *Coleman*, 71 U. S. 4 Wall. 513 [18: 435]; *Grafton* v. *Cummings*, 99 U. S. 100 [25: 366]. Indeed, the rule is too well settled to require further citation of authorities, that, if the parol agreement be clearly and satisfactorily proven, and the plaintiff, relying upon such agreement and the promise of the defendant to perform his part, has done acts in part performance of such agreement, to the knowledge of the defendant—acts which have so altered the relations of the parties as to prevent their restoration to their former condition—it would be a virtual fraud to allow the defendant to interpose the statute as a defense and thus to secure to himself the benefit of what has been done in part performance. It must appear, however, that the acts done by the plaintiff were done in pursuance of the contract, and for the purpose of carrying it into execution, and with the consent or knowledge of the other party. While acts done prior to the contract or preparatory thereto, such as delivering abstracts of titles, measuring the land, drawing up deeds, etc., are not regarded as sufficient part performance, it is otherwise with such acts as taking open possession of the land sold, or making permanent or valuable improvements thereon, or doing other acts in relation to the land manifestly inconsistent with any other theory than that of carrying out the parol undertaking.

Plaintiff introduced the testimony of three witnesses, all of which tended to show that a meeting of all the heirs was held the last of May, 1873, at the homestead, at which it was agreed to sell square 179, pay off the indebtedness, and divide the balance. The indebtedness consisted of taxes upon square 179 and a mortgage debt upon it, the indebtedness of the widow, and the taxes due upon the homestead occupied by her in square 199. There was another meeting in June, at which there was a deed read which had been prepared. John Riggles, who appeared for the first wife, objected to the deed upon the ground that it was not in accordance with the will, when Mr. Evans, who appeared on behalf of the children of the second wife, promised that the children should share and share alike in the house at the death of the mother, and said* "that 255 it would not be fair for the children of the last wife to do all the waiting and the children of the first wife get their share at once; that it would only be equitable for the children of the first wife to do part of the waiting and share equally with them, so that it would be literally carried out, and we consented to divide equally upon that basis, and would have refused to have sold any more than sufficient to pay off the indebtedness unless they would agree to this equitable division, which was agreed to by all the heirs without any objection."

The agreement, so far as concerned square 179, was carried out, and defendant Hannah was paid about $3000 as her share of the proceeds of the sale. Mr. Evans, who, as before stated, appeared for the children of the second wife, among whom was defendant Hannah, after stating that it was understood that the homestead was to be sold, says that "it was a distinct and positive verbal agreement, thoroughly understood and consented to by all without reservation; we did not wish to send the deed back for a change, fearing that delays were dangerous; we were anxious to settle. Q. Do you know that Hannah Riggles Erney understood positively that she was consenting and agreeing to break the terms of her father's will? A. I do know that she did. . . . As I said before, I represented the children by the second wife, and my wife's interest, like Mrs. Erney's, I was bound to protect in every way. I, therefore, consulted with her, explained the terms of the deed, read the will to her, and asked her, as well as the other heirs by the second wife, if she thoroughly understood and consented to selling the property. She was satisfied, and so expressed herself." This testimony was also corroborated

by Sarah A. Turton, one of the children by the first wife.

The only testimony to the contrary is that of defendant herself, who always understood that the land was sold "to pay the indebtedness of mother, and then it was to be divided equally, and that is all." She remembered of but one meeting, but acknowledged that Mr. Evans was her representative in the transaction. She denied entering into any contract 256] *concerning the disposition of the land, but her testimony is quite unsatisfactory and her memory evidently defective.

By the terms of the will square 179, after being charged with the maintenance and support of the widow and her four children during her life, and after her death until the youngest should become of age, was to be sold and the proceeds to be divided between the children of the first wife, with a proviso that, if the lands so sold should exceed the value of the homestead lands, the children of the second wife should receive enough to make the shares of all equal.

The ultimate objects of the will were, *first*, to provide for the maintenance and expenses of the wife and younger children until they became of age; and, *second*, that the property should then be equally divided between them. This equality would certainly be defeated, if the defendant Hannah were permitted to share equally in the proceeds of square 179, and in addition to receive the whole of the proceeds of square 190. It seems to us altogether improbable that the children of the first wife would have entered into this arrangement, without an understanding that they were also to share in the proceeds of the homestead.

The decree of the court below is, therefore, reversed, and the case remanded for further proceedings in conformity with this opinion.

Mr. Justice **Brewer** and *Mr. Justice* **White** dissented from this opinion.

MICHAEL MORAN ET AL., *Plffs. in Err.*,
v.
FRANK D. STURGES, as Receiver of Schuyler's Steam Tow Boat Company.

(See S. C. Reporter's ed. 256-288.)

Property in possession of court—power of other court—maritime lien—restraining United States court.

1. Where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court.
2. Whenever the litigation in the court where the property is first seized has ended, or the possession of such court or its officers is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them.
3. A state court is without jurisdiction to enforce maritime liens, and is incapable of displacing them, and, therefore, though the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto, and when its jurisdiction has determined the admiralty courts may proceed.
4. Where the receiver appointed by the state court in proceedings for the dissolution of a corporation, never took actual possession of certain vessels belonging to the corporation, and did not qualify as receiver, until after the United States marshall had taken such possession of such vessels under libels issued by the United States district court to enforce maritime liens thereon, the latter court acquired jurisdiction, and a judgment of the state court restraining the libelants from prosecuting such libel, was an unlawful interference with the United States district court, and should be reversed.

[No. 892.]

Argued March 13, 14, 1894. Re-argued April 19, 20, 1894. Decided May 26, 1894.

IN ERROR to the Supreme Court of the State of New York, to review a judgment of that court, entered upon the direction of the court of appeals of the state of New York, affirming the order of the general term, affirming the order of the special term of the supreme court of that state, granting an injunction enjoining Michael Moran *et al.*, from taking any further proceeding upon certain libels filed by them in the District Court of the United States for the Eastern District of New York, against the Schuyler Steam Tow Boat Company, or against the steamboats of that Company, except the Niagara, and from taking any action whatsoever under said libels, and in proceedings looking to the condemnation and sale of the steamboats, or any of them, except the Niagara. *Reversed, and cause remanded for further proceeding.*

See same case below 20 L. R. A. 391, 136 N. Y. 169.

Statement by *Mr. Chief Justice* **Fuller:**

The Schuyler Steam Tow Boat Company was a corporation organized under the laws of New York. On July 31, 1891, the trustees of the company filed a petition in the supreme court of the state of New York at Albany county, at *chambers, for the voluntary disso 258] lution of the company under sections 2419 and 2423 of the Code of Civil Procedure of that state, and in their petition prayed for the appointment of a temporary receiver under section 2423 as amended, whose powers and duties were specified in section 1788. N. Y. Code Civ. Proc. 1891, pp. 643, 835, 836. The petition stated that the stock, effects, and other property of the corporation were not sufficient to pay the just amounts for which it was liable, nor to afford reasonable security to those who might deal with it, for the reasons that the corporation was indebted to the Holland Trust Company of New York in a large sum

NOTE. - *As to concurrent jurisdiction of tribunals*, see note to Smith v. M'Iver, 6: 152.

As to concurrent jurisdiction of state and United States courts, as to territory and offenses, see note to United States v. Bevans, 4: 404.

As to when a judgment at law will be enjoined by a bill in equity, see note to Davis v. Tileston, 12: 366.

As to when injunction to restrain acts of public officers will be granted, see note to Mississippi v. Johnson, 18: 437.

As to jurisdiction of equity to restrain trespasses and wrongs, see note to Northern Indiana R. Co. v. Michigan Cent. R. Co. 14: 674.

of money on a demand loan, payment whereof had been demanded, and that there were no available assets to meet the same; that the corporation had already defaulted upon certain claims set forth in the schedule attached, which were secured by notes which had been presented for payment and payment refused for want of such assets; that "other claims set forth in the schedule are either due or rapidly becoming due; and that there is serious danger of the company's vessels, constituting the sole property of the said company, being libeled in the admiralty courts of the United States for such claims as constitute maritime liens, including the claims for services and supplies rendered to said vessels. That in the event of said vessels being libeled and sold under a decree in admiralty, there would be little hope in realizing the value of said vessels on such sale, and the security of creditors and stockholders would be seriously imperiled;" that the assets must be realized by sale, and would be insufficient to pay all the claims in full, etc. Thereupon the presiding judge, the attorney general of New York appearing and consenting thereto, signed an order to show cause before a referee therein named, on November 16, 1891, why the company should not be dissolved, and by the same order appointed Frank D. Sturges temporary receiver of the property, "with all the powers and subject to all the duties that are defined as belonging to temporary receivers appointed in an action in section 1788 of the code." It was further ordered "that all creditors of said corporation, be and they are hereby restrained and enjoined 259] *from bringing any actions against the said corporation for the recovery of a sum of money, and from taking any further proceedings in any action already commenced against the said corporation for such purpose." A copy of the order was directed to be published at least once in each of the three weeks immediately preceding November 16, 1891, and that a copy be served upon each of the several persons specified in the schedule attached to the petition as a creditor or stockholder of the corporation. It was further ordered that before entering upon the duties of such receivership the said receiver should execute and acknowledge in due form of law a bond in the penal sum of $50,000, payable to the state of New York, with sureties. This order was entered and the petition and accompanying papers filed in the office of the clerk of the court for Albany county in the forenoon of August 1, 1891. On the afternoon of August 1, 1891, which was Saturday, and on Monday, August 3, 1891, plaintiffs in error, Michael Moran and other co-owners of certain tugs, filed libels in admiralty in the District Court of the United States for the Eastern District of New York against certain steamboats, which were the property of the Schuyler Company. Process was issued under said libels to the United States marshal for that district, and on August 1 he seized and took into his possession the steamboats Niagara, Belle, and Syracuse, and affixed his notice of seizure thereto. On August 3 he seized and took into his custody the steamboats Vanderbilt, Jacob Leonard, and America, and affixed his notice of seizure thereto. On August 4, 1891, the receiver went on board the steamboats mentioned and ascertained that the marshal was in possession thereof by his keepers, and he also found affixed to the boats the marshal's notice of seizure. The receiver applied to the state court, August 26, and was duly authorized by order that day in that court entered to contest said libels or to take such other proceedings therein as might be advisable, and to use the funds in his hands for the purpose of giving such security as he might be able, as required in contesting the libels. In September, 1891, the receiver made a motion in the United States district court for an order *directing the [260 marshal to withdraw from the custody of the steamboats held under the admiralty process. The motion was denied on the ground that the question should be raised by answer to the libels, and leave was given to answer accordingly. The receiver availed himself of this permission and appeared in one action against each vessel and filed his answer contesting the jurisdiction of the admiralty court. He thereafter made an application to this court for a writ of prohibition to the district court, which was denied November 13, 1891.

On November 10 the receiver verified a petition addressed to the supreme court of the state of New York, in which he asked that plaintiffs in error herein might be enjoined from prosecuting the libels which they had filed in the District Court of the United States for the Eastern District of New York. Affidavits were attached to the petition, and on these papers and the preceding record one of the justices of the supreme court of the state entered an order November 11, 1891, that plaintiffs in error show cause at a special term of the court, November 14, 1891, why they should not be enjoined from taking any further proceedings on their libels in the United States courts, and in the meantime plaintiffs in error were enjoined and restrained from taking any further action under their libels, and from attempting any proceeding looking to the condemnation or sale of the steamboats or any of them. Affidavits in opposition were presented by plaintiffs in error on the hearing of the order to show cause. Certain allegations were made in the petition and the moving affidavit of a knowledge by Moran at the time he filed the first libel that a receiver of the company had been appointed. These were denied, and Moran set forth under oath all his information and sources of information on the subject of the proceedings contemplated to dissolve the company, with the dates. The petition set forth that if libelants were permitted to prosecute their libels and obtain decrees thereunder, and the steamboats were condemned and sold to satisfy the same, it would result in the vessels being sold for less than their value, and that the interest of the corporation and the general creditors thereof would be greatly sacrificed; that the *vessels [261 would bring a much larger price if sold as a fleet; that all creditors who were entitled to a preference by having liens as well as all unsecured creditors could be fully protected in this proceeding; that petitioner was advised that a larger portion of the claims for which libels had been filed did not constitute liens against the vessels, nor were libelants entitled

to any preference for such portion of their claims. The petition further stated that under the order of August 26, the receiver had not sufficient funds to give security to contest all of the libels, and was wholly unable to give the security necessary to release the vessels from the marshal's custody, and for which reason, unless the libelants were restrained from prosecuting the libels, the receiver would be unable to prevent the condemnation and sale of the steamboats. The petition also set forth the receiver's application to the District Court of the United States for the Eastern District of New York for an order directing the marshal of the district to surrender the custody of the steamboats; the denial thereof on the ground that the question of jurisdiction ought not to be decided upon motion; the leave to the receiver to answer the libels and contest the jurisdiction by answer; his appearance and answer in one action brought against each steamboat for the purpose of testing the jurisdiction of that court, he not being able, as he alleged, to furnish the security necessary in order to answer all the libels, which were some forty in number. It was also averred that a motion had been made in the district court by Moran for the sale of the steamboats, and that the proceeds be deposited in court to await the result of the action; that the motion was opposed by the receiver and withdrawn as to the libels in which he had answered; that the motion had since been urged in the actions in which the receiver had not appeared and answered, and that the district court had intimated that the motion would be granted November 13. Petitioner denied the jurisdiction of the district court over the steamboats, or any of them, at the time the libels were filed, and asserted that they were at that time in the custody of the state court, and not liable or subject to the attachment made by the marshal.

262] On December 7, 1891,* the special term of the supreme court granted the prayer of the receiver and entered an order for an injunction, enjoining plaintiffs in error from taking any further proceedings upon their libels in the District Court of the United States for the Eastern District of New York against the steamboat company or against the steamboats of that company, except the Niagara, and from taking any action whatsoever under said libels and in proceedings looking to the condemnation and sale of the steamboats, or any of them, except the Niagara.

Plaintiffs in error appealed from that order to the general term, by which it was affirmed, and they then carried the case to the court of appeals of the state of New York, which affirmed the order of the general term (20 L. R. A. 391, 136 N. Y. 169) and directed that its judgment be made the judgment of the supreme court, which was done December 6, 1892, whereupon this writ of error was sued out.

Messrs. **Robert D. Benedict,** *James Emerson Carpenter* and *Joseph F. Mosher,* for plaintiffs in error, on both arguments:

The state court had no authority to make an order or give a judgment enjoining the plaintiffs in error from prosecuting the suit which they had begun in the United States district court.

Buck v. *Colbath,* 70 U. S. 3 Wall. 334 (18: 257); *United States* v. *Johnson County Suprs.* 73 U. S. 6 Wall. 195 (18: 776).

The state courts cannot enjoin proceedings in courts of the United States, nor the latter in the former courts.

English v. *Miller,* 2 Rich. Eq. 320; *United States* v. *Keokuk,* 73 U. S. 6 Wall. 514 (18: 933); *Strozier* v. *Howes,* 30 Ga. 578; *Bryan* v. *Hickson,* 40 Ga. 405; *Hines* v. *Rawson,* 40 Ga. 356, 2 Am. Rep. 581; *Kendall* v. *Winsor,* 6 R. I. 453; *Daly* v. *Sheriff,* 1 Woods, 175; *Peck* v. *Jenness,* 48 U. S. 7 How. 625 (12: 846).

The district court of the United States had jurisdiction because it had acquired rightful possession of this property by the seizure of it by the marshal under his process.

Hagan v. *Lucas,* 35 U. S. 10 Pet. 400 (9: 470); *Wiswall* v. *Sampson,* 55 U. S. 14 How. 54 (14: 323); *Taylor* v. *Carryl,* 61 U. S. 20 How. 583 (15: 1028); *Freeman* v. *Howe,* 65 U. S. 24 How. 450 (16: 749); *Buck* v. *Colbath,* 70 U. S. 3 Wall. 334 (18: 257); *United States* v. *Johnson County Suprs.* 73 U. S. 6 Wall. 196 (18: 776); *Covell* v. *Heyman,* 111 U. S. 176 (28: 390); *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 305 (28: 733); *Ayers* v. *McAuley,* 149 U. S. 614 (37: 871); *The Caroline,* 1 Low. Dec. 174; *Adler* v. *Roth,* 5 Fed. Rep. 895; *Senior* v. *Pierce,* 31 Fed. Rep. 625; *Kresset* v. *The E. L. Cain,* 45 Fed. Rep. 367.

If the receiver was in possession, from the time of making the order appointing him, any interference with the property after that time was a contempt of court, but he was not in possession, as the order did not vest the possession; but only the right to acquire possession.

Albany City Bank v. *Schermerhorn,* 9 Paige, 372, 38 Am. Dec. 551; *Bowery Sav. Bank* v. *Richards,* 3 Hun, 366; *Walling* v. *Miller,* 108 N. Y. 173; *Varnum* v. *Hart,* 119 N. Y. 101, 108; *Smith* v. *Davis,* 63 Hun, 100.

There are manifest reasons for distinguishing the present case from the authorities relied on by the courts below and the defendants in error to sustain their action.

The Belfast v. *Boon,* 74 U. S. 7 Wall. 624 (19: 266); *The Ad Hine* v. *Trevor,* 71 U. S. 4 Wall. 555 (18: 451); *Bird* v. *The Josephine,* 39 N. Y. 19; *Brown* v. *Gray,* 70 Hun, 263; *Pelham* v. *The B. F. Woolsey,* 3 Fed. Rep. 457.

This proceeding of the corporation under which this receiver claims was collusive, and is not valid as against the plaintiffs in error.

Coggeshall v. *United States* (*The Slavers, Reindeer*) 69 U. S. 2 Wall. 402 (17: 911).

Mr. **James W. Eaton,** for defendant in error, on both arguments:

By the order of July 31, appointing a receiver, the New York state court acquired jurisdiction of the property of the corporation, and that jurisdiction is exclusive as against all other courts of co-ordinate jurisdiction.

Re Christian Jensen Co. 128 N. Y. 550.

The act of filing security is not at all essential to the jurisdiction of the court, and process levied intermediate the appointment of the receiver and his giving a bond is void.

Maynard v. *Bond,* 67 Mo. 315; *Rutter* v. *Tallis,* 5 Sandf. 610; *Steele* v. *Sturges,* 5 Abb.

Pr. 442; *Texas Trunk R. Co.* v. *Lewis*, 81 Tex. 1; *Olney* v. *Tanner*, 10 Fed. Rep. 101, 18 Fed. Rep. 636; *Sedgwick* v. *Menck*, 1 Nat. Bank. Reg. 675; *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480; *Wiswall* v. *Sampson*, 55 U. S. 14 How. 52 (14: 322.)

This rule has been repeatedly applied to cases where such an exercise of jurisdiction on the part of the state court has been held to give it exclusive cognizance and control to the exclusion of a Federal court of co-ordinate jurisdiction attempting to interfere with the subject-matter in dispute; and that, too, by the Federal courts themselves.

Union Trust Co. v. *Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; *Hickox* v. *Holloday*, 29 Fed. Rep. 226; *Bruce* v. *Manchester & K. R. Co.* 19 Fed. Rep. 342; *Conkling* v. *Butler*, 4 Biss. 22; *Hamilton* v. *Choutcau*, 3 McCrary, 509; *Hutchinson* v. *Green*, 2 McCrary, 471; *Walker* v. *Flint*, 7 Fed. Rep. 435; *Kennedy* v. *Indianapolis, C. & L. R. Co.* 8 Fed. Rep. 97; *The Red Wing*, 14 Fed. Rep. 869; *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15: 1028); *Judd* v. *Bankers & M. Teleg. Co.* 31 Fed. Rep. 183.

The court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation and to take possession and control of the subject-matter of the investigation to the exclusion of all interference by other courts of co-ordinate jurisdiction.

Williams v. *Benedict*, 49 U. S. 8 How. 111 (12: 1003); *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 (9: 470); *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 (18: 257); *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 294 (28: 729); *Schuchle* v. *Reiman*, 86 N. Y. 270; *Union Trust Co.* v. *Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; *Sedgwick* v. *Menck*, 6 Blatchf. 156; *Young* v. *Montgomery & E. R. Co* 2 Woods, 606; *Covell* v. *Heyman*, 111 U. S. 183 (28: 393); *Fox* v. *Hempfield R. Co.* 2 Abb. U. S. 157; *Rio Grande R. Co.* v. *Vinet*, 132 U. S. 478 (33: 400); *Attleborough Nat. Bank* v. *Northwestern Mfg. & Car Co.* 28 Fed. Rep. 113; *Morrison* v. *Menhaden Co.* 37 Hun, 522.

Property in possession of an officer of a state court, under legal process is in the possession of that court, and, therefore, within its exclusive jurisdiction; and the Federal courts by replevin or any other process, cannot disturb such possession.

Senior v. *Pierce*, 31 Fed. Rep. 625; *Kressel* v. *The E. L. Cain*, 45 Fed. Rep. 367; *Tefft* v. *Sternberg*, 40 Fed. Rep. 2.

It may be argued that these cases do not apply to the case at bar because the property was not taken into manual possession under process of the court. But that, under the authorities, is not necessary.

Gluck, Receivers, §§ 30, 31; *Union Trust Co.* v. *Rockford, R. I. & St. L. R. Co.* 6 Biss. 197; Beach, Receivers, §§ 20, 349.

The cases which hold priority of manual possession as the test of jurisdiction between Federal and state courts are cases relating to the levy of a marshal on the one hand and the levy of a sheriff on the other, and do not apply to the case of a receiver.

The court will take into account fractions of a day in determining priority of jurisdiction.

People v. *Central City Bank*, 53 Barb. 412, 417.

The court appointing the receiver has priority over the court subsequently levying, through its officer, upon the property which, by the act of appointing the receiver, is in the custody of the first court.

Hagan v. *Lucas*, 35 U. S. 10 Pet. 401 (9: 471); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15: 1028); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Pulliam* v. *Osborne*, 58 U. S. 17 How. 471 (15: 154); *Adler* v. *Roth*, 5 Fed. Rep. 895; *Senior* v. *Pierce*, 31 Fed. Rep. 626; *The Sailor Prince*, 1 Ben. 237; *The Caroline*, 1 Low. Dec. 173; *Loring* v. *Marsh*, 2 Cliff. 323.

A court should not allow any interference with property in the hands of its receiver.

Beach, Receivers, § 15; *Young* v. *Montgomery & E. R. Co.* 2 Woods, 606.

No court is authorized to interfere with the possession, custody or control of another court, no matter what the form of its mandate may be.

Jennings v. *Carson*, 8 U. S. 4 Cranch, 2 (2: 731); *Tefft* v. *Sternberg*, 40 Fed. Rep. 2; *The Robert Fulton*, 1 Paine, 620; *Keating* v. *Spink*, 3 Ohio St. 105, 62 Am. Dec. 214; *The Oliver Jordan*, 2 Curt. 414.

A court should protect its own jurisdiction and prevent interference with its possession of the property by injunction.

High, Inj. § 108; *Akerly* v. *Vilas*, 15 Wis. 401; *Home Ins. Co.* v. *Howell*, 24 N. J. Eq. 238, *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 46 Vt. 792; *Hendee* v. *Connecticut & P. R. R. Co.* 23 Blatchf. 453; Beach, Receivers, §§ 738, 739; 1 Kent, Com. 410.

When a state court has first acquired jurisdiction of the subject-matter and of the parties, it may enjoin the prosecution of a subsequent suit by the defendant concerning the same subject-matter in a Federal court in another state.

High, Inj. § 110; *French* v. *Hay*, 89 U. S. 22 Wall. 250 (22: 857); *Kern* v. *Huidekoper* ("*Dietzsch* v. *Huidekoper*") 103 U. S. 491 (26: 357).

Courts of equity will restrain litigation in courts of other states, or even of foreign countries, where such interference is justified under any of the heads of equitable jurisdiction.

Carron Iron Co. v. *Maclaren*, 5 H. L. Cas. 416; *Dehon* v. *Foster*, 4 Allen, 545; *Bank of Bellows Falls* v. *Rutland & B. R. Co.* 28 Vt. 470; *Hayes* v. *Ward*, 4 Johns. Ch. 123; *Vail* v. *Knapp*, 49 Barb. 299; *Cunningham* v. *Butler*, 142 Mass. 47, 56 Am. Rep. 657; *Mitchell* v. *Bunch*, 2 Paige, 606, 22 Am. Dec. 669; *Kittle* v. *Kittle*, 8 Daly, 72; *Erie R. Co.* v. *Ramsey*, 45 N. Y. 637; *Dinsmore* v. *Nereshimer*, 38 Hun, 204; *Garrison* v. *Marie*, 1 How. Pr. N. S. 348; *Bowers* v. *Durant*, 43 Hun, 348, 104 N. Y. 661; *Carroll* v. *Farmers & M. Bank*, Harr. (Mich.) 197; *Williams* v. *Mayrault*, 31 Barb. 364; *Burgess* v. *Smith*, 2 Barb. Ch. 276; *DeGroot* v. *Jay*, 30 Barb. 483; *Taylor* v. *Baldwin*, 14 Abb. Pr. 166; Willard, Eq. Jur. 348.

Messrs. McCarthy and *Berier*, for Lehigh Valley Coal Co. *et al.*

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This court declined to issue the writ of prohibition to the District Court of the United States for the Eastern District of New York

from proceeding upon these libels because the alleged want of jurisdiction in the district court over the vessels was in course of litigation in that court on due process. *Ex parte Fassett*, 142 U. S. 479, 484 [35: 1087, 1088]. The state court upon the receiver's application granted in effect the prohibition which we denied, and restrained libelants from prosecuting their libels. The question is whether it was within the power of the state court to do this?

The general rule is that state courts cannot enjoin proceedings in the courts of the United States, and this was held at a very early day, in reference to a judgment of the circuit court (*M'Kim* v. *Voorhies*, 11 U. S. 7 Cranch, 281 [3: 3431]; while on the other hand, it was determined **268**] that the circuit court would* not enjoin proceedings in a state court, and any attempt of that kind was forbidden by Act of Congress. *Diggs* v. *Wolcott*, 8 U. S. 4 Cranch, 179 [2: 587]; Act of March 2, 1793, 1 Stat. at L. 335. In *United States* v. *Johnson County Supra*, 73 U. S. 6 Wall. 166, 195 [18: 768, 776], this court, speaking through *Mr. Justice* Clifford, said: "State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separably and independently of each other, and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' . . . Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of state tribunals." And in *United States* v. *Keokuk*, 73 U.S. 6 Wall. 514 517 [18: 933, 934], the same learned justice, again speaking for the court, observed: "Orders for an injunction issued by state courts are as inoperative upon the process of the circuit court of that district as they would be if directed to the process of a circuit court in any other district of the United States, because the state and Federal courts, in their sphere of action, are independent of any such control."

Mr. Justice Story was of opinion that to the doctrine which permits the courts of one state in proper cases to enjoin persons within their jurisdiction from instituting legal proceedings in other states, or from further proceeding in actions already begun, there exists the exception that the state courts cannot enjoin parties from proceeding in the courts of the United States, nor the latter enjoin them from proceeding in the former courts, an exception based upon peculiar grounds of municipal and constitutional law. Story, Eq. § 900; Story, Const. § 1757.

By the Judiciary Act of 1793 (1 Stat. at L. 334, chap. 22, § 5) the granting of injunction to **269**] stay proceedings in any* court of a state was prohibited in express terms, and it was held in *Peck* v. *Jenness*, 48 U. S. 7 How. 612, 624 [12: 841, 846] that even the district court sitting in bankruptcy could not issue an injunction to stay a creditor of the bankrupt from proceeding in a state court, *Mr. Justice* Grier saying: "It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* v. *Earl of Cassilis*, 2 Swanst. 313, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland which, on more mature reflection, he dissolved; because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

The provision of the Act of 1793 was carried forward into section 720 of the Revised Statutes, with the addition of the words "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy," and *under that exception [**270** restraint by injunction was held authorized in *Chapman* v. *Brewer*, 114 U. S. 158 [29: 83].

In *French* v. *Hay*, 89 U. S. 22 Wall. 250 [22: 857] a cause had been properly removed from a state court to the circuit court of the United States, under the removal acts, and the circuit court had vacated a decree previously rendered in the state court and dismissed the cause for want of equity, and it was held that the circuit court, having jurisdiction *in personam* over the parties, and having control over the cause, would not permit its jurisdiction to be trenched upon by any other tribunal, and might properly enjoin a party to the cause from proceeding beyond the territorial jurisdiction of the court in contravention of its decree. So, in *Kern* v. *Huidekoper* ("*Dietzsch* v. *Huidekoper*"), 103 U. S. 494 [26: 497], a plaintiff in a replevin suit brought in a state court had properly removed it to the Federal court and obtained a judgment there in his favor, but the state court proceeded to try the cause and render judgment against the plaintiff, notwithstanding the removal, and an action was then brought in the state court upon the replevin bond. It was

held that the court of the United States might enjoin the prosecution of such action, the relief being merely ancillary to the jurisdiction already acquired and necessary to give effect to its own judgment.

And resort to injunction in proceedings in admiralty for the limitation of the liability of ship owners under an Act of Congress, passed since the Act of 1793, and expressly providing that after the institution of such proceedings "all claims and proceedings against the owner shall cease" (Act of March 3, 1851, chap. 43, § 4, 9 Stat. at L. 635); Rev Stat. § 4285; was sustained in *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.* 109 U. S. 578, 599, 600 [27:1038, 1046].

These were all cases in which the issue of an injunction to a state court had been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a court of the United States of its lawful jurisdiction over particular persons or things.

In *Gaylord* v. *Ft. Wayne, M. & C. R. Co.* 6 Biss. 286, 291, 292, a bill was filed in the circuit [271] court of the United States* for the District of Indiana, to obtain, among other things, the appointment of a receiver of the property of an insolvent corporation, and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained and an amendment made, a receiver was appointed. While proceedings were pending in the Federal court a suit was commenced in the state court of Indiana in which a receiver was also appointed, who took possession of the property. Subsequently the property was surrendered by the persons in possession under the receiver of the state court to the receiver of the Federal court upon his application, and he retained possession of the property, the court refusing to rescind the order appointing him. In disposing of the case, the circuit court, Drummond, *J.*, said: "We think that there is no other safe rule to adopt, in our mixed system of state and Federal jurisprudence than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled. . . . Of course, in all that has been said, it is assumed, what was the fact in this case, that the bill was not only filed first in this court, but that the process was issued and duly served upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court."

In *Home Ins. Co.* v. *Howell*, 24 N. J. Eq. 238, 241, the complainant filed its bill for relief against two policies of insurance, which it alleged the defendant had fraudulently obtained from it upon his property in Illinois, and prayed that the policies might be delivered up and canceled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or in equity upon them or making use of them in any way for the purpose of establishing any claim for damages against the complainant. Defendant appeared and filed an answer, to which a replication being filed, proofs were taken. After the suit was commenced, defendant brought an action at law on the policies against the company in a state court of Illinois, which suit was on its petition removed into the Circuit Court of the United States for the Northern District of that state. *The company [272] thereupon filed its petition in the court of New Jersey for an injunction to restrain him from prosecuting his suit in Illinois, and an injunction having been issued, a motion was made to dissolve it. In denying the motion, the Chancellor said: "This court having the power to hear and determine the subject matter in controversy, and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is, that as between courts of concurrent and co-ordinate jurdisdiction (and the circuit court of the United States and the state courts are such in certain controversies, such as that involved in this suit, for example —between citizens of different states) the court that first obtains possession of the controversy must be allowed to dispose of it, without interference from the co-ordinate court. . . . Where a party is within the jurisdiction of this court, so that on a bill properly filed here, this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and, of course, from prosecuting one commenced after the bringing of the suit in this court."

In *Brooks* v. *Delaplaine*, 1 Md. Ch. 354, the high court of chancery of Maryland dismissed a bill in equity, because at the time it was filed a suit, involving the same controversy was pending in the county court having concurrent jurisdiction. And see the observations of *Mr. Justice* Field, in *Sharon* v. *Terry*, 36 Fed. Rep. 337, 355.

We decided in *Cole* v. *Cunningham*, 133 U. S. 107 [33: 538], that a creditor, who is a citizen and resident of the same state as his debtor against whom insolvent proceedings have been instituted in such state, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to seize or attach the personal property of the debtor situated in another state, and embraced in the assignment, he may be restrained by injunction by the courts of the state in which he and the debtor reside. But we also held in *Reynolds* v. *Adden*, *136 U. S. 348 [34: 360], that a [273] creditor who was not a citizen or resident of the same state with his debtor might proceed in another state against property there, unaffected by insolvency proceedings in the state of the debtor's residence, if in accordance with the law of such other state. The debtor in that case was a citizen and resident of Massachusetts, where the insolvency proceedings were had. The creditor was a citizen of New Hampshire, and he attached property of the debtor in Louisiana, where the rule was that the transfer of the estate of an insolvent debtor by judicial operation is not binding upon the citizens and inhabitants of Louisiana or any other state except the state in which the insolvent proceedings have taken place, at least until the assignee has reduced the property to possession or done what is equivalent thereto.

In *Worthington* v. *Lee*, 61 Md. 530, in a suit for specific performance of a covenant for the renewal of a lease and for an injunction to restrain an action of ejectment for the recovery of the premises, the court of appeals of Maryland held, Alvey, *Ch. J.*, delivering the opinion of the court, that so far as the parties were within the jurisdiction of the court or bound by the decree, they might be restrained from taking any action at law in the courts of Maryland for the recovery of the property, but as to those parties residing in other states, they could not be restrained by injunction from the state court from suing in the circuit court of the United States, by which their right so to sue must be determined.

It will be preceived that the principle invoked in such cases as *Gaylord* v. *Ft. Wayne, M. & C. R. Co.* and *Home Ins. Co.* v. *Howell, supra*, is, that courts for the purpose of protecting their jurisdiction over persons and subject-matter may enjoin parties who are amenable to their process and subject to their jurisdiction from interference with them in respect of property in their possession or identical controversies therein pending, by subsequent proceedings as to the same parties and subject-matter in other courts of concurrent jurisdiction.

The proceeding in which upon petition the injunction under consideration was granted, was a proceeding in insolvency in the state court to dissolve and wind up the Schuyler 274] *Company on its own application, under the statutes of New York in that behalf, and if it be conceded that that court could protect its exercise of jurisdiction over that subject-matter by enjoining creditors from prosecuting suits against the company on petition of the receiver in that suit and without the bringing of a new suit for that purpose, it does not follow that it had power to grant the injunction in question.

If the state court could not restrain proceedings in the district court of the United States; if the jurisdiction of the state court over the libelants had not attached; or if the district court obtained jurisdiction over the vessels in priority to the state court, then this judgment must be reversed.

It is a rule of general application that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. This doctrine has been repeatedly affirmed by this court. *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 [9: 470]; *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 [15: 1028]; *Peck* v. *Jenness*, 48 U. S. 7 How. 612, 625 [12: 841, 846]; *Freeman* v. *Howe*, 65 U. S. 24 How. 450 [16: 749]; *Ellis* v. *Davis*, 109 U. S. 485, 498 [27: 1006, 1010]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Covell* v. *Heyman*, 111 U. S. 176 [28: 390]; *Borer* v. *Chapman*, 119 U. S. 587, 600 [30: 532, 537]. These cases were cited in *Byers* v. *McAuley*, 149 U. S. 608, 614 [37: 867, 871]; and the language of *Mr. Justice* Matthews in *Covell* v. *Heyman* was quoted to this effect: "The point of the decision in *Freeman* v. *Howe, supra*, is that, when property is taken and held under process, mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person, not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute, by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of *that court; but that all other [275 remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer or the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And *vice versa*, the same principle protects the possession of the property while thus held, by process issuing from state courts, against and disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States." *Porter* v. *Sabin*, 149 U. S. 473 [37: 815].

In *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334, 341, 345 [18: 257, 260, 261], the same rule was referred to as settled, and *Mr. Justice* Miller said: "A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but how much more disastrous would be the consequences of such a course, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit. This principle, however, has its limitations; or rather its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound, or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudication of the court first possessed of the property, depends upon principles familiar to the law; but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions." It was further said: "It is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other *mat- [276 ters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the reme-

dies, the character of the relief sought, and the identity of the parties in the different suits." Hence it was held that an action of trespass might be sustained in the state court against the marshal for levying on property not belonging to the defendant in his writ, although his possession could not have been interfered with.

The reason was that his possession was the possession of the court, and, pending the litigation, no other court of merely concurrent jurisdiction could be permitted to disturb that possession, while the action of trespass constituted no such interference.

In this and like cases the question has arisen in respect of courts of concurrent jurisdiction as to parties and subject-matter.

But the question in the case at bar arises in respect of the state court and a district court of the United States, whose cognizance of all civil causes of admiralty and maritime jurisdiction is, under the Constitution and by the ninth section of the Judiciary Act of 1789 (reproduced in Rev. Stat. 711), exclusive. *New Jersey Steam Nav. Co.* v. *Merchants Bank of Boston*, 47 U. S. 6 How. 390 [12: 485]; *The Moses Taylor* v. *Hammons*, 71 U. S. 4 Wall. 411 [18: 397]; *The Ad Hine* v. *Trevor*, 71 U. S. 4 Wall. 555 [18: 451]; *Rodd* v. *Heartt* ("*The Lottawanna*") 88 U. S. 21 Wall. 558, 580 [22: 654, 663]; *Johnson* v. *Chicago & P. Elev. Co.* 119 U. S. 388, 397 [30: 447, 450]; *The J. E. Rumbell*, 148 U. S. 1, 12 [37: 345, 347]. As said by *Mr. Justice* Miller: "It must be taken as the settled law of this court that wherever the district courts of the United States have original cognizance of admiralty causes, by virtue of the Act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law." 71 U. S. 4 Wall. 568 [18: 455]. The act saves to suitors in all cases "the right of a common law remedy, where the common law is competent to give it;" that is, not a remedy in the common law courts, but a common law remedy. Suitors are not compelled to seek **277**] such *remedy, if it exists, nor can they, if entitled, be deprived of their right to proceed in a court of admiralty, and the state courts have no authority to hear and determine a suit *in rem* to enforce a maritime lien. *The Belfast* v. *Boon*, 74 U. S. 7 Wall. 624, 644 [19: 266, 272]; *Bird* v. *The Josephine*, 39 N. Y. 19, 27.

A statutory proceeding to wind up a corporation is not a common law remedy, and a maritime lien cannot be enforced by any proceeding at common law. These libelants were entitled to have their causes tried in the court of admiralty, according to the rules and practice of admiralty, and that right could not be taken away from them, nor would the decree or judgment of the state court be pleadable in bar to their libels. If, then, the receiver had first taken actual possession of these vessels and sold them, such sale would not have cut off maritime liens and the right to have them enforced, and while it may be true that the state courts, exercising equitable jurisdiction, might undertake, in the distribution of property, to save the rights of holders of maritime liens, yet it is certain that those courts would have no power by a sale under statute to destroy their liens unless they had voluntarily submitted themselves to that jurisdiction.

In *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 [15: 1028], it was held that where a vessel had been seized under process of foreign attachment issuing from a state court in Pennsylvania, and a motion was pending in that court for an order of sale, process issued under a libel filed in the district court of the United States for mariners' wages and supplies, could not divest the authorities of the state of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal as inoperative. And this because while the property levied upon was in the actual possession of one jurisdiction, it should not be taken by an officer acting under another. *Mr. Chief Justice* Taney and three of his associates dissented upon the ground that the question was not one "between the relative powers of a state and the United States, acting through their judicial tribunals, but merely upon the relative powers and* duties of [**278** a court of admiralty and a court of common law in the case of an admitted maritime lien." The *Chief Justice* stated that the following propositions were undisputed: "The lien of seamen for their wages is prior and paramount to all other claims on the vessel, and must be first paid. By the Constitution and laws of the United States, the only court that has jurisdiction over this lien, or authorized to enforce it, is the court of admiralty, and it is the duty of that court to do so. The seamen, as a matter of right, are entitled to the process of the court to enforce payment promptly, in order that they may not be left penniless, and without the means of support on shore. And the right to this remedy is as well and firmly established as the right to the paramount lien. No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien, or the remedy which is given to the seaman. A general creditor of the ship owner has no lien on the vessel. When she is attached (as in this case) by process from a court of common law, nothing is taken, or can be taken, but the interest of the owner remaining after the maritime liens are satisfied. The seizure does not reach them. The thing taken is not the whole interest in the ship. And the only interest which this process can seize is a secondary and subordinate interest, subject to the superior and paramount claims for seamen's wages; and what will be the amount of those claims, or whether anything would remain to be attached, the court of common law cannot know until they are heard and decided upon in the court of admiralty." *Mr. Justice* Campbell, who delivered the opinion of the majority, observed, at its close, that the view taken of the case rendered it unnecessary "to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable or as perishable upon them;" and he cited the case of *The Oliver Jordan*, 2 Curt. 414, in which *Mr. Justice* Curtis held that property in the custody

of the law of a state, under an attachment, cannot be arrested by a warrant from a district court, sitting in the admiralty, in a pro-
279] ceeding to *enforce the lien of a materialman, but declined to then order the libel to be dismissed as "the state process may be so terminated as to render it practicable to proceed in the admiralty against the vessel."

As already pointed out it was held in *Buck* v. *Colbath*, *supra*, that whenever the litigation in the court where the property is first seized has ended, or the possession of such court or its officers is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. This view is illustrated by many decisions in the district courts, and was applied by *Mr. Justice* Blatchford, then district judge, in *The Sailor Prince*, 1 Ben. 234.

That was a case of a libel by seamen to recover wages against a ship and freight money, wherein the marshal made return to the process that he had not attached the vessel, but had attached the freight money in the hands of the parties who held it. Prior to the service of process, suit had been brought in the state court against the owners of the vessel, in which warrants of attachment had been issued, under which the sheriff had seized and was holding her when the marshal came to seize her. He had also served copies of the warrants on the parties who held the freight money, with notice that he attached it. But *Judge* Blatchford held that the seaman had a paramount lien for their wages upon the freight money, and that such lien was to be administered by the court of admiralty by the service of its process; that as against a lien of that character, the principle established in *Taylor* v. *Carryl* ought not to be extended; that the application of the principle of that case to an attachment issuing from a state court against a vessel only worked delay in the enforcement of a sailor's lien for wages upon her, but that the application of it to an attachment against freight money would work the entire destruction of the lien; that the possession of the freight money by the sheriff, constructive or otherwise, was not such as the possession of the vessel in *Taylor* v. *Carryl*, or such as pre vented the marshal from levying his process
280] *upon it, so as to give the district court jurisdiction of it *in rem*. The learned judge considered the cases of *Taylor* v. *Carryl*, *Freeman* v. *Howe*, and *Buck* v. *Colbath*; and regarded the principle proceeded on in *Taylor* v. *Carryl*, at best, as a rule of comity; a relinquishment by a court of admiralty of its clear jurisdiction, "in favor of a state court, which cannot enforce or displace such lien, and has no jurisdiction over it, giving to the state court the right, for the time being, to obstruct and interfere with the lien and with the remedy of the seamen. That principle or rule of comity is, according to *Taylor* v. *Carryl*, to be sustained in regard to a vessel which has been seized by and is in the lawful custody of the sheriff under process from the state court, so long as it is in such custody, the federal court being at liberty, when the litigation in the state court is ended, or when the possession of the sheriff is discharged, to take possession of the vessel and enforce against it admiralty liens. . . . Now, this rule of comity, thus regarded and limited and administered, may, perhaps, in ordinary cases, work no other mischief than to cause unnecessary and harsh delay in the enforcement of their rights by a class of men whose paramount and superior claims are recognized in the codes of law of all commercial countries. The state court can seize and sell only the interest of the owner in the vessel over and beyond the amount of the liens of the seamen, and can convey no absolute right of property in the whole vessel to a purchaser. Legally, the lien remains, to be enforced the moment the hand of the state officer is withdrawn from the vessel. And the vessel, in theory at least, remains *in specie*, so as to be subject to process for the enforcement of such lien." But that learned judge declined to extend that principle so far as to permit the state court to appropriate the money to the payment of inferior claims of creditors who had attached it by the process of the state court, as if this were done, "the lien of the seamen on such money for their wages is gone, extinguished, put out of existence, in the face of an admiralty court, by the act of a court of common law. The court of admiralty is to abnegate functions which are conferred upon it by the *Constitution and laws, and to refuse to [281 enforce a clearly admitted paramount admiralty lien, which no other court can enforce or directly destroy or supersede, because a state officer has, under process from a state court, attached a sum of money which is the subject of such lien, and is to permit the state court to apply that money to the payment of an inferior claim not founded on a lien, and thus indirectly destroy the lien practically and to all intents and purposes."

A similar question arose in *The Caroline*, 1 Low. Dec. 173, and it was held that it was not a good defense to a petition that freight might be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials, and that the consignee, before the libels were filed, was summoned as trustee or garnishee of the ship owner in a court of common law; that the courts of common law of Massachusetts had no power to adjust maritime liens upon a fund attached under the foreign attachment law of that state, and the consequence of giving priority to such an attachment might be the destruction of the liens; that a court of common law would be bound to guard against this consequence by discharging the supposed trustee, or by waiting till the liens were adjusted; and that the district court might proceed to adjust the liens and might order the freight to be brought in for that purpose; and Lowell, *J.*, said: "The decision in *Taylor* v. *Carryl*, as explained in *Freeman* v. *Howe*, and in *Buck* v. *Colbath*, does not operate to defeat the paramount maritime liens, but only to delay their enforcement, because the sheriff can sell only the right of the ship owner, subject to those liens; the practical effect of which I find to be that the sheriff usually waives his possession when libels are filed for maritime liens, because his title becomes of little or no market value. So that we have come back pretty much to the practice which prevailed before the leading case was decided."

The views of *Judge* Blatchford in respect of the attachment of credits, and thereby the destruction of maritime liens, were fully concurred in. And see *Clifton* v. *Foster*, 103 Mass. 233; *Eldy* v. *O'Hara*, 132 Mass. 56.

In *The E. L. Cain*, 45 Fed. Rep. 367, the 282] sheriff had *attached a tug and turned it over to a receiver appointed by the state court. After that the marshal, under process upon libels filed for seamen's wages and supplies, seized the vessel, but the district court held that the tug, "having been taken possession of by process of the state court, and by that court placed in the custody of the receiver, it could not be held by any process out of this court until discharged by order of the state court." And Simonton, *J.*, said: "So, for the present, this court can proceed no further. But the liens set up in this court are maritime liens, which cannot be adjudicated or passed upon in the state court. Over these liens the jurisdiction of this court is exclusive. They will be protected in this court." The cause was continued until the state court had ordered a sale or in any other mode released its custody of the tug. To the same effect, Brown, *J.*, in *The James Roy*, 59 Fed. Rep. 784.

In *The Elezena*, 53 Fed. Rep. 359, section 2186 of the Code of Virginia, providing that the sale of a vessel forfeited by proceedings in a state court for violating the oyster laws of the state "shall vest in the purchaser a clear and absolute title," was held by Hughes, *J.*, inoperative to divest maritime liens of innocent parties attaching before the arrest of the vessel, and that the vessel might be subsequently seized in the hands of the purchaser and subjected to such liens by proceedings in the admiralty courts.

A maritime lien is not divested by a forfeiture for a breach of municipal law (*The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409 [6:122]) nor by a sale to a bona fide purchaser without notice. *The Chusan*, 2 Story, 456; *The Bold Buccleugh*, 3 W. Rob. 29, 7 Moore P. C. 267. It is *jus in re;* and "it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear anything; but a claim against all mankind; a suit *in rem*, asserting the claim of the libelant to the thing, as against all the world." *The Young Mechanic*, 2 Curt. 404, 412. See also *Galena, D. D. & M. Packet Co.* v. *Rock Island R. Bridge* ("*The Rock Island Bridge*"), 73 U. S. 6 Wall. 213 [18:753]; *The J. E. Rumbell*, 148 U. S. 1 [37:345].

283] *We think it entirely clear that, as a state court is without jurisdiction to enforce maritime liens, so it is incapable of displacing them, and, therefore, though under the rule laid down in *Taylor* v. *Carryl*, the possession by the state court of property subject to such liens will not be disturbed, yet that court can only deal with the property subject thereto, and when its jurisdiction has determined the admiralty courts may proceed.

But upon the facts disclosed in this record, was the district court required to stay its hand until the termination of the proceedings in the state court? It is admitted that the receiver never took actual possession of the vessels, and that he did not qualify until after the marshal had taken such possession under the libels; but it is said that, as his appointment was made on July 31, before the libels were filed, when his bond was executed, approved, and filed in the office of the clerk of the court for Albany county, his title to the property related back to the time of his appointment, and that he had constructive possession as of that date, which constructive possession overreached the possession of the marshal.

Certain sections of the New York statutes (Rev. Stat. §§ 66, 67; Code Civ. Proc. 1891, App. 1167) provide that a receiver "before entering on the duties of his appointment shall give such security to the people of the state, and in such penalty as the court shall direct;" and "such receiver shall be vested with all the estate, real and personal, of such corporation from the time of his having filed the security hereinbefore required."

The contention is not only that the title to these vessels vested in the receiver as of July 31 and that, in such a case as this, constructive is the equivalent of actual possession, but that although the receiver did not qualify until after the seizure by the marshal, he thereupon became constructively possessed of the vessels as of July 31, and the jurisdiction of the district court was thereby ousted. But if jurisdiction had attached, it would not be defeated even by the withdrawal of the property for the purposes of the state court, and, moreover, the doctrine of relation has no application. As between* two courts of concurrent 284] and co-ordinate jurisdiction, having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have first obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken cannot be invalidated by relation. That doctrine is resorted to only for the advancement of justice, and, under these state statutes, is adopted to defeat fraudulent, unwarranted, and unjust dispositions of the debtor's property, and to accomplish just and equitable ends. *Herring* v. *New York, L. E. & W. R. Co.* 105 N. Y. 340, 377.

At the time these libels were filed and the marshal seized the property, it had not been developed whether or when the receiver would or might give the security required and enter upon the discharge of his duties, and he had neither actual nor constructive possession.

The jurisdiction of the state court over the subject-matter of the winding up of the corporation and the distribution of its assets did not embrace the disposition of the claims of the libelants upon these vessels, nor were they as holders of maritime liens represented by the attorney general when he assented to the

order of July 31, as mere creditors of the Schuyler Company were. The adjudication by that order may have so operated on the title in respect of the parties to that suit as to place the property constructively in the custody of the law as of that date, but not as to all persons and for all purposes. Under the circumstances we are unable to accept the conclusion that simply by the institution of the winding up proceeding, property, subject to liens over which that court could not exercise jurisdiction *in invitum*, was placed in such a situation in respect of liability to being 285] ultimately* brought within the custody of the court that the district court could not obtain jurisdiction for the purpose of ascertaining and enforcing those liens in respect of which its jurisdiction was exclusive. It appears to us that the district court violated no rule of comity nor any other rule in entertaining the libels.

The title and the right of possession as between the receiver and the creditors of the Schuyler Company may have vested as of July 31, but this could not operate to divest a jurisdiction, not concurrent, to the exercise of which no actual impediment existed at the time it was invoked. As has been seen, maritime liens are incumbrances placed on vessels by operation of law, and neither the death nor the insolvency of the owner can divest or extinguish them or transfer jurisdiction over them to courts for the settlement of the estates of decedents or insolvents, although for the purposes merely of such settlement these are the appropriate tribunals. In the orderly administration of justice the representatives of such estates should apply to the court which alone has cognizance to ascertain and enforce these exceptional interests in the thing itself, which accompany it wherever it goes and into whosesoever hands it comes, and which cannot be displaced by the action of other courts *in invitum*.

The receiver accordingly properly applied to the state court for leave to contest the libels or to take such other proceedings therein as might be advisable, and was duly authorized so to do. Thereupon he made a motion in the district court for an order directing the marshal to withdraw from the custody of the steamboats held under the admiralty process, which motion was denied on the ground that the question should be raised by answer to the libels. The receiver then appeared in one action against each vessel and filed his answer contesting the jurisdiction of the admiralty court. If the decision of that court had been adverse, he could have tested its correctness on appeal, but he seems to have been unwilling to abide the result, and to have entertained the view that while the proceedings in the District Court, to which he had become a party, were 286] pending, he could go into the *state court and ask it to determine the question of jurisdiction by anticipation and by injunction prevent its decision by the tribunal to which it had authorized him to resort. Not only so, but he made an application to this court to prohibit the district court from exercising jurisdiction. This was denied because the question involved was in due course of decision below, and the receiver thereafter obtained the injunction under consideration. Apart from the legal effect of this decision to the jurisdiction of the district court, we cannot say that we are favorably impressed with this course of proceeding, and the less so since in the original application to the state court on July 31 it was averred that there was serious danger of the vessels "being libeled in the admiralty courts of the United States for such claims as constituted maritime liens, including the claims for services and supplies rendered to said vessels."

We are of opinion that the state court had no jurisdiction *in personam* over the libelants as holders of maritime liens when the libels were filed; that the question of jurisdiction was, as the case stood, one for the district court to decide in the first instance; that the district court had jurisdiction; and that the judgment under review was in effect an unlawful interference with proceedings in that court.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice **Brewer** dissenting:

While I agree with nearly all that is said in the opinion I am unable to concur in the conclusions finally reached and the judgment ordered. I agree that "it is a rule of general application that where property is in the actual possession of one court of competent jurisdiction such possession cannot be disturbed by process out of another court;" and I may say that I agree further that when a court has possession of property it may restrain the bringing of any suit in any other court to disturb that possession, and that an order* for such 287] restraint operates upon all persons within its jurisdiction, and can be enforced, if need be, by proceedings as for a contempt; but I disagree with my brethren as to the matter of possession. In the opinion of the court the possession of the officer is deemed the important matter. I submit that that is significant only as it bears upon the question of possession by the court. No one would pretend that the act of a marshal or a sheriff in taking possession of property would have any significance unless it were in the execution of some order of the court. If the proceeding is of itself such as to put the property into the possession of the court, that is enough, and there is no need of inquiry as to whether the officer of the court has in fact placed his hand upon it. Now, the statutory proceeding instituted by this insolvent corporation—a creature of the state of New York—involved a surrender of its property to the possession of the court. Such is the construction placed by its highest court upon the statutes of New York; and that construction, it seems to me, is binding upon this court. It is only in harmony with views that have been expressed by judges of the Federal courts. The Bankrupt Act of Congress authorized voluntary proceedings in bankruptcy, as do the statutes of New York authorize voluntary proceedings on the part of its corporations in insolvency. In *Re Vogel*, 7 Blatchf. 19, a question was presented as to the jurisdiction of the bankruptcy court as against that of a state court, whose officers in obedience to a writ of replevin had taken manual possession of the property before any officer of the former

court had touched it, and the court held that from the time of the filing of the petition in bankruptcy the jurisdiction of that court over the property attached. I quote the language of *District Judge* Blatchford, whose opinion was sustained by *Mr. Justice* Nelson:

"It is manifest, from these provisions, that when a voluntary petitioner in bankruptcy files his petition in due form, he becomes, *eo instanti*, a bankrupt, so far as any interference with the property named in his inventory is concerned, and that such property is thereby brought into the bankruptcy court, and placed in its custody and under its protection, as fully **288**] *as if actually brought into the visible presence of the court. Being in the custody of the bankruptcy court, no other court, and no person acting under any process from any other court, can, without the permission of the bankruptcy court, interfere with it; and, to so interfere, is a contempt of the bankruptcy court."

Believing that the rule thus stated is the one to be applied in this case, I hold that, when the petition in insolvency was filed, the corporation, the owner and possessor of the property, surrendered it to the state court, and by no subsequent proceedings in any other court could that possession be disturbed.

I cannot agree that the respective jurisdiction of state and Federal courts is to be determined by a scramble between sheriff and marshal for possession.

For these reasons, while I concur in most of the reasoning of the opinion, I am constrained to dissent from the judgment.

I am authorized to say that *Mr. Justice* **White** concurs in the foregoing views.

RICHARD P. BARDEN ET AL., *Plffs. in Err.*,
v.
NORTHERN PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 288-349.)

Right of Northern Pacific Railroad Company to mineral lands—subsequent discovery of minerals—construction of government grant.

1. The Northern Pacific Railroad Company cannot recover under the grant to it by the Act of Congress of July 2, 1864, mineral lands, from persons in possession thereof who have made locations, although the mineral character of the land was not discovered until the year 1888, no patent having been issued to said company therefor.
2. It was the intention of Congress to exclude from the grant of lands to the Northern Pacific Railroad Company, of July 2, 1864, actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral.
3. Nothing will pass by a government grant, to the grantee by implication or inference; unless essential to the enjoyment of the thing granted, and exceptions intended for the benefit of the public are to be maintained and liberally construed.

[No. 612.]

Argued Jan. 23, 30, 31, 1893. Reargued April 11, 1894. Decided May 26, 1894.

IN ERROR to the Circuit Court of the United States for the District of Montana, to review a judgment in favor of plaintiff, in an action brought by the Northern Pacific Railroad Company, plaintiff, for the possession of certain parcels of land containing veins or lodes of rock in place bearing gold, silver and other precious metals situated within section 27 of township 10 north, range 4 west, of the principal meridian of Montana. *Reversed, and cause remanded with directions to enter a judgment in favor of the defendants with costs.*

Statement by *Mr. Justice* **Field:**

This was an action for the possession of certain parcels of land containing veins or lodes of rock in place bearing gold,* silver and [**289**] other precious metals, situated within section 27 of township 10 north, range 4 west of the principal meridian of Montana, claimed by the Northern Pacific Railroad Company—the plaintiff below, the defendant in error here—as parts of the land granted to it by the Act of Congress of July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound on the Pacific coast, by the Northern Route," and the acts and resolutions supplementary and amendatory thereof. 13 Stat. at L. 365, chap. 217.

By its first section the plaintiff was incorporated and authorized to construct and maintain a continuous railroad and telegraph line with the appurtenances, from a point on Lake Superior in the state of Minnesota or Wisconsin and thence westerly by the most eligible route as should be determined by the company, within the territory of the United States, on a line north of the forty fifth degree of latitude, to some point on Puget sound, with a branch by the valley of the Columbia river to a point at or near Portland in the state of Oregon. The company was invested with all the powers, privileges, and immunities necessary to carry into effect the purposes of the Act.

By the third section a grant of land, other than mineral, was made to the company in words of present conveyance to aid in the construction of the railroad and telegraph line and for other purposes. Its language is: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway *every alternate section of public land, not mineral*, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on

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NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 25: 794.

each side of said railroad whenever it passes through any state, and whenever on the line 290]thereof *the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." The grant thus made is accompanied with certain conditions or provisos—these among others: "That *all mineral lands* be, and the same are hereby, excluded from the operations of this Act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected, as above provided; and that the word '*mineral*' when it occurs in this Act shall not be held to include iron or coal."

By the fourth section it was enacted: "That whenever said Northern Pacific Railway Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this Act, the commissioners shall so report to the President of the United States; and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and certified by said commissioners to the President of the United States, then patents shall be is- 291]sued to said company conveying the *additional sections of lands as aforesaid; and so on as fast as every twenty-five miles of said road is completed as aforesaid."

By the sixth section it was enacted: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this Act; but the provisions of the Act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and* of the Act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company; and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The complaint alleges that the general route of the railroad extending through Montana was fixed February 21, 1872, and the lands in controversy were within forty miles of such general route, and were public lands not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption or other claims or rights; that thereafter, July 6, 1882, the line of the road extending opposite and past the described lands, was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and that the demanded parcels were within forty miles of the line thus definitely fixed; that thereafter the plaintiff constructed and completed that portion of its railroad and telegraph line extending over and along the line of definite location; that thereafter the President of the United States appointed three commissioners to examine the same, and they reported to him that that portion of the railroad and telegraph line had been completed in a good, substantial, and workmanlike manner, in all respects, as *required [292 by the Act of July 2, 1864, and the Act supplementary thereto and amendatory thereof; that the President accepted the line as thus constructed and completed; that at the time of filing the plat of definite location in the office of the Commissioner of the General Land Office, namely, July 6, 1882, the described land was not known mineral land, and was more valuable for grazing than for mining purposes; that in 1868 all the lands in township 10 north, of range 4 west, were duly surveyed, and the township plat was, September 9, 1868, filed in the United States district land office for the district of Helena, Montana, that being the district in which said township is situated, and by that survey the land of the township was ascertained and determined to be agricultural and not mineral, and that said determination and report have continually remained in force; that after the completion of the railroad the plaintiff listed the section, including the lands described, and other lands, as portions of the grant, and on November 8, 1868, filed the list in the district land office at Helena, and paid the fees allowed by law; that the list was accepted and approved by the receiver and register and certified to the Commissioner of the General Land Office, and has since remained in the same district land office and in the office of the Commissioner; that at the time of the acceptance, approval, and allowance of the list, and at all times prior thereto, no part of the land was known mineral land, or was of greater value for mining purposes than for grazing, agricultural, or town-site purposes; that during the year 1888 certain veins or lodes of rock in place bearing gold and silver and other precious metals were discovered on said described land; and thereafter William B. Wells, William Muth, Harpin Davies, and Richard P. Barden, citizens of the United States, without the consent and against the will of the plaintiff, entered upon said land and made locations of said veins and lodes upon

certain lots thereof, as follows, to wit: the Vanderbilt quartz lode mining claim on lot 68, August 10, 1888; the Four Jacks and the New York Central & Hudson River quartz lode mining claims on lots 72, 74, and 75, respectively, May 9, 1889; and the Chauncey M. Depew 293] quartz lode mining claim on *lot 73—all of said lots being within section 27, township 10 north, range 4 west; that the defendants are in possession of said lots, claiming under said locations, through mesne conveyances from the locators, and have been and are extracting ore therefrom; and that the same are mineral lands.

And the complaint further alleges that the United States have failed, neglected, and refused to issue to the plaintiff a patent for said land, though all acts required by law to entitle the plaintiff to a patent have been fully performed; that the title to the premises has vested in the plaintiff under and by virtue of the Acts of Congress and its compliance therewith; that the lots designated are of the value of over $6000, and that the value of the ore wrongfully extracted and taken from them by the defendants is over $100.

Wherefore the plaintiff prays judgment against defendants for the recovery of the possession of the said lots, for the value of the ore so extracted, and for costs.

To this complaint the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action, and entitle the plaintiff to the relief prayed. The demurrer was argued before the circuit judge and the district judge holding the Circuit Court of the Ninth Circuit, at Helena, in the state of Montana, and they differed in opinion upon the demurrer, the circuit judge holding that it was insufficient and should be overruled, and the district judge dissenting therefrom. Judgment was accordingly entered, overruling the demurrer, and the defendants were allowed ten days within which to answer the complaint. But they came into court and stated that they would abide by their demurrer, and declined to file an answer; whereupon their default was entered, and on application of the plaintiff's attorneys it was ordered that judgment be entered against them for the recovery of the possession of the lots designated, the value of the ore taken therefrom, and costs of suit, which was accordingly done. To the ruling of the court in overruling the demurrer exception was taken by the defendants; and to reverse the judgment they have brought the case to this court on writ of error.

Messrs. **W. H. H. Miller,** *Atty. Gen.*, **George H. Shields,** *Assistant Atty. Gen.*, **Martin F. Morris,** *W. W. Dixon, Edwin W. Toole,* and *William Wallace, Jr.*, for plaintiffs in error, on first argument:

Messrs. **Lawrence Maxwell,** *Jr., Solicitor Gen.*, and **W. W. Dixon,** for plaintiffs in error on reargument:

The complaint admits that the lands sued for are "mineral lands." The plaintiff must, therefore, show title to mineral lands. But its grant, instead of being for mineral lands, is of "every alternate section of public land, not mineral," etc., with the proviso "that all mineral lands be, and the same are hereby, excluded from the operation of this Act," and with the further proviso, in the joint resolution of January 30, 1865 (13 Stat. at L. 567) "that no Act passed at the first session of the thirty-eighth Congress granting lands to states or corporations to aid in the construction of roads or for other purposes . . . shall be so construed as to embrace mineral lands, which, in all cases, shall be and are reserved exclusively to the United States, unless otherwise specially provided, in the Act or acts making the grant."

Although the lands were not known to be mineral until after the filing of the map of definite location, the lands were the same then that they are now, and were, therefore, in fact mineral at that time. At the time of the grant little was known of the country through which the road was to pass.

Congress could not, therefore, have meant to reserve simply lands not known to be mineral at the time of the Act, for practically nothing was known, and such a reservation would have been of no avail.

The grant must be construed to mean just what it says and as excluding from its operation not merely lands known to be mineral, but all lands in fact mineral. Nor is it material that the grant is one *in præsenti* which attaches at the time of filing the map of definite location, for the exception is also *in præsenti* and no matter when the grant attaches, it cannot attach to mineral lands, for they are not granted, but reserved.

The Act itself provides for the issuing of patents to the railroad company, and contemplates therefore that the Secretary of the Interior, prior to such issue, shall determine whether the lands sought to be patented come within the terms of the grant; in other words, whether they are in odd sections, unappropriated, not mineral, etc.

After the Secretary of the Interior has decided that any particular lands are not mineral, and has issued a patent therefor, the title is not liable to be defeated by the subsequent discovery of minerals.

Davis v. *Wiebbold*, 139 U. S. 507 (35: 238); *Moore* v. *Smaw*, 17 Cal. 199.

If the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitles the Secretary of the Interior to have the patent cancelled.

Morton v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639); *Western Pac. R. Co.* v. *United States*, 108 U. S. 510 (27: 806).

Barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals.

Central Pac. R. Co. v. *Valentine*, 11 U. S. Land Dec. 238.

The reservation of mineral lands from the grant does not have the effect of diminishing the aggregate amount of land which the company shall receive, for the Act provides in terms "that in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands may be selected."

The delay of the government in issuing a patent does not affect the power of the rail-

road company to assert, meantime, by possessory action, its rights in lands which are in fact not mineral, but such delay cannot have the effect of authorizing it to recover lands which it admits to be mineral.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241 (35: 999).

While the Secretary of the Interior may make use of the public surveys, no conclusive effect is to be given to them either in favor of the government or against the government in determining whether lands are mineral or nonmineral.

Winscott v. *Northern Pac. R. Co.* 17 U. S. Land Dec. 274; *Cole* v. *Markley*, 2 U. S. Land Dec. 847; *Robinson* v. *Forrest*, 29 Cal. 317; *Merrill* v. *Dixon*, 15 Nev. 401; *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639).

Under the homestead pre-emption and town site laws, the discovery of minerals after patent does not defeat the title.

Davis v. *Wiebbold*, 139 U. S. 507 (35: 238).

Lands known to be mineral cannot be entered for town site or by a pre-emptor or homestead settler.

Morton v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639).

If the land is discovered to be mineral before the settler has acquired a vested interest and becomes entitled to his final certificate, he must take the land, if at all, and pay for it as mineral land.

Rea v. *Stephenson*, 15 U. S. Land Dec. 37; *Jones* v. *Driver*, 15 U. S. Land Dec. 514; *Harnish* v. *Wallace*, 13 U. S. Land Dec. 108.

Occupation and improvement of the public lands do not confer any vested right on the pre-emptor prior to final entry and payment. The question must be determined according to the facts in existence at the time of the sale; that is, when the pre-emptor makes the only entry that is required of him and pays the purchase money.

Frisbie v. *Whitney*, 76 U. S. 9 Wall. 187 (19: 668); *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307 (31: 182).

Messrs. **James McNaught, James C. Carter** and *A. H. Garland*, for defendant in error, on both arguments:

All lands containing gold are not necessarily mineral lands. The true criterion is whether upon the whole the lands appear to be better adapted to mining or other purposes.

Ah Yow v. *Choate*, 24 Cal. 567; *Gold Hill Quartz Mining Co.* v. *Ish*, 5 Or. 104; *Alford* v. *Barnum*, 45 Cal. 482; *Merrill* v. *Dixon*, 15 Nev. 491; *Pacific Coast Min. & M. Co.* v. *Spargo*, 16 Fed. Rep. 348; *Western Pac. R. Co.* v. *United States*, 107 U. S. 516 (27: 621); *Cowell* v. *Lammers*, 21 Fed. Rep. 200.

Patents to lands not known to be mineral lands at the time the patent issued carry the title to all mines subsequently discovered in the lands, notwithstanding the reservation from the sale of mineral lands in the acts of Congress.

Ferry v. *Street*, 4 Utah, 521; *Deffebuck* v. *Hawke*, 115 U. S. 392 (29: 428); *United States* v. *Reed*, 28 Fed. Rep. 482; *Reilly* v. *Blackmore* ("*Tombstone Town Site Cases*") (Ariz.) Sept. 1, 1887.

A town site entry upon land not known to be mineral land at the time of entry is prior to any after acquired mining claim.

Colorado Coal & I. Co. v. *United States*, 123 U. S. 307 (31: 182); *Richards* v. *Dower*, 81 Cal. 44; *Francoeur* v. *Newhouse*, 40 Fed. Rep. 618; *Davis* v. *Wiebbold*, 139 U. S. 507 (35: 238); *Smith* v. *Hill*, 89 Cal. 122.

The mineral lands excluded from the operation of the Act are the lands known to be such at the time the company acquired its title. The departmental construction fixes the time when land must be known to be mineral to be excluded from the operation of the agricultural land laws, as the time when the title, if it be nonmineral, vests in the grantee.

The contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts.

Pennoyer v. *McConnaughy*, 140 U. S. 23 (35: 370); *Heath* v. *Wallace*, 138 U. S. 582 (34: 1067); *United States* v. *Philbrick*, 120 U. S. 59 (30: 561); *United States* v. *Burlington & M. R. Co.* 98 U. S. 341 (25: 200); *United States* v. *Graham*, 110 U. S. 221 (28: 125); *Pollock* v. *Bridgeport S. B. Co.* ("*The Laura*") 114 U. S. 416 (29: 148); *United States* v. *Moore*, 95 U. S. 763 (24: 589); *Brown* v. *United States*, 113 U. S. 571 (28: 1080); *Robertson* v. *Downing*, 127 U. S. 613 (32: 271); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 366 (33: 367).

The Town Site Act did not prohibit the passage of the title to mines of gold, silver, cinnabar or copper, which were not known to exist.

Davis v. *Wiebbold*, 139 U. S. 507 (35: 238).

The "mineral land" proviso in the railroad lands grant is to receive the same construction as the similar provisions excluding such lands from the operation of the other land laws.

United Soc. v. *Eagle Bank*, 7 Conn. 456; *Le Roy* v. *Chabolla*, 1 Sawy. 456; *Saxonville Mills* v. *Russell*, 116 U. S. 21 (29: 556); *State* v. *Springfield Twp.* 6 Ind. 83; *United States* v. *Gear*, 44 U. S. 3 How. 130 (11: 527); *Kansas Pac. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 609 (21: 374); *Ivanhoe Min. Co.* v. *Keystone Consol. Min. Co.* 102 U. S. 167 (26: 126).

The third section of the Act of July 2, 1854, makes a grant *in præsenti*. When once identified, the title attaches to the lands not reserved, as of the date of the grant.

St. Paul & P. R. Co. v. *Northern Pac. R. Co.* 139 U. S. 5 (35: 79); *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 247 (35: 1001); *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 509 (33: 694); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 741 (23: 637); *Kansas Pac. R. Co.* v. *Dunmeyer*, 113 U. S. 640 (28: 1125); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 60 (22: 554); *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 496, 497 (24: 1096, 1097); *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 429 (26: 579); *Wood* v. *Burlington & M. R. Co.* 104 U. S. 329 (26: 772); *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 725 (28: 874).

The provisions in the fourth section of the Northern Pacific Act providing that patents

shall issue for the lands granted, do not modify or restrict the effect of the third section.

Wright v. *Roseberry*, 121 U. S. 500 (30: 1041); *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 510 (33: 694); *Langdon* v. *Hazen*, 88 U. S. 21 Wall. 530 (22: 609); *Denny* v. *Dodson*, 32 Fed. Rep. 904.

A patent, if issued under the Act for lands which cannot be granted, is a mere nullity, void because issued without authority of law.

Doolan v. *Carr*, 125 U. S. 618 (31: 844); *Western Pac. R. Co.* v. *United States*, 106 U. S. 510 (27: 803); *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 674 (22: 645); *Mullan* v. *United States* 118 U. S. 278 (30: 173); *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 325 (31: 189); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 452 (27: 228).

After lands have ceased to belong to the United States, the government cannot authorize an entry thereon without the consent of the owner, for the purpose of exploring for minerals.

Francoeur v. *Newhouse*, 40 Fed. Rep. 624; *Davis* v. *Wibbold*, 139 U. S. 528 (35: 246); *Golden Terra Min. Co.* v. *Mahier*, 4 Morris's Min. Rep. 398; *Amador Medean Gold Min. Co.* v. *South Spring Hill Gold Min. Co.* 36 Fed. Rep. 668; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 286 (34: 159); *Noyes* v. *Mantle*, 127 U. S. 348 (32: 168); *Belk* v. *Meagher*, 104 U. S. 284 (26: 757); *Abraham L. Miner*, 9 U. S. Land Dec. 405; *North Noonday Min. Co.* v. *Orient Min. Co.* 11 Fed. Rep. 123.

A legislative use of words which have received a judicial and departmental construction, is an adoption by the legislature of that construction.

2 Lester, Land Laws, 321, 322; Copp, U. S. Mining Laws & Decisions, 251.

The question involved in this case is one of law and not of fact, a patent issued in pursuance of a mistaken construction of a previous grant is void and can be attacked collaterally.

Stinson v. *Clarke*, 45 Fed. Rep. 762; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 292 (34: 157); *Morton* v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639); *Southern Pac. R. Co.* v. *Wiggs*, 43 Fed. Rep. 333.

The decisions of the department in such cases are not final or conclusive.

Wright v. *Roseberry*, 121 U. S. 488 (30: 1039); *Northern Pac. R. Co.* v. *Wright*, 51 Fed. Rep. 71; *Miller* v. *Tobin*, 16 Or. 540; *Smith* v. *Ewing*, 23 Fed. Rep. 742; *Wilson* v. *Fine*, 40 Fed. Rep. 52; *Megerle* v. *Ashe*, 33 Cal. 89.

A patent, if issued to the plaintiffs in error by the department, would be the result of a misconstruction of the law after the land had ceased to be public and became private: such a patent would be void and subject to attack collaterally.

Doolan v. *Carr*, 125 U. S. 618 (31: 844); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636 (26: 875); *Stoddard* v. *Chambers*, 43 U. S. 2 How. 284 (11: 269).

A full title in fee simple passes by railroad and other grants *in praesenti*, upon a full compliance with the terms and provisions thereof on the part of the grantee, upon which an action of ejectment can be maintained before patent is issued.

Northern Pac. R. Co. v. *Majors*, 5 Mont. 111; *Butz* v. *Northern Pac. R. Co.* 119 U. S. 55 (30: 330); *Northern Pac. R. Co.* v. *Amerker*, 7 U. S. App. 53; *Denny* v. *Dodson*, 32 Fed. Rep. 899; *Northern Pac. R. Co.* v. *Wright*, 51 Fed. Rep. 71; *Northern Pac. R. Co.* v. *Amerker*, 46 Fed. Rep. 253; *Calahan* v. *McTague*, 46 Fed. Rep. 251; *Northern Pac. R. Co.* v. *Meadows*, 46 Fed. Rep. 254.

By permission of the court, *Messrs. A. T. Britton, A. B. Browne* and *Geo. R. Peck* filed a brief for Atlantic & Pacific R. Co.

Mr. Justice **Field** delivered the opinion of the court:

*This action is brought for the possession [312 of certain parcels or lots of mineral land claimed by the plaintiff below—the defendant in error here—as embraced in the grant of the United States of July 2, 1864. The facts constituting the claim of the plaintiff are set forth at length in the complaint, and to their sufficiency the defendants demurred as not constituting a cause of action or entitling the plaintiff to the relief prayed. The lots are there conceded to be mineral lands, and the grant of the government applies in terms only to lands other than mineral.

To remove any doubt of the intention of the government to confine its concession to lands of that character, the grant is accompanied with a proviso declaring that all mineral lands are excluded from its operations. And as if to cut off every possible suggestion by any ingenious and strained construction, that mineral lands might be reached under the legislation giving vast tracts of public lands to states and private corporations, under the pretence of aiding public improvements, a joint resolution was passed by Congress in January of the following year, declaring "that no Act passed at the first session of the Thirty-eighth Congress [that being of the year 1864] granting lands to states or corporations to aid in the construction of roads, or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the Act or Acts making the grant." 13 Stat. at L. 567. This provision should be borne in mind when the statement is made, as it is, that there has been no reservation of mines or minerals to the government.

No part of the contemplated road or telegraph line of the Northern Pacific Railroad Company had at the passage of this joint resolution been constructed or commenced, and on the authority of the case of the *Northern Pac. R. Co.* v. *Beckne*, "*Northern Pac. R. Co.* v. *Traill County*," 115 U. S. 600 [29: 477], its provisions are to be deemed an amendment of the original Act, and as operative as if originally incorporated therein.

The action being for the possession of lands conceded to be *mineral, under the Act [313 of Congress of July 2, 1864, it would seem that the simple reading of the granting clause and its proviso and the joint resolution mentioned would be a sufficient answer to the complaint, and a sufficient reason to sustain the demurrer without further consideration. But the plaintiff's counsel appear to find in the fact which

they allege, that the lands were not known to be mineral at the time the plaintiff, by the definite location of a line of its road, was able to identify the sections granted, a sufficient ground to avoid the limitations of the grant and the prohibitions of the proviso and joint resolution.

The grant was of 20 alternate sections of land, designated by odd numbers, on each side of the road which the plaintiff was authorized to construct—a tract of 2000 miles in length and forty miles in width, constituting a territory of 80,000 square miles. It is true the grant was a float, and the location of the sections could not be made until the line of the proposed road had become definitely fixed. The ascertainment of the location of the sections in no respect affected the nature of the lands or the conditions on which their grant was made. If swamp lands or timber lands, or mineral lands previously, they continued so afterwards.

It is also true, that the grant was one *in præsenti* of lands to be afterwards located. From the immense territory from which the sections were to be taken it could not be known where they would fall until the line of the road was established; that the grant attached to them, subject to certain specified exceptions: that is, the sections, or parts of sections, which had been previously granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, were excepted, and the title of its other sections or parts of sections attached as of the date of the grant so as to cut off intervening claimants. In that sense the grant was a present one. But it was still, as such grant, subject to the exception of mineral lands made at its date or then excluded therefrom by conditions annexed. Whatever the location of the sections, and whatever the exceptions then arising, there remained that original exception declared [314] in the creation of the grant. The *location of the sections and the exceptions from other causes in no respect affected that one, or limited its operation. There is no language in the Act from which an inference to that effect can be drawn, in the face of its declaration that all mineral lands are thereby "excluded from its operations," and of the joint resolution of 1865 that "the Act of the Thirty-eighth Congress [that is, of the previous session of 1864] granting lands to states or corporations, to aid in the construction of roads or for other purposes, shall be so construed as to embrace mineral lands." The plaintiff, however, appears to labor under the persuasion that only those mineral lands were excepted from the grant which were known to be such on the identification of the granted sections by the definite location of the proposed road and the ascertainment at that time of the exceptions from them of parcels of land previously disposed of; and that the want of such knowledge operated in some way to eliminate the reservation made by Congress of the mineral lands. But how the absence of such knowledge on the ascertainment of the sections granted and the parcels of land embraced therein previously disposed of, had the effect or could have the effect to eliminate the reservation of mineral lands from the Act of Congress, we are unable to comprehend. Such a conclusion can only arise from an impression that a grant of land cannot be made without carrying the minerals therein; and yet the reverse is the experience of every day. The granting of lands, either by the government or individuals, with a reservation of certain quarries therein, as of marble, or granite, or slate, or of certain mines, as of copper, or lead, or iron found therein, is not an uncommon proceeding, and the knowledge or want of knowledge at the time by the grantee, in such cases, of the property reserved in no respect affects the transfer to him of the title to it. No one will affirm that want of such knowledge on the identification of the lands granted, containing the reserved quarries or mines, would vacate the reservation, and we are unable to perceive any more reason from that cause for eliminating the reservation of minerals in the present case from the grant of the government than for eliminating for a like cause the reservation *of quarries or mines in the cases [315 supposed. And it will hardly be pretended that Congress has not the power to grant portions of the public land with a reservation of any severable products thereof, whether minerals or quarries contained therein, and whether known or unknown; yet such must be the contention of the plaintiff or its conclusions will fall to the ground. The cases cited in support of the claim of the plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining sections or parts thereof, to attach as of the date of the grant, but has absolutely no other effect. Such is the purport, and the sole purport, of the cases of *St. Paul & P. R. Co.* v. *Northern Pac. R. Co.* 139 U. S. 1 [35: 77], and *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 247 [35: 999, 1001], cited by the plaintiff. In both of those cases the writer of this opinion had the honor to write the opinions of this court; and it was never asserted or pretended that they decided anything whatever respecting the minerals, but only that the title to the lands granted took effect, with certain designated exceptions, as of the date of the grant. They never decided anything else. And what was that title? It was of the lands which at the time of the grant were not reserved as minerals, and of the lands which at the time of the location had not been sold, reserved, or to which a pre-emption or homestead right had not attached. If one were to sell land, reserving therefrom the minerals of gold or silver found therein, and tell the purchaser to take the surveyor and measure off the land, would it be urged or pretended that the moment the surveyor ascertained the boundaries of the land sold the reservation of minerals then undiscovered would be eliminated? Would any one uphold the reasoning, or the doctrine, which would assert such a conclusion? And can any one see the difference between the case now before us and the case supposed? Not a word was said or suggested in the cases cited about the elimination of the reservation for that cause; and not only in the cases cited by the plaintiff, but in a multitude of other cases, almost without number, a like silence *was observed. In none of them was it [316

ever pretended that the ascertainment of the location of the lands granted operated to withdraw from the grant the reservation of minerals then undisclosed. The grant did not exist without the exception of minerals therefrom, and Congress has declared in positive terms, that the Act shall not be construed to embrace them, and there is nothing in any of the cases cited in the plaintiff's contention which indicates in the slightest degree that the original exception was subsequently qualified.

It seems to us as plain as language can make it that the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral. After the plaintiff had complied with all the conditions of the grant, performed every duty respecting it, and among other things that of definitely fixing the line of the route, its grant was still limited to odd sections which were not mineral at the time of the grant, and also to those which were not reserved, sold, granted, or otherwise appropriated, and were free from pre-emption and other claims or rights at the time the line of the road was definitely fixed, and was coupled with the condition that all mineral lands were excluded from its operation, and that, in lieu thereof, a like quantity of unoccupied and unappropriated, agricultual lands, in odd sections, nearest to the line of the road, might be selected.

There is, in our judgment, a fundamental mistake made by the plaintiff in the consideration of the grant. Mineral lands were not conveyed, but by the grant itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located they could not pass under the grant. Mineral lands being absolutely reserved from the inception of the grant, Congress further provided that at the the time of the location of the road other lands should be excepted, viz, those previously sold, reserved, or to which a homestead or pre-emption right had attached.

It is difficult to perceive the principle upon {317} which the term "known" is sought to be inserted in the Act of Congress, either to limit the extent of its grant or the extent of its mineral, though its purpose is apparent. It is to add to the convenience of the grantee and enhance the value of its grant. But to change the meaning of the Act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is in terms prohibited. Besides the impossibility, according to recognized rules of construction, of incorporating in a statute a new term—one inconsistent with its express declarations—there are many reasons for holding that the omission of the word "known," as defining the extent of the mineral lands excluded, was purposely intended.

The grant to the railroad company was, as we have already mentioned, two thousand miles in length and forty miles in width, making an area of eighty thousand square miles, a territory nearly equal in extent to that of Ohio and New York combined. This territory was known to embrace in its hills and mountains great quantities of minerals of various kinds, and among others those of gold and silver. It was sparsely inhabited and in many districts of large extent was entirely unoccupied. The policy of Congress as expressed in its numerous grants of public lands to aid in the construction of railroads has always been to exclude the mineral lands from them, and reserve them for special disposition, as seen in the following acts among others: Acts of July 1, 1862 (12 Stat. at L. 489), and of July 2, 1864 (13 Stat. at L. 356), making grants to the Union and Central Pacific Companies; Act of July 4, 1866 (14 Stat. at L. 83), making a grant to the Iron Mountain Railroad Company; Act of July 13, 1866 (14 Stat. at L. 94), making a grant to the Pioneville, etc. Railroad; Act of July 25, 1866 (14 Stat. at L. 239), making a grant to the California & Oregon Railroad, sections 2 and 10; Act of July 27, 1866 (14 Stat. at L. 292), making a grant to the Atlantic & Pacific Railroad and to the Southern Pacific Railroad; Act of March 2, 1867 (14 Stat. at L. 518), making a grant to the Stockton & Copperopolis Railroad; Act of March 3, 1871 (16 Stat. at L. 573), making a grant to the Texas Pacific Railroad. In all of these cases and in all grants of *public lands in aid {318 of railroads, minerals (except iron and coal) have uniformly been reserved, and in no instance has such a grant been held to pass them. Patents issued after an examination and determination of the fact by the government whether portions of the land embraced in such grants did or did not contain other minerals have been held as conclusive in subsequent controversies, and of this we shall speak more fully hereafter; but grants in aid of railroads (and we speak of no other grants) before such determination and issue of a patent have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case.

When the Act was passed making the grant to the plaintiff, it would have been impossible to state with any accuracy what parts of the tract contained minerals and what did not. That fact could only be ascertained after extensive and careful explorations, and it is not reasonable to suppose that Congress would have left that important fact dependent upon the simple designation by the plaintiff of the line of its road, and the possible disclosure of minerals by the way, instead of leaving it to future and special explorations for their discovery. To suppose that Congress intended any such limitation would be to impute to it a desire that its exclusion of minerals from the grant should be defeated, which it is impossible to admit. It is conceded that in the interpretation of statutes like the one before us, reference may be had not only to the physical condition of the country and its surroundings, but that its political conditions and necessities may also be considered. The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens, engaged in the struggle, looked forward hopefully and confidently to this source for relief to the burdened treasury.

And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes 319]*belief that they could have deliberately designed in this hour of sore distress and fearful pressure upon their finances, to give away to a corporation of their own creation not only an imperial domain in land but the boundless wealth that might lay buried in the mineral regions covered by 80,000 square miles. They knew that the mineral belt over which the proposed railroad was to pass was almost entirely unexplored. They, therefore, retained from their grant the mineral lands, whether known or unknown, and left the discovery of the minerals to future explorations, and their disposition to future legislation. We can never admit that, at the time and under the circumstances upon which the grant was made, Congress intended that its clear words of exclusion of minerals should be interpreted to mean the exact reverse—that when it declared that "no Act of Congress granting lands in aid of railroads" passed during the session of 1864 (the session at which the grant under consideration was made) should "be construed to embrace minerals," it meant that such Act might be so construed. Never has it as yet fallen to Congress to deceive by its legislation and juggle in this way.

To incorporate the term "known" into the Act and add it to the description of the mineral excepted would also contravene a settled rule in the construction of grants like the one before us, that nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed. As justly observed by counsel for the defendant in their very able brief, "the reservation in the grant of mineral lands was intended to keep them under government control for the public good, in the development of the mineral resources of the country, and the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation and ultimately succumb to such terms, subject to such conditions, and amenable to such servitudes as it might see proper to impose. The government has exhibited its beneficence in reference to its mineral lands as it has in the disposition of its agricultural lands, where the claims 320]*and rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time."

Some weight is sought to be given by counsel of the plaintiff to the allegation that the lands in controversy are included in the section which was surveyed in 1868 and a plat thereof filed by the surveyor in the local land office in September of that year, from which it is asserted that the character of the land was ascertained and determined, and reported to be agricultural and not mineral. But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the surveyor general. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or to determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject. In *Cole* v. *Markley* (2 Decisions Dept. of the Interior relating to Public Lands, 847–849) Mr. Teller, when Secretary of the Interior, in a communication to the Commissioner of the General Land Office, speaks at large of the notations of surveyors, and says: "Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only prima facie evidence, and subject to be rebutted by satisfactory proof of the real character of the land." The determination of the character of the land granted by Congress, in any case, whether agricultural or mineral, or swamp or timber land, is placed in the officers of the Land Department, whose action is subject to the revision of the Commissioner of the General Land Office, and on appeal from him by the Secretary of the *Interior. Under their direction [321 and supervision the actual character of the land may be determined and fully established. The effect of a patent issued by them under the authority of Congress, as to such matters, we shall presently consider. In the present case the mineral character of the lands in controversy is conceded. They are alleged in the complaint to be mineral lands containing gold and silver and other precious metals.

Nor is there any force in the averments that in November, 1868, the plaintiff listed the section embracing the mineral lands in controversy, with other sections, as portions of its grant, and filed the lists in the local land office at Helena and paid the receiver's fees for filing the same; and that the register and receiver accepted, allowed, and approved the list, and certified the same to the Commissioner of the General Land Office, and that no part of the fees has ever been refunded. The Act of Congress does not provide that selections of the lands by the plaintiff, as a part of its grant, shall in any respect change its purport and effect and eliminate any of its reservations; nor does it empower the officers of the local land office to accept the list as conclusive with respect to such grant in any particular. There was, therefore, no obligation on the part of any one to refund to the plaintiff the fees paid on filing the list mentioned, when an attempt is made to do away with its supposed effect.

There is, in our opinion, no merit in any of the positions advanced by the plaintiff in support of its claim to the mineral lands in controversy. The language of the grant to the plaintiff is free from ambiguity. The exclusion from its operation of all mineral lands is entirely clear, and if there were any doubt respecting it, the established rule of construction applicable to statutes making such grants

would compel a construction favorable to the grantor.

Some reference should be made here to the language used in the cases of *Deffeback* v. *Hawke*, 115 U. S. 399 [29: 425], and *Davis* v. *Wiebbold*, 139 U. S. 507 [35: 238], as it is contended that it is in conflict with the views expressed in the present case. If so, the writer of this opinion, who was also the writer of the 322] opinions in *both of the cases cited, must take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience.

The case of *Deffeback* v. *Hawke* arose in this wise: The plaintiff asserted title to mineral lands under a patent of the United States, founded upon an entry under the laws of Congress, for the sale of mineral lands. The defendant, not having the legal title, claimed a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on a portion of the public lands appropriated and used as a town site—that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose. And it was held by this court that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper could be obtained under the pre-emption or homestead laws, or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands. These three cases, those under the pre-emption and homestead laws and town-site Act, were classed together. It was found that under the pre-emption and homestead Act lands containing known saline deposits and mines could not be purchased. In the town site Act it was provided that by virtue of its provisions no title could be acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws. And under the mineral Act of Congress it was provided that in all cases lands valuable for minerals should be reserved from sale except as otherwise expressly provided. The court held that under those acts land could be purchased which was not known to be mineral; and from this the inference was drawn that only lands known at the time of the sale to be valuable for minerals could be excluded, and if they were not thus known to be valuable for minerals a sale might 323]be had. *This was not a case arising upon a grant like the one under consideration at present; but, inasmuch as the law of Congress authorized lands valuable for minerals to be sold generally under the mineral Act, and excluded from sale mineral lands when claimed for homesteads or pre-emption or for town sites, it was thought that these conflicting provisions of law would be reconciled by simply excluding from the sale lands known at the time to be mineral. But that case has no bearing upon the present one involving the construction of an Act of Congress declaring in express terms that no mineral lands shall be conveyed by the grant made.

The case of *Davis* v. *Wiebbold* was an action on the part of a mineral claimant who had obtained a patent in January, 1880, of a parcel of land within the exterior limits of Butte town site, subsequently to the patent for the town site.

When the entry of the town site was had and the patent issued, and a sale was thereafter made to the defendant of the lots held by him, it was not known—at least, it does not appear that it was known—that there were any valuable mineral lands within the town site, and the question was whether in the absence of this knowledge the defendant, who claimed under the town site patent, could be deprived by the laws of the United States of the premises purchased and occupied by him, because of a subsequent discovery of minerals in them, and the issue of a patent to the discoverer under whom the plaintiff claimed. The court said that the declaration that no title could be acquired under the provisions relating to such town sites and the sale of lands therein to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws, would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such was held not to be the necessary meaning of the terms used; in strictness they imported only that the provisions by which the title to the land in such town sites was transferred should not be the means of passing a title also to mines of gold, silver, cinnabar, or copper in the land, or to valid mining claims or possessions thereon; but *that they [324 were to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying exceptions in acts of Congress of mineral lands from grant or sale. Thus read, the court held that they merely prohibited the passage of title under the provisions of the town site laws to mines of gold, silver, cinnabar, or copper, which were known to exist on the issue of the town site patent, and to mining claims and mining possessions, in respect to which such proceedings had been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The patent for the town site was therefore held to cover minerals subsequently discovered in the lands patented. The patent was in law a declaration that minerals did not exist in the premises when it was issued, and the subsequent acquisition of minerals in the town site was within the specific authorization of the Act of Congress that all valuable minerals should be open for exploration and sale. There is a marked distinction between that case under the town site law, and the present case, under a grant of Congress excluding mineral lands from its operation, although it is conceded that some of the language used is broader than the necessities of the case required. Yet the effect given to the town site

patent will be found not inconsistent with the views hereafter expressed in the present case.

Some effect is also sought to be given to the fact that Congress authorized the Northern Pacific Railroad Company to place a mortgage upon its entire property. Admitting that such is the fact, the conclusion claimed does not follow. Congress thereby only authorized a mortgage upon the property granted to the company, which was the lands without minerals. The mortgage could not cover more than the property granted. So also it is said that the states and territories through which the road passes would not be able to tax the property of the company, unless they could tax the whole property, minerals as well as lands. 325] We do not see why not. *The authority to tax the property granted to the company did not give authority to tax the minerals which were not granted. The property could be appraised without including any consideration of the minerals. The value of the property excluding the minerals could be as well estimated as its value including them. The property could be taxed for its value to the extent of the title which is of the land.

The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest states, and it must be strictly construed. It would seem from the frequency with which we have announced this doctrine that it should be forever closed against further question, but as the most extravagant pretensions are made in the plaintiff's construction of the present grant, we will venture to refer to one or two of the important judicial declarations on that subject.

The general rule, when grants relate to matters of public interest, is thus forcibly expressed by *Chief Justice* Taney: "The object and end of all government," said the Chief Justice, speaking for the court, "is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. . . . . The continued existence of a government would be of no great value, if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the hands of privileged corporations." *Charles River Bridge Propra.* v. *Warren Bridge Propra.* 36 U. S. 11 Pet. 507 [9:808].

In *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23:634] this court said: "The rules which govern the interpretation of legislative grants . . . apply as well to grants of lands to states to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which 326] it desires to promote, but declines to *undertake. . . . If the terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings, one of extension and one of limitation, they must be accepted in a sense favorable to the grantor."

In *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618 [28: 1109], speaking of the construction of legislative grants, the court said: "They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that titles to land and to minerals in them shall be settled, and not be the subject of constant and ever recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of the public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can here evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, *it can issue to the rightful claimant the [327 patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The Act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance.

It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

In *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 651 [26: 880], this court thus spoke of the Land Department in the transfer of public lands: "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that capacity they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive, **328]*** when brought to their notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law."

In *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 450 [27: 227], the language of the court was that: "The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annullment or limitation."

In *Heath* v. *Wallace*, 138 U. S. 573 [34: 1063], it was held that "the question whether or not lands returned as 'subject to periodical overflow' are 'swamp and overflowed lands' is a question of fact properly determinable by the Land Department." And *Mr. Justice* Lamar added: "It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country." If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise *appropriated, or because not **[329** free from pre emption or other claims or right at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight* v. *United Land Asso.* 142 U. S. 178 [35: 980], as the "supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States," by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accurancy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

In the case of the *Central Pac. R. Co.* v. *Valentine*, 11 U. S. Land Dec. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: "The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the *title which vested by the Act, necessari- **[330** ly implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not

required. This practice having been uniformly followed and generally accepted for so long a time there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property."

It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is non-mineral, it will not comply with the Act of Congress in which the grant before us was made to plaintiff. The grant, **331**] even when all the acts required *of the grantees are performed, only passes a title to non-mineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were non-mineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and as we have already said in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title.

The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company, to assert in the meantime, by possessory action (as held in *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241 [35: 999]) its right to lands which are in fact non-mineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein.

On the other hand, an affirmance of the judgment in this case would enlarge the grant of the government against its oft-repeated exception of mineral lands, and give to the plaintiff the vast mineral wealth of the states through which the grant passes. It would render the plaintiff corporation imperial in its resources—one that would far outshine "the wealth of Ormus and of Ind." And, as counsel justly observes, the same rule would apply to all our transcontinental railroads and give to them nearly all our mineral lands, when Congress has time and again declared that they should have no mineral lands, and that no Act of Congress should be construed to give them any; and that they "in all cases shall be and are reserved exclusively to the United States unless otherwise specially provided in the Act or acts making the grant."

*It is unnecessary to pursue this subject [**332** any further. We will only observe that we do not notice the numerous assertions made in the argument of the plaintiff, as to what has been decided by this court and what is the settled rule in cases of railroad grants by Congress embracing mineral lands, the correctness of which we do not admit. The official reports will disclose wherein the errors lie sufficiently for the attainment of accuracy of statement in matters of judicial decision.

The plaintiff in this case, not having a patent, and relying solely upon its grant, which gives no title to the minerals within any of its lands, shows by its complaint no cause of action for the possession of the mineral lands claimed. The demurrer of the defendants should have been sustained, and judgment entered thereon in their favor.

It follows that the judgment of the circuit court in this case must be reversed and the cause remanded to that court with directions to sustain the demurrer of the defendants and enter judgment thereon in their favor with costs. And it is so ordered.

Mr. Justice **Brewer** dissenting:

I dissent from the opinion and judgment of the court in this case. The burden of the opinion seems to be that the magnitude of that which is supposed to pass by the grant, as construed by defendant in error, is so great that it cannot be believed that Congress intended to make such a donation; and, therefore, rules of decision, repeatedly affirmed and hitherto the settled law in the construction of such grants, are set aside and a new rule established, whether applicable to this grant alone, or also hereafter to be considered as applicable to the whole body of law in respect to public lands I know not, nor is it affirmed. I respectfully insist that the magnitude of the loss supposed to result to the government is a mere chimera of the imagination—*ignotum pro magnifico*—and that even if it be ever so great, it furnishes no ground for a departure from settled rules and established law.

*The grant of land to the Northern Pa- [**333** cific Railroad Company is enormous; no one disputes that; but before being appalled by its magnitude it is fitting that a comparison be made between it and others, accepted and construed without fear of results. If it be said that its total area is vastly in excess of that of any other Congressional grant, it must at the same time be remembered that the length of the road, in aid of whose construction it was made, is also greatly in excess of that of any other road theretofore or since thus aided. The only fair method of comparison is that by mile. Tested in that way it is the same as other grants. Texas Pacific Railroad grant, 16 Stat. at L. 573. And it is only twice as large as that to the Union Pacific Railroad and the Central Pacific Railroad, and they in addition were aided by the bonds of the nation to the

amount of $16,000 a mile, with an increase (in the mountainous portions of the road) to $32,000 per mile. I affirm that the value of the grant, unquestioned hitherto, to the Union Pacific Railroad and the Central Pacific Railroad Companies was greater per mile than that to the Northern Pacific Railroad Company, and that this defendant in error would at any time have been glad to make an exchange therefor mile for mile.

It is true that the country through which this proposed road was to run was, in 1864, an unknown and uninhabited region, but I deduce therefrom a conclusion the very opposite of that drawn in the opinion of the court. The corporation, the recipient of this grant, would never have moved in the construction of the road if it had not supposed that, upon the definite location of its line, it would receive, in accordance with the rulings of this court, an absolute and unquestioned title to all the lands within the limits of its grant, at that time not taken by homestead or pre-emption right and not known to be mineral lands, and thus excepted from the operation of the grant; neither would the mortgage placed upon the road and its land grant, as authorized by the Act of Congress, have ever successfully appealed to the confidence of the possessors of money except upon like belief. The limits of the place lands were fixed by the terms of the Act. [334] and also the limits of the *indemnity lands. If at the time of the definite location there was no certainty as to what lands within the place limits passed by the grant, there was also an equal uncertainty as to what lands within the indemnity limits could be selected, and an absolute impossibility of making any selection because of ignorance as to the extent of the loss in the place limits; and when it is affirmed that at the time of the definite location there was no certainty as to whether any lands passed by this grant either within the place or indemnity limits, the assertion is necessarily that the mortgagees were invited to loan their money upon a security, of the existence of any part of which there was no certainty, and could not be any certainty, until after Congress by a subsequent Act had appropriated money for an exploration, of which there is no hint in the granting Act. Such an assertion is equivalent to saying that Congress invited parties to lend upon real estate security, the title to no acre of which no act of mortgagor or mortgagee could ever certainly secure. It may be that in the far days to come (and thirty years have passed since the passage of the Act without any effort on the part of Congress in that direction) it shall suit Congress to appropriate money for an exploration of the character of these lands, and it may then be found that every quarter section, though not known to be when the line was definitely located and the road fully constructed, is in fact possessed of minerals, and therefore excepted from the operation of the grant. I respectfully submit that it ought not to be imputed to Congress that it invited a loan on securities which might turn out to be but apples of Sodom—beautiful to the eye, but ashes to the taste.

Much is said of the possible mineral wealth within the area of this grant, and we are told that, when the government was in the financial stress, caused by the war, it is not to be supposed that Congress would willingly throw away this enormous mineral wealth; but surely that suggestion has not even the semblance of force. There has been no reservation of mines or minerals to the government. On the contrary, the entire purpose in respect to mines has been and is expressed in the two rules: First, ordinary lands are given to *all [335] willing to make homesteads of them, and sold to others for $1.25 per acre, and when conveyed carried all mines and minerals beneath the surface, second, as to the ungranted and still public lands, they are open to exploration by individuals, and the discoverer of mines is entitled to purchase the land, embracing the mines, on the payment of $5 per acre, if the mine is a lode or vein, and $2.50 an acre if it is a placer mine.

Obviously no visions of an undiscovered "wealth of Ormus or of Ind," out of which the debts of the war were to be paid, floated before the eyes of Congress when this legislation was pending and prompted the exception of mineral lands. The only purpose was to secure to the individual explorer an opportunity to search for the as yet undiscovered mines. But that purpose was no more significant and no stronger than that to secure to the individual emigrant the opportunity to acquire a homestead, or to pre-empt a farm. And this right, as always held, expired when the definite location of the road was made. Under what theory can it be said that it was more important and more within the thought of Congress to give time to the individual to hunt through the country in pursuit of mines than to the emigrant pioneer to locate a home or purchase a farm?

But it is said that Congress never meant that this vast mineral wealth should pass to the corporation, and that the individual must contract with that corporation for the purchase of any mine. And yet with a strange inconsistency, as it seems to me, before the opinion is closed it is declared in effect that Congress meant that when the President should issue a patent, the mineral wealth, vast as it is supposed to be, should then pass to the corporation. If Congress by its legislation excluded mineral lands from the scope of this grant, then surely no executive officer is authorized to convey mineral lands, and even the patent of the President passes no title thereto. The concession that a patent conveys the mines as incident to the conveyance of the land is a concession that the language of the grant, excluding from the operation of the grant mineral lands, is not to be taken absolutely; and leaves *the only difference between the [336] opinion of the court and my own that of the time as to which the identification of the lands as mineral lands is to be had.

Coming to the matter of identification, the rule uniformly laid down heretofore—in the construction of all railroad grants, including those with like exception of mineral lands—has been that the identification takes place at the time of the definite location. Out of the multitude of cases in which this doctrine has been laid down I quote from one in which this very grant to the Northern Pacific was under consideration.

In *St. Paul & P. R. Co.* v. *Northern Pac. R. Co.* 139 U. S. 1, 5 [35: 77, 79], it was said:

"As seen by the terms of the third section of the Act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. . . .

"This is the construction given to similar grants by this court, where the question has often been considered; indeed, it is so well settled as to be no longer open to discussion. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 60 [22: 551, 554]; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23: 634]; *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491 [24: 1095]; *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 426 [26: 578]. . . .

"It is contended that they are qualified and restricted by the provision of the fourth section, that whenever twenty-five miles of the road are completed in a good, substantial, and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the president, patents shall be issued 'confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road.' This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands [337] as coterminous with the *completed section, but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title. As deeds of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. The previous grant or confirmation is in no respect impaired thereby, or its construction affected. See on this point *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521 [22: 606]; *Wright* v. *Roseberry*, 121 U. S. 488, 497 [30: 1039, 1040]."

I refer also to the case of *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 247 [35: 1001, 1002]. That was a case involving the construction of the grant to the Central Pacific Railroad Company, which grant, as the one before us, excluded from its operation mineral lands; no patent had issued for the particular tracts; the plaintiff claimed by lease from the Central Pacific Railroad Company, and brought an action of ejectment against the defendant in possession. The trial court charged the jury that, although no patent had been issued, on the definite location of the line of the road, the title to the lands within the place limits passed to the company unless they had been previously sold, reserved, or otherwise disposed of by the United States, or a pre-emption, homestead, swamp land, or other lawful claim had attached to them, or they were known to be mineral lands or were returned as such. A judgment rendered in favor of the plaintiff upon such an instruction was sustained by this court, and it was distinctly held that a full title had passed to the railroad company. There was no pretence in that case of any ruling as to the character of the land by the Interior Department or any determination by the Secretary of the Interior that this was not mineral land. In disposing of the case this court said:

"By the terms of the Act making the grant the contention *of the defendant is not sup- [338] ported. Those terms import the transfer of a present title, not one to be made in the future. They are that 'there be and is hereby granted' to the company every alternate section of the lands. No partial or limited interest is designated, but the lands themselves are granted, as they are described by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered.

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses, they import a grant *in præsenti*, carrying at once the interest of the grantor in the lands described. *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 [22: 551]; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23: 634].

"In *Wisconsin Cent. R. Co.* v. *Price County*, 133 U. S. 496, 507 [33: 687, 693], referring to the different acts of Congress making grants to aid in the construction of railroads, we stated that they were similar in their general provisions, and had been before this court for consideration at different times, and of the title they passed we said: 'The title conferred was a present one, so as to insure the donation for the construction of the road proposed against any revocation by Congress, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant.'

"As the sections granted were to be within a certain distance on each side of the line of the contemplated railroad, they could not be located until the line of the road was fixed. The grant was, therefore, in the nature of a 'float;' but, when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title then attached as of the date of the grant, except as to such parcels as had been in the meantime under its provisions appropriated to other purposes.

*"That doctrine is very clearly stated in [339] the Leavenworth case cited above, where the language of the grant was identical with that of the one under consideration, and the court said: 'There be and is hereby granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can

have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant. They vest a present title in the state of Kansas (the grantee named) though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and, by relation, has the same effect upon the selected parcels as if it had specifically described them.

"The terms used in the granting clause of the Act of Congress, and the interpretation thus given to them, exclude the idea that they are to be treated as words of contract or promise rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest."

It is a misconstruction of the decision to say that the court only held that an action could be maintained for the possession of lands not mineral. For it was neither alleged nor proved that the lands were not mineral, but simply that at the date of the definite location they were not known to be mineral. The same allegation and proof could have been made in this case if the action had been brought two years before the discovery of the mineral and four years after the definite location, and the court then, under the authority of the Tarpey case, would have been compelled to sustain a judgment in favor of the company, declaring it the owner of the land, while now it enters the very opposite judgment that the company is not the owner. So, in the Tarpey case, if the day after the opinion of this court had been announced some enterprising explorer had discovered a mine of value within the limits of the tract in controversy in that case, following this opinion the court would [340] have been compelled to hold that *the company had no title, never had had any title, although it had affirmed a judgment declaring that it had the title. It is impossible to uphold such a difference of ruling on anything equivalent to a condition subsequent. For as held in *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 [22: 551], no one can take advantage of the non-performance of such a condition but the grantor or his heirs or successors, and the government has taken no action in respect to the title to this tract since the discovery of the mineral.

These decisions could be supplemented by a score and more in which the same doctrine has been affirmed and reaffirmed until, as said in the quotation first above made, "it is so well settled as to be no longer open to discussion." All these authorities are in effect wholly overthrown by this decision, for there is no identification of the lands passing by the grant unless it is known and can be known at the time what lands pass. Take any particular mile of the road; on either side of the line, as located, there are twenty alternate sections within the place limits. By the rule now laid down, the title to no one of these twenty sections passes to the company, because it is not known absolutely which are mineral lands. So far as known, none may be mineral, and yet, as in this case before us, six years after that line of definite location an exploration develops the fact of minerals, and then it is declared that the title did not pass. When you simply say, as the court does in this opinion, that out of those twenty sections there shall pass the title to such lands as shall thereafter be found or be determined by the Secretary of the Interior to be non mineral lands, you say in effect that there is no identification of a single tract. This court has hitherto said that when the line of definite location was fixed the lands granted were identified. That means, if it means anything, that the particular tracts which passed by the grant were disclosed. Now it is said that they are not disclosed, and cannot be identified as passing by the grant until it shall be affirmatively proved that they do not contain mines or the Secretary of the Interior has determined that they are not mineral lands. There is, therefore, at the time no identification of the particular lands which *pass, as has al- [341 ways heretofore been declared. It is true, as suggested, that it is no uncommon thing to make a grant of lands with a reservation of mines or minerals, and if such were the reservation in this case there would be no question as to the matter of identification; but there is in this case no reservation of mines or minerals; no land passes with a reservation of anything underneath the surface. There is simply an exception of mineral lands from the operation of the grant, and there has got to be something to separate and distinguish one class of lands, to wit, mineral lands, from the other, non mineral lands, before there is any identification as to any lands. So, unless there is that which, at the time of the definite location, distinguishes lands non mineral from lands mineral, there is no identification of any particular tract as passing under this grant.

In the case of *Davis* v. *Wichfield*, 139 U. S. 507, 524 [35: 238, 244], this court said:

"It would seem from this uniform construction of that department of the government specially entrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

And again, on page 519:

"The exceptions of mineral lands from preemption and settlement and from grants to states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of mineral improvements are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

It is probably unnecessary, in view of this declaration as to the uniform construction by the Land Department, to refer to *any spe- [342 cific rulings therein, and yet the following illustrations may not be amiss: By the Act of

March 3, 1853 (10 Stat. at L. 244), it was provided (sec. 6) "that all the public lands in the state of California, whether surveyed or unsurveyed, . . . excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, 1841, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided." In a circular of instructions issued to the registers and receivers in California, October 12, 1853, construing this Act, Commissioner Wilson defines the above exception of "mineral lands" as "lands on which are situated any known salines or mines." 1 Lester's Land Laws, p. 698.

In *State* v. *Poley*, 4 Copp's L. O., this question, as stated by Secretary Schurz, was presented, arising under the Congressional grant of school lands to the state of California:

"Did the title to lands in said sections vest in the state, upon survey, if their mineral character was unknown at the time, and the same were regarded by the officers of the government as ordinary public lands, not reserved or otherwise appropriated, but subject to disposal under the general laws of the United States?"

And this was his answer:

"In compliance with the doctrine established by the courts, it must, I think, be held that the title vested in the state at the date of the survey, when the land was not known to be mineral, or was not treated as such by the government. If, following the doctrines of the courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be affected? If for three years, why not for ten or fifty, or after the title derived from the state has been transmitted through numerous grantees? For lands confessedly not mineral at the date of survey, may, many years thereafter, be ascertained, through the improvements in mining operations, to be valuable as mineral lands. To [343] maintain such a doctrine might result in placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly expressed provisions of law. In my opinion, there is nothing in the Act which can thus be interpreted. I must, therefore, hold that the discovery of the mineral character of the land in sections 16 and 36, subsequent to survey, does not defeat the title of the state to the same as school lands."

Again, the Land Department can acquire no knowledge as to whether these lands are mineral or not, except by exploration, and that requires the labors of explorers and the payment of their compensation therefor. That Congress never contemplated that there should be any such exploration, as a condition of passage of title, is evident from the fact that thirty years have passed since the date of this grant; thirty-two years since the date of the grant to the Union Pacific and Central Pacific Railroad companies, which also excluded mineral lands, and never has an Act been passed, or, even so far as we are advised, even a bill offered in Congress, contemplating the appropriation of a single dollar for such an exploration. Aside from an exploration conducted by the government, at its expense, the only way that knowledge could be acquired would be through the personal efforts of individual explorers. Was it contemplated by this Act that the Secretary of the Interior should have authority to wait so long as he saw fit for the results of these individual explorations before finding and determining that any particular tract was mineral or not? Assuredly a suggestion of such a purpose on the part of Congress would border closely on disrespect to the intelligence and integrity of that body.

But Congress knew that provision had already been made for ascertaining the character of these lands. Revised Statutes, section 2395, contains these provisions:

"Seventh. Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill seats which come to his knowledge, all water courses over which the line he runs may pass, and also the quality of the lands.

"Eighth. These field-books shall be re- [344] turned to the surveyor general, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the surveyor generals office for public information, and other copies shall be sent to the places of the sale, and to the General Land Office."

By the Act of July 26, 1866 (14 Stat. at L. 251) the mineral lands of the public domain were declared to be free and open to exploration or occupation, and provision was made for the entry and patenting of a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper.

In a circular of instructions issued under this Act, January 14, 1867, the Commissioner says of section 11:

"In order to enable the department properly to give effect to this section of the law, you will cause your deputy surveyors to describe in their field notes of surveys, in addition to the data required to be noted in the printed Manual of Surveying Instructions, on pages 17 and 18, the agricultural lands, and represent the same on township plats by the designation of "agricultural lands." 2 Lester's Land Laws, 317.

It is true that such survey and report only give what are the surface indications of the tracts, but any other examination and exploration for discovering minerals beneath the surface, require, as any one can see, a large expenditure of money, and it may well be believed that Congress, knowing that the surveys which were already provided for, would disclose the character of the lands so far as they could be disclosed by the surface appearances, meant that the field-books returned to the Land Department containing that information should be that which should guide in the

identification of the tracts at the time of the definite location as mineral or not mineral.

Again, the section by which the land grant was [345] made to the *Northern Pacific Railroad Company, after defining the place limits of the grant and providing for the definite location of the line of the road, contained this clause (13 Stat. at L. p. 368):

"And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

But unless at the time of that definite location there was an identification of the particular lands within the place limits which passed, how could there be any selection in the indemnity limits? Take this particular tract in controversy before us: If, after the definite location, the company had applied to the Secretary for a selection of land within the indemnity limits in lieu of this tract, would not the Secretary have been compelled to refuse such selection, on the ground that, so far as was known this was not mineral land, and, therefore, passed by the grant? And if now, after the lapse of six years, mineral is discovered and it is adjudged that the title does not pass, is it not possible—nay, probable—that when selection is sought of lands within the indemnity limits it will be found that all have been taken by homestead or pre-emption; or, if not, and a selection is made of any particular tract within those limits, will not the land thus selected and supposed to pass to the company come within the rule here announced that if, before the patent shall issue, mines be discovered it must be adjudged non-mineral land, and, therefore, not passing by the selection? In other words, the title to no lands within the place limits passes because it is unknown whether they are mineral or not, and no selection can be made within the indemnity limits because it is not known how much the deficiency is.

Again, in section 4 of the same Act, it is provided that after the completion of twenty-five consecutive miles of road, commissioners shall be appointed by the President, to exam- [346] ine as *to whether the road has been completed in a substantial and workmanlike manner, and if they make a favorable report—

"Patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

If language can make anything plain it is that when the commissioners have reported favorably as to the construction of any twenty-five consecutive miles of road, the right to a patent exists. It was said in *Stark* v. *Starr*, 73 U. S. 6 Wall. 402, 418 [18: 925, 929]:

"The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants."

When this case was argued before us at the last term it was conceded by the Attorney General that if it was not known that the lands were mineral at the time of that report, the title then passed. Such a concession on the part of the government, if now recognized, would compel an affirmance of this judgment; for, at the time the commissioners made report as to the twenty five consecutive miles adjacent to this tract, no mineral had been discovered, and so far as known the land was not mineral; but the court in this opinion repudiates such concession, and holds that the matter of determination remains open until the very issue of the patent.

Again, by a resolution of May 31, 1870 (16 Stat. 378) the Northern Pacific Railroad Company was authorized to issue its bonds secured by mortgage upon its entire property. Did Congress mean to imply that at that time no specific tracts passed by the mortgage, but only such as might thereafter be *determined [347] by the Land Department to be non-mineral? That resolution contained also this provision:

"Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre."

How could the company sell any particular tract, unless at the time the purchaser knew that the title of the company was perfect? And if the company had failed to place its mortgage, as it most certainly would have failed if the construction now contended for had been believed to be the true construction of this grant, then by the terms of this provision at the end of five years from the completion of the road any tract would be open to settlement and pre-emption as are the public lands of the government.

Again, it is abundantly well settled that lands the title to which remains in the government are not subject to taxation. Can it be that Congress contemplated that the territories and states which should be organized along the line of this transcontinental highway should not be able to tax any alternate sections within the place limits of this grant until such time as it should appropriate money for an exploration as to their character? Take this particular tract for illustration: In 1872 the line of definite location was fixed; apparently it was within the terms of the grant, but it is now adjudged that no title passed to the Northern Pacific, but remained in the government. Was the land subject to taxation during the six years prior to the discovery of the mines?

Will it be said that Congress intended that the Northern Pacific should pay the taxes on all the lands so situated, taking the chances in the future of some of them proving to be non-mineral? Would such injustice be imputed to Congress, even as against a corporation? Suppose the Northern Pacific did not pay, and some party purchased the land at a tax sale: has he lost his money because the land now proves 348] to be mineral lands, and, therefore, *still the property of the government? Or, if the state is under obligation to refund the money thus improperly collected in the way of taxes, what then results? The state or county has regulated its tax levy and its expenditures upon the supposition that these lands were subject to taxation. If the title has not passed from the government they are not taxable, and a new burden must be cast upon the property of individuals within the territorial limits to make good the unexpected deficiency of public funds.

It is well known in the history of this and similar land grants that there was an earnest effort to relieve many of the lands from the burdens of state taxation—an effort which brought to this court the cases of the *Kansas Pac. R. Co.* v. *Prescott*, 83 U. S. 16 Wall. 603 [21: 373], and *Union Pac. R. Co.* v. *McShane*, 89 U. S. 22 Wall. 444 [22: 747]. This litigation was carried on on the part of the railroad companies under the superintendence and direction of Hon. John P. Usher, who was Secretary of the Interior at the time of the passage of these land grant acts, than whom perhaps no one was more familiar with the land laws of the United States; and during all that litigation there was not even a suggestion that the absolute transfer of the title at the time of the definite location was, as to any particular tract, delayed by the question thereafter to be determined as to whether the lands were mineral or not.

Turning to legislation other than that respecting railroad land grants, we find by section 2258 of the Revised Statutes that preemptions are not allowed of "lands on which are situated any known salines or mines." In section 2302, in reference to homesteads, it is enacted: "Nor shall any mineral lands be liable to entry and settlement under its provisions." Section 2392, in reference to town sites, reads: "No title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws." In one of these three clauses the word "known" is used, but not in the others. Is thereby any difference intended as to what shall be excepted from the scope of the authority to acquire lands? That in reference to town sites, as heretofore decided in 349] *Davis* v. *Wieklold*, 139 U. S. 507 [35: 258], includes only *known* mines.

I deem it unnecessary to pursue this discussion further. Many other considerations of equal significance might be adduced. It is enough to say in conclusion that the uniform and settled rule of decision heretofore has been that identification of the particular tracts which pass under a grant was complete at the time of the definite location of the line of the road. Congress, with a knowledge of that frequent ruling, has never by any Act directed a change. It is to be presumed that the legislation of the various states has been cast upon that as the law of the land. To now overthrow that and establish a new rule not merely unsettles the question of title to the lands within this vast area, but it may produce complications which we do not now perceive in the rights of individuals and counties, and even of the states along the line of this road. If ever there was a case in which the rule *stare decisis* should prevail, this is one.

I, therefore, dissent from the opinion and judgment in this case, and am authorized to say that *Mr. Justice* **Gray** and *Mr. Justice* **Shiras** concur in this dissent.

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,
v.
GEORGE HAMBLY.

(See S. C. Reporter's ed. 349-361.)

Fellow servant, who is.

A common day laborer in the employ of a railroad company owning and operating a line of rail-

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NOTE.—*As to fellow servants and their negligence; who are fellow servants, vice principal; superior servant; liability of master*, see note to Baltimore & O. R. Co. v. Baugh, 37: 773.

As to master's duty to furnish suitable and safe machinery and appliances; and liability to servant for their being insufficient or out of repair, see note to Richmond & D. R. Co. v. Elliott, 37: 723.

As to freedom of plaintiff from contributory negligence necessary to entitle him to recover, see note to Stokes v. Saltonstall, 18: 115.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 28: 141.

Railroad conductors and engineers; when fellow servants with other employés; liability of company; recent decisions.

An engineer of a freight train in backing into a railroad freight yard is a fellow servant with a yard clerk engaged in his duty of taking a record of the seals of the cars in the yard. New York & N. E. R. Co. v. Hyde, 55 Fed. Rep. 138.

One whose duties are to take the number of each car coming into a station, is a fellow servant with the engineer of a locomotive used upon the railroad of the company by which they were both employed, where no authority was vested in either as to the other. Beuhring v. Chesapeake & O. R. Co. 37 W. Va. 582.

A railroad fireman is a fellow servant with the engineer and fireman of another train, and recovery cannot be had for his death resulting from a collision ensuing upon the violation of the rules of the company by such engineer and fireman in proceeding with their train upon the single track over which the train of the deceased had the right of way. Cole v. Northern Cent. R. Co. 12 Pa. Co. Ct. 374.

A railroad engineer engaged in delivering coal to a coal company on the latter's dock, under directions of the latter's agent as to when and where the coal shall be dumped and what cars shall be brought in and taken out, is not a fellow servant of one exclusively in the employ of the coal company upon such dock. Central R. of N. J. v. Stoomer, 1 U. S. App. 256, 51 Fed. Rep. 518.

Negligence of an engineer in putting in motion

road, who was at the time he received the injury complained of working for the company under the direction of a section boss, or foreman on a culvert on the line of its road, was a fellow servant with the engineer and conductor operating and conducting a passenger train on company's road, in such a sense as exempted the company from liability for an injury inflicted upon him by and through the negligence of said conductor and engineer in moving and operating said passenger train.

[No. 187.]

Submitted Dec. 21, 1893. Decided May 26, 1894.

IN ERROR to the Circuit Court of the United States for the District of North Dakota to review a judgment for the plaintiff, George Hambly, against the Northern Pacific Railroad Company, defendant, for damages for personal injuries sustained by plaintiff, while acting as helper to a crew of masons engaged in building a stone culvert for the defendant company. *On certificate of questions to this court. Questions answered.*

Statement by *Mr. Justice* **Brown:**

*This was an action by Hambly to recover damages for personal injuries sustained by him while acting as helper to a crew of masons engaged in building a stone culvert for the defendant company on its right of way about two miles west of Jamestown in North Dakota. Upon the trial of the case before a jury, the following facts were proven and admitted to be true by both parties, viz: "That the plaintiff was a common laborer in the employ of the defendant company, and at the time he received the injury which is the ground of this action, he was in the service [350

an engine stopped to be oiled, while a co-employé is engaged in oiling it, is that of a fellow servant, and not of the employer. Henshaw v. Pond's Extract Co. 50 N. Y. S. R. 263.

The engineer and conductor of a train upon which a section man is being carried to his work are fellow servants of the latter, and their disobedience of orders not to go upon a defectively constructed bridge without examining it, which directly causes it to break down with the engine, is attributable to him so as to relieve the railroad company from liability for his death because of the defective construction of the bridge. Carney v. Caraquet R. Co. 29 N. B. 425.

A railroad engineer is not a superior agent, officer, or person having the right to control or direct the services of a brakeman on the train, but they are fellow servants when engaged in the execution of their ordinary functions. Evans v. Louisville, N. O. & T. R. Co. 70 Miss. 527.

Failure of a railroad freight engineer in running into a station to observe a rule of the company that "freight trains will approach all stations under full control" is negligence of a fellow servant relieving the company from liability for the death of a conductor of another train which, in accordance with orders, had halted at such station and was not seen by the engineer of the former in time to stop before he ran into it. Enright v. Toledo, A. A. & N. M. R. Co. 93 Mich. 409.

The engineer and fireman of a locomotive running alone and without any train attached are fellow servants, so as to preclude the latter from recovering from the railroad company for injuries caused by the negligence of the former. Baltimore & O. R. Co. v. Baugh, 149 U. S. 368 (37: 772), 54 Am. & Eng. R. Cas. 328.

Since the duty to inspect a railway engine and see that the coupling apparatus used to fasten together the engine and tender is in a safe condition rests upon the railway company, the fact that the engineer failed to make a proper inspection of the coupling will not relieve the company from liability for his negligence in that regard causing injuries to the fireman on the engine. Sabine & E. T. R. Co. v. Ewing, 1 Tex. Civ. App. 531.

A fireman on a locomotive engine and a telegraph operator are engaged in different departments and about a different piece of work, within Miss. Const. 1890, § 193, providing that every employé of a railroad company, or his personal representative shall have the same remedies for an injury produced by the act or omission of the corporation or its employés, or other persons not employés, where the injury results from the negligence of a fellow servant engaged in another department of labor. Illinois Cent. R. Co. v. Hunter, 70 Miss. 471.

A conductor of a freight train is not a fellow servant of a brakeman in regard to injuries sustained by the latter while obeying the former's orders to carry goods across the track, through negligence of the former in ordering a portion of the train to be backed down upon such track. Richmond & D. R. Co. v. Brown, 89 Va. 749.

A rule of a railroad company providing that conductors will be held responsible for the proper adjustment of switches used by their trains does not make a conductor the representative of the company so as to make his negligence that of the company in respect to injuries sustained by other employés. Miller v. Southern Pac. R. Co. 20 Or. 285.

A mere direction by a conductor to turn a switch, given to an occasional employé of the company, who boarded the train of his own accord, while off duty, not being within the authority of the conductor, will not render the company liable for an injury sustained by such employé while complying with the direction. McDaniel v. Highland Ave. & B. R. Co. 90 Ala. 64.

A railroad company is not liable for the death of a brakeman, caused by the negligence of a conductor on the same train in selecting whom the company was not guilty of negligence. Congrave v. Southern Pac. R. Co. 88 Cal. 360.

An engineer on a switch engine is not guilty of such negligence in permitting his fireman, who had been employed as a brakeman for six months and as a fireman for twenty months, and had handled the engine more or less, to operate the engine in coupling to and removing a freight car standing upon the track, as to render the company liable for injuries sustained by a switchman because the fireman started the engine too suddenly. Thompson v. Lake Shore & M. S. R. Co. 84 Mich. 281.

A laborer on a work train cannot recover from the railroad company for personal injuries occasioned by the negligence of the engineer in starting the train without a signal of his intention so to do. Higgins v. Missouri Pac. R. Co. 104 Mo. 413.

A railroad company is not liable for injuries resulting to one of its locomotive firemen by reason of the negligence of the engineer upon the same engine, unless the company exposed the fireman to unusual and unnecessary risks, or retained the engineer in its service knowing that he was unfit or incapable, since the engineer and fireman are fellow servants. Hobbs v. Atlantic & N. C. R. Co. 9 L. R. A. 838, 107 N. C. 1, 45 Am. & Eng. R. Cas. 592.

A railroad company is not liable for the death of a fireman, caused by an engineer on another engine mistaking a signal to move ahead as being intended for him, when it was intended for the engine on which deceased fired. Peaslee v. Fitchburg R. Co. 152 Mass. 155.

of the defendant, working under the direction and supervision of a section 'boss' or foreman of the defendant company, assisting in building a culvert on defendant's line of railroad, and that while so engaged, the injury complained of and for which he sues, was inflicted upon him by being struck by a locomotive of a moving passenger train on the defendant's road (said train belonging to the defendant, and being operated by a conductor and engineer in its employ) and that the injury he received by coming in contact with said passenger train, and which is the injury sued for in this cause, was due solely to the misconduct and negligence of the conductor and locomotive engineer on said passenger train, in operating and conducting the movements of said train."

Upon the foregoing facts, defendant prayed for an instruction to the jury that the engineer and conductor of the passenger train were fellow servants with the plaintiff, and hence that the defendant company was not liable for the injury received by the plaintiff through their negligence. Upon the question of giving such instructions the opinions of the judges were opposed, and the circuit judge being of opinion that the plaintiff and said conductor and engineer were not fellow servants in the sense that would exempt the defendant from liability, so instructed the jury, which returned a verdict for the plaintiff in the sum of $2500, upon which judgment was entered. Defendant thereupon moved for a new trial, upon the granting of which the judges were opposed in opinion. The motion was denied, and the judges certified the following questions for the opinion of this court:

351] "1. Whether, on the admitted facts of this case hereinbefore set out, the jury should have been instructed that the plaintiff and said conductor and engineer were fellow servants, and that they should return a verdict for the defendant.

"2. Whether, on the facts hereinbefore set out, the court should have set aside the verdict and judgment in the case and granted defendant a new trial.

"3. Whether the plaintiff, who was a common day laborer in the employ of the defendant (which is a railroad company owning and operating a line of railroad) and who was at the time he received the injury complained of working for the defendant under the order and direction of a section 'boss' or foreman on a culvert on the line of defendant's road, was a fellow servant with the engineer and conductor operating and conducting a passenger train on the defendant's road, in such a sense as exempted the defendant from liability for an injury inflicted upon plaintiff by and through the negligence of said conductor and engineer in moving and operating said passenger train."

Messrs. **James McNaught, A. H. Garland,** and **H. J. May,** for plaintiff in error:

The engineer and conductor of the passenger train and defendant in error, were fellow servants.

Randall v. *Baltimore & O. R. Co.* 109 U. S. 488 (27: 1005); *Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Harvey* v. *New York Cent. & H. R. R. Co.* 88 N. Y. 481; *Howard* v. *Denver & R. G. R. Co.* 26 Fed. Rep. 837.

The servant takes upon himself the risk of accidents in the common course of the business, all open and palpable risks, including the negligence of all fellow servants.

Crispin v. *Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *McCosker* v. *Long Island R. Co.* 84 N. Y. 77; *Brick* v. *Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *Loughlin* v. *State*, 105 N. Y. 159; *Hussey* v. *Coger*, 3 L. R. A. 559, 112 N. Y. 614; *McKinnon* v. *Noreross*, 3 L. R. A. 320, 148 Mass. 533; *Quinn* v. *New Jersey Lighterage Co.* 23 Fed. Rep. 363; *Mealman* v. *Union Pac. R. Co.* 37 Fed. Rep. 189.

The following is a partial list of cases in which it has been held that an engineer was a fellow servant with a laborer upon the track.

Vick v. *New York Cent. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Rep. 36; *Easton* v. *Houston & T. C. R. Co.* 32 Fed. Rep. 893; *Collins* v. *St. Paul & S. C. R. Co.* 30 Minn. 31; *Van Wickle* v. *Manhattan R. Co.* 32 Fed. Rep. 278; *Pennsylvania R. Co.* v. *Wachter*, 60 Md. 395; *St. Louis, I. M. & S. R. Co.* v. *Shackelford*, 42 Ark. 417; *Buckley* v. *Gould & C. Silver Min. Co.* 14 Fed. Rep. 833; *Wood* v. *New Bedford Coal Co.* 121 Mass. 252; *Schultz* v. *Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881; *Gormley* v. *Ohio & M. R. Co.* 72 Ind. 31; *Clifford* v. *Old Colony R. Co.* 141 Mass. 564.

The relationship of fellow servants existed between deceased and the faulty engineer.

Slater v. *Jewett*, 85 N. Y. 61, 29 Am. Rep. 627; *Ryan* v. *Cumberland Valley R. Co.* 23 Pa. 384; *Blake* v. *Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Ohio & M. R. Co.* v. *Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Whoalan* v. *Mad River & L. E. R. Co.* 8 Ohio St. 249; *Chicago & A. R. Co.* v. *Keefe*, 47 Ill. 108; *Boldt* v. *New York Cent. R. Co.* 18 N. Y. 432; *Sullivan* v. *Mississippi & M. R. R. Co.* 11 Iowa, 421.

Mr. **S. L. Glaspell,** for defendant in error:

The negligence which caused the injury to defendant in error was that of the conductor and engineer of a passenger train.

Chicago, M. & St. P. R. Co. v. *Ross*, 112 U. S. 377 (28: 787); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003).

The facts should be set forth in the certificate to show to whom the conceded negligence was properly chargeable and because this is not done the cause should be remanded to the circuit court.

Ogilvie v. *Knox Ins. Co.* 59 U. S. 18 How. 577 (15: 490); *United States* v. *City Bank of Columbus*, 60 U. S. 19 How. 385 (15: 662).

Where the peril grows out of extrinsic causes or circumstances which cannot be discovered by the use of precaution and prudence, then the master is liable.

Baird v. *Pettit*, 70 Pa. 477.

Persons in charge of trains are not fellow servants in the same common employment with persons working along the track.

Garrahy v. *Kansas City, St. J. & C. B. R. Co.* 25 Fed. Rep. 258; *Pike* v. *Chicago & A. R. Co.* 41 Fed. Rep. 95; *Chicago & N. W. R. Co.* v. *Moranda*, 93 Ill. 302; *Sullivan* v. *Missouri Pac. R. Co.* 97 Mo. 113; *Dick* v. *Indianapolis, C. & L. R. Co.* 38 Ohio St. 389, 8 Am. & Eng. R. Cas. 101, *Hobson* v. *New Mexico & A. R. Co.*

(Ariz.) 28 Am. & Eng. R. Cas. 360; *King* v. *Ohio & M. R. Co.* 14 Fed. Rep. 277.

Where a duty which the master owes his servants, as the furnishing and maintaining of safe tools and appliances, has been delegated to a servant, the negligence of the latter is the negligence of the master.

Northern Pac. R. Co. v. *Herbert*, 116 U. S. 642 29: 755.

The negligence of a superior servant who has authority to direct the movements of those subordinate to him, is an exception or limitation to the fellow servant rule.

Lane v. *Chicago & N. W. R. Co.* 60 Ill. 171, 14 Am. Rep. 32; *Madden* v. *Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695; *Copper* v. *Mullins*, 30 Ga. 146, 76 Am. Dec. 638; *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 616; *Louisville & N. R. Co.* v. *Collins*, 2 Duv. (Ky.) 114, 87 Am. Dec. 486; *O'Donnell* v. *Allegheny R. Co.* 59 Pa. 239, 98 Am. Dec. 336; *Moon* v. *Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Nashville & C. R. Co.* v. *Carroll*, 6 Heisk. 347; *Donaldson* v. *Mississippi & M. R. Co.* 18 Iowa, 280, 87 Am. Dec. 391; *Reynolds* v. *Northern Pac. R. Co.* 42 Fed. Rep. 383; *Howard* v. *Delaware & H. Canal Co.* 40 Fed. Rep. 195; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 (28: 787).

There is a clear distinction between this case and *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1005). Hambly's duties as a common laborer assisting to build a culvert on the line of railroad did not bring him to work at the same place with the conductor and engineer of the passenger train. He was not engaged in train service or track service.

Mr. Justice **Brown** delivered the opinion of the court:

The third question certified to this court, and the only one it is necessary for us to consider, involves the inquiry whether the plaintiff Hambly and the conductor and engineer of the passenger train were, either by the common law or the statute of Dakota, fellow servants in such sense as to exempt the defendant railway from liability.

There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow service. The authorities are hopelessly divided upon the general subject as well as upon the question here involved. It is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation. It may be said in general that, as between laborers employed upon a railroad track and the conductor or other employés of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas, and Wisconsin hold the relation of fellow servants to exist (*Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Gifford* v. *Old Colony R. Co.* 141 Mass. 564; *Brodeur* v. *Valley Falls Co.* 16 R. I. 448; *Harvey* v. *New York Cent. & H. R. R. Co.* 88 N. Y. 481; *Gormley* v. *Ohio & M. R. Co.* 72 Ind. 31; *Collins* v. *St. Paul & S. C. R. Co.* 30 Minn. 31; *Pennsylvania R. Co.* v. *Wachter*, 60 Md. 395; *Houston & T. C. R. Co.* v. *Rider*, 62 Tex. 267; *St. Louis, *I. M. & S. R. Co.* v. *Shackelford*, 42 [356] Ark. 417; *Blake* v. *Maine Cent. R. Co.* 70 Me. 60; *Ryan* v. *Cumberland Valley R. Co.* 23 Pa. 384; *Sullivan* v. *Mississippi & M. R. R. Co.* 11 Iowa, 421; *Fowler* v. *Chicago & N. W. R. Co.* 61 Wis. 159; *Kirk* v. *Atlanta & C. A. L. R. Co.* 94 N. C. 625, 55 Am. Rep. 621; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; *Keystone Bridge Co.* v. *Newberry*, 96 Pa. 246, 42 Am. Rep. 543) while in Illinois, Missouri, Virginia, Ohio and Kentucky the rule is apparently the other way. *Chicago & N. W. R. Co.* v. *Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Sullivan* v. *Missouri Pac. R. Co.* 97 Mo. 113; *Richmond & D. R. Co.* v. *Normant*, 84 Va. 167; *Dick* v. *Indianapolis, C. & L. R. Co.* 38 Ohio St. 389; *Louisville, C. & L. R. Co.* v. *Carter*, 9 Bush, 580; *Madden* v. *Chesapeake & O. R. Co.* 28 W. Va. 610, 57 Am. Rep. 695. The cases in Tennessee seem to be divided. *East Tennessee, V. & G. R. Co.* v. *Rush*, 15 Lea, 145; *Louisville & N. R. Co.* v. *Robertson*, 9 Heisk. 276; *Haley* v. *Mobile & O. R. Co.* 7 Baxt. 239; *Nashville & D. R. Co.* v. *Jones*, 9 Heisk. 27; *East Tennessee, V. & G. R. Co.* v. *Gurley*, 12 Lea, 46.

In this court the cases involving the question of fellow service have not been numerous nor, perhaps, altogether harmonious. The question first arose in the case of *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 [27: 1005], in which a brakeman, working a switch for his train on one track in a railroad yard, was held to be a fellow servant of an engineer of another train upon an adjacent track, upon the theory that the two were employed and paid by the same master, and that their duties were such as to bring them to work at the same place at the same time, and their separate services had as a common object the moving of trains. It is difficult to see why, if the case under consideration is to be determined as one of general and not of local law, it does not fall directly within the ruling of the Randall case. The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of train men are concerned, from those of a laborer engaged in keeping the track in repair; *neither of them is under [357] the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the "immediate common object" of securing the safe passage of trains over the road. As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person in-

jured, the doctrine of fellow service should not apply. In this view it is not difficult to reconcile the numerous cases which hold that persons whose duty it is to keep railroad cars in good order and repair are not engaged in a common employment with those who run or operate them. The case of *Northern Pac. R. Co.* v. *Herbert*, 116 U.S. 642 [29: 755], is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow servants. See also *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 [25: 612]; *Union Pac. R. Co.* v. *Snyder*, *ante*, p. 597. Even in Massachusetts, whose courts have leaned as far as any in this country in supporting the doctrine of fellow service, it has been held that agents who are charged with the duty of supplying safe machinery are not to be regard-[358] ed as fellow servants with those *who are engaged in operating it. *Ford* v. *Fitchburg R. Co.* 110 Mass. 240.

Directly in line with the case of *Randall* v. *Baltimore & O. R. Co.* is that of the *Quebec SS. Co.* v. *Merchant*, 133 U. S. 375 [33: 656], in which the stewardess of a steamship belonging to a corporation brought suit to recover damages for personal injuries sustained by her by reason of a defective railing at a gangway, which gave way as she leaned against it, and precipitated her into the water. The railing had been recently removed and the gangway opened to take off some freight, and had not been properly replaced by the porter and carpenter of the ship whose duty it was to replace them. It was held that, as the porter and carpenter were fellow servants with the stewardess, the corporation was not liable. Said *Mr. Justice* Blatchford: "As the porter was confessedly in the same department with the stewardess, his negligence was that of a fellow servant. The contention of the plaintiff is that, as the carpenter was in the deck department and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow servant with the stewardess. But we think that, on the evidence, both the porter and the carpenter were fellow servants with the plaintiff. The carpenter had no authority over the plaintiff, nor had the porter. . . . There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative." The division of the crew into departments was treated as evidently for the convenience of administration upon the vessel, but having no effect upon the question of fellow service. See also *Baltimore & O. R. Co.* v. *Andrews*, 17 L. R. A. 190, 50 Fed. Rep. 728.

The case of the *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377 [28: 787], is claimed to have laid down a different doctrine, and to be wholly inconsistent with the defense set up by the railroad in this case. This action was brought by the engineer of a freight train to recover damages occasioned by the joint negligence of the conductor of his own train and *that of a gravel train with which it came [359] in collision. The case was decided not to be one of fellow service upon the ground that the conductor was "in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants." The court drew a distinction "between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of a corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence." In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. Under such circumstances he was held not to be a fellow servant with the fireman, brakeman, and engineer, citing certain cases from Kentucky and Ohio, which maintained the same view.

It may be observed that quite a different question was raised in that case from the one involved here, in the fact that the liability of the company was placed upon a ground which has no application to the case under consideration, viz. that the person sustaining the injury was under the direct authority and control of the person by whose negligence it was caused. That it was not, however, intended in that case to lay down as a universal rule that the company is liable where the person injured is subordinate to the person causing the injury, is evident from the latest deliverance of this court in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368 [37: 772] in which an engineer and fireman were held to be, when engaged in their respective duties as such, fellow servants of the railroad company, and the fireman precluded by principles of general law from recovering damages from the company for injuries caused by the negligence of the engineer.

Neither of these cases, however, is applicable here, since they involved the question of "subordination" of fellow *servants and not [360] "different departments." Of both classes of cases, however, the same observation may be made, viz, that to hold the principal liable whenever there are gradations of rank between the persons receiving and the persons causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train or two seamen of equal rank in the same ship, are comparatively

rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no farther in contact with each other than as if they had been employed by different principals.

We think the case is indistinguishable in principle from Randall's case, which was decided in 1883, and has been accepted as a sound exposition of the law for over ten years; and that, unless we are prepared to overrule that case, the third question certified must be answered in the affirmative. The authorities in favor of the proposition there laid down are simply overwhelming.

We have thus far treated this case as determinable by the general and not by the local law, as was held to be proper both in the Ross case and the case of Baugh. In so holding, however, the court had in view only the law of the respective states as expounded by their highest courts. Wherever the subject is regulated by statute, of course the statute is applied by the Federal courts pursuant to Revised Statutes, section 241, as a "law" of the state.

By section 3753, Compiled Laws of Dakota Territory, in one of the courts of which this 361] case was originally *commenced, "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risk of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé." In the case of *Elliot* v. *Chicago, M. & St. P. R. Co.* 3 L. R. A. 363, 5 Dak. 523, a case which arose after the enactment of the above statute, the supreme court of the territory held that a section foreman and a train conductor were coemployés within the purview of this statute, and were "engaged in the same general business." While this construction, given by the supreme court of a territory, is not obligatory upon this court, it is certainly entitled to respectful consideration, and in a doubtful case might well be accepted as turning the scale in favor of the doctrine there announced. The opinion is a very elaborate one, reviews a large number of cases, and follows those of New York, Pennsylvania, and Massachusetts, as founded upon sounder principles. We may safely assume that the construction thus given to this statute will not be overruled by the courts of the two states which have succeeded the supreme court of the territory without most cogent reasons for their action.

The third question certified must be answered in the affirmative.

The Chief Justice, *Mr. Justice* **Field,** and *Mr. Justice* **Harlan** dissented.

*JOHN H. REAGAN ET AL., *Appts.*, [362
v.
THE FARMERS LOAN & TRUST COMPANY ET AL. (No. 1.)

(See S. C. 154 U. S. 362-413.)

Suit against a state—jurisdiction of Federal court—state power to regulate charges by carrier—equity powers of United States court—validity of statute—courts may restrain rates fixed by a commission—equal protection of property—14th Amendment—reasonableness of rates—rates prescribed by Texas railroad commission unjust.

1. A suit to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authority is not a suit against the state, within the prohibition of the 11th Amendment, since the state is interested only in a governmental and not in a pecuniary sense.
2. The constitutionality of a state statute will not oust the jurisdiction of a Federal court in a suit between citizens of different states to prevent such wrongful administration of the statute by state officers, as will make it an illegal burden and exaction upon an individual.
3. A section of a statute prescribing penalties, and another section declaring the effect as evidence of freights fixed by commissioners may be dropped as invalid without affecting the validity of the remainder of the statute, where it appears that the prime object of the statute was the establishment of rules for the operation of railroads, and the regulation of their rates, which can be fully accomplished irrespective of those sections.
4. Although the formation of a tariff of charges for transportation by a common carrier is a legislative or ministerial rather than a judicial function, the court may decide whether or not such rates are unjust and unreasonable and such as to work a practical destruction to rights of property, and if found so to be may restrain their operation.
5. The fixing and enforcement by a railroad commission of unjust and unreasonable rates for transportation by railroad companies is an unconstitutional denial of the equal protection of the laws.
6. A schedule of rates made by railroad commissioners, being challenged as a whole, the court must either condemn or sustain it as a whole and cannot rearrange it or prepare a new schedule.
7. An injunction against the enforcement of unreasonable and unjust rates fixed by railroad commissioners must not extend to restraining the commission from proceeding to establish other rates.
8. A tariff of railroad rates fixed by a commission, which will so diminish the earnings of a road that they will not be able to pay one half the interest on its bonded debt above the operating expenses, is unjust and unreasonable, where, without waste

NOTE.—*As to power of Congress to regulate commerce*, see note to Gibbons v. Ogden, 6: 23, and to Brown v. Maryland, 6: 678.

As to tonnage tax, see note to Inman SS. Co. v. Tinker, 24: 118.

As to interstate commerce; regulation of; power of Congress; how far exclusive, see notes to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute when valid as being a regulation of commerce; drummers; ranch; railroads; telegraph companies; state tax on commerce, when valid, see note to Harmon v. Chicago, 37: 236.

or mismanagement in construction or operation, the road has cost far more than the amount of stock and bonds outstanding, which represent money expended in its construction, and the rates have been voluntarily decreased by the company within ten years more than 30 per cent, while under these rates the stock, representing two fifths of the value of the road, has never received a dividend, and for the last three years the earnings above operating expenses have been insufficient to pay the bonded debt.

[No. 928.]

Argued April 4, 5, 1894. Decided May 26, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the International & Great Northern Railroad Company from putting or continuing in effect the rates or tariffs of the railroad commission of Texas, described in the complaint, and perpetually enjoining said railroad commission and the Attorney General of Texas, from instituting any suits for penalties under the law of Texas of April 3, 1891, or under or by virtue of the said tariffs of said railroad commission, etc., and perpetually restraining said railroad commission from issuing any further tariffs, and decreeing that the rates and tariffs heretofore made and issued by said commission and described in the complaint are unreasonable, unfair and unjust, and cancelling the same, and declaring the same to be null and void, etc. *Reversed in part and affirmed in part.*

Statement by *Mr. Justice* Brewer:

On April 3, 1891, the legislature of the state of Texas passed an act to establish a railroad commission. The first section provides for the appointment and qualification of three persons to constitute the commission; the second for the organization of the commission, while the third defines the powers and duties of the commission, and is as follows:

"Sec. 3. The power and authority is hereby vested in the railroad commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges, and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this act prescribed through proper courts having jurisdiction.

362:3] "(*a*) The said commission shall have power, and it shall be its duty, to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

"(*b*) The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reasonable rate for each railroad subject to this act for the transportation of each of said classes and subdivisions.

"(*c*) The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this act.

"(*d*) The said commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads.

"(*e*) The said commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more lines of such railroads.

"(*f*) If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the commission shall fix the *pro rata* part of such charges to be received by each of said connecting lines.

"(*g*) Until the commission shall make the classifications and schedules of rates as herein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

"(*h*) The commission shall have power, and it shall be its duty from time to time, to alter, change, amend, or abolish any classification or rate established by it when deemed necessary; and such amended, altered, or new classifications or rates shall be put into effect in the same manner as the originals.

"(*i*) The commission may adopt and enforce such rules, regulations, and modes of procedure as it may deem proper to hear and determine complaints that may be made against the classifications or the rates, the rules, regulations, and determinations of the commission.

"(*j*) The commission shall make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty eight hours' notice to the consignee, not to include Sundays.

"(*k*) The commission shall make and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The commission shall have power to prescribe reasonable rates, tolls, or charges for all other services performed by any railroad subject hereto."

The first paragraph of the fourth section is in these words:

"Sec. 4. Before any rates shall be established under this act, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases."

The remaining paragraphs give power to adopt rules of procedure. The fifth, sixth, and seventh sections are as follows:

"Sec. 5. In all actions between private parties and railway companies brought under

this law, the rates, charges, orders, rules, regulations, and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and 365]accepted to be reasonable, fair, *and just, and in such respects shall not be controverted therein until *finally found* otherwise in a direct action brought for that purpose in the manner prescribed by sec ions 6 and 7 hereof.

"Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act, or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: *Provided*, That if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice.

"Sec. 7. In all trials under the foregoing section the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts, or charges complained of are unreasonable and unjust to it or them."

Sections 8, 9, 10, 11, 12, and 13 contain special provisions which are not material to the consideration of any question presented in this case.

Section 14 reads:

"Sec. 14. If any railroad company subject to this act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm or corporation a greater rate, charge, or compensation than that fixed and established by the railroad commission for the transportation of freight, passengers, or cars, or for the use of any car on the 366]*line of its railroad, or any line operated by it, or for receiving, forwarding, handling, or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the state of Texas a sum not less than $100 nor more than $5000."

Section 15 defines unjust discrimination, and imposes a penalty of not less than $500 nor more than $5000 upon any railroad company violating any provision of the section.

Section 16 is leveled against officers and agents of railroads, and imposes a penalty of not less than $100 nor more than $1000 for certain offenses denounced therein.

Section 17 declares that any railroad company violating the provisions of the act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the act, shall pay, in addition to such damages to the person injured, a penalty of not less than $125 nor more than $500.

In sections 18 and 19 are further provisions as to penalties. The remaining sections, 20 to 24, inclusive, contain matter of detail which is unimportant in this case.

Three of the plaintiffs in error, Reagan, McLean, and Foster, were duly appointed and qualified as members of said railroad commission, and organized it on the 10th day of June, 1891. The other plaintiff in error, Culberson, is the attorney general of the state, who, by section 19 of the act, was charged with the duty of instituting suits in the name of the state for the recovery of all the penalties prescribed by the act, excepting those recoverable by individuals under the authority of section 17.

After the commission had organized on June 10, it proceeded to establish certain rates for the transportation of goods over the railroads in the state, and also certain regulations for the management of such transportation. Thereafter, on April 30, 1892, the Farmers' Loan & Trust Company filed its bill in the Circuit Court of the United States for the Western District*of Texas, making as defendants the[367 railroad commissioners, the attorney general, the International & Great Northern Railroad Company, and Thomas M. Campbell, the receiver thereof, duly appointed by the district court of Smith county, Texas. That bill, which is too long to be copied in full, alleged that the plaintiff was the trustee in a trust deed executed by the railroad company on the 15th day of June, 1881, to secure a second series of bonds, aggregating $7,054,000, bearing interest at the rate of 6 per cent per annum; and that there was a prior issue of bonds to the amount of $7,954,000, secured by a conveyance to John S. Kennedy and Samuel Sloan, as trustees. It then set forth the railroad commission act heretofore referred to, or so much thereof as was deemed material, the proceedings of the commission, and the notices that were given to the railroad company, and attached as exhibits the several orders prescribing rates and regulations. It also averred generally that such rates were unreasonable and unjust, set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates, or any other rates, and also restraining the attorney general from instituting any suits to recover penalties for failing to conform to such rates and obey such regulations. The International & Great Northern Railroad Company appeared, filed an answer and also a cross bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The railroad commission and the attorney general at first filed answers, but, after a certain amount of testimony had been taken (of the nature and extent of which we are not advised, inasmuch as it is not preserved in the record) they withdrew their answers and filed demurrers, leave being given at the same time to the complainant and cross complainant to amend the bill and cross bill before the fil-

ing of the demurrer. The amendments to the bill and cross bill were similar, and contained allegations more in detail of the losses in revenue sustained by the company through the enforcement of the tariffs, and the average reduction caused by such tariffs in the rate there-
[368] tofore *existing; and also setting forth certain contract rights under an act of the legislature of the state of Texas, passed on February 7, 1883. Thereafter the cause was submitted to the court on the bills and cross bills and demurrers, and, on March 23, 1891, a decree was entered in favor of the plaintiff as follows:

"This cause having been set down for final hearings on the pleadings and evidence, and being called for hearing thereon, the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted conditioned upon the said defendants paying all costs of taking depositions and evidence, herein against them to be taxed, and for which execution may issue, and on condition that the complainant and cross complainant have leave to amend before the filing of the demurrers of the said defendants, which leave was granted, and whereupon said amendments were filed, and the demurrers of the said defendants were filed to the original bill of complaint and cross bill in this cause, as also to all amendments thereto, and were, by complainant and cross complainant, set down for argument by consent, and were by all parties forthwith submitted; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled; and the defendants John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson having entered of record their refusal to make further answer, and the fact that they stood upon their demurrers, and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged, and decreed that the bill of complaint as amended, and the cross bill of complainant as amended, in the above entitled cause, be, and the same are hereby, sustained and taken for confessed. And the said cause coming on further to be heard upon the bill of complaint herein as amended, and upon the answer of the defendant railroad company thereto, confessing the same, it is further ordered, adjudged, and decreed as follows, to wit:

"First. That the injunctions heretofore is-
[369] sued in this *cause be, and the same are hereby, made perpetual, and accordingly,

"Second. That defendant, the International & Great Northern Railroad Company be, and it is hereby, perpetually enjoined, restrained, and prohibited from putting or continuing in effect the rates, tariffs, circulars, or orders of the railroad commission of Texas, or either or any of them, as described in the bill of complaint herein and in 'Exhibit C' thereto and therewith filed, and from charging or continuing to charge the rates specified in said tariffs, circulars, or orders, or either or any of them.

"Third. It is further ordered, adjudged, and decreed that the defendants, the railroad commission of Texas and the defendants, John H. Reagan, William P. McLean, and L. L. Foster, acting as the railroad commission of Texas, and their successors in office, and the defendant, Charles A. Culberson, acting as attorney general of the state of Texas, and his successors in office, be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the state of Texas, approved April 3, 1891, and fully described in the bill of complaint; or under or by virtue of any of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders, or circulars of said railroad commission, or any or either of them combined, and said defendants Reagan, McLean and Foster and the railroad commission of Texas are further perpetually restrained from certifying any copy or copies of any of said orders, tariffs, or circulars, or from delivering or causing or permitting to be delivered, certified copies of any of said orders, tariffs, or circulars to the said Culberson or any other party, and from furnishing the said Culberson, or any other party, any information of any character for the purpose of inducing, enabling or aiding him or any other party to institute or prosecute any suit or suits against the said defendant *railroad company for the recov-
[370] ery of any penalty or penalties under the said act.

"Fourth. It is further ordered, adjudged and decreed that the said railroad commission of Texas and the said Reagan, McLean and Foster be perpetually enjoined, restrained, and prohibited from making, issuing, or delivering to the said railroad company, or causing to be made, issued, or delivered to it, any further tariff or tariffs, circular or circulars, order or orders.

"Fifth. It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars, or any or either of them combined.

"Sixth. It is further ordered, adjudged, and decreed that all rates, tariffs, circulars, and orders heretofore made and issued by said commission, and fully described in 'Exhibit C' to the bill of complaint herein, be, and they are hereby, declared to be unreasonable, unfair, and unjust as to complainant and cross complainant, and they are hereby canceled and declared to be null, void, and of no effect.

"Seventh. It is further ordered, adjudged, and decreed that all costs herein be taxed against said defendants Reagan, McLean, Culberson, and Foster and the railroad commission of Texas, and that execution may issue therefor."

From that decree the railroad commission and the attorney general have appealed to this court.

Messrs. **Charles A. Culberson**, Atty. Gen. of Texas, **Henry C. Coke** and *W. S. Simkins*, for appellants:

This being a suit by a citizen of the state of New York against the attorney general and the railroad commission, it is in effect a suit against the state of Texas inhibited by the 11th Amendment to the Constitution of the United States.

Ex parte Ayers, 123 U. S. 443 (31: 216); *Pennoyer* v. *McConnaughy*, 140 U. S. 10 (35: 365); *Re Tyler*, 149 U. S. 190 (37: 697); *Rensselaer & S. R. Co.* v. *Bennington & R. R. Co.* 18 Fed. Rep. 617; *McWhorter* v. *Pensacola & A. R. Co.* 2 L. R. A. 504, 24 Fla. 417.

The law does not deny the right of trial by jury. If such were the case it would not render it objectionable. Trial by jury is not essential to due process of law.

Walker v. *Sauvinet*, 92 U. S. 90 (23: 678); *Kennard* v. *Louisiana*, 92 U. S. 480 (23: 478); *Hurtado* v. *California*, 110 U. S. 533 (28: 237); *State* v. *Whisner*, 35 Kan. 275; *Janes* v. *Reynolds*, 2 Tex. 252; *Reagh* v. *Spann*, 8 Stew. (Ala.) 108.

The penalties denounced by the statute are not immoderate or excessive.

O'Neil v. *State*, 58 Vt. 140, 56 Am. Rep. 557, 144 U. S. 331 (36: 455); *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa, 341; *Chicago & N. W. R. Co.* v. *Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 877.

The legislature has the authority to establish courts inferior to the supreme court and to allot and distribute its jurisdiction as it may deem proper.

Atlantic Exp. Co. v. *Wilmington & W. R. Co.* 18 L. R. A. 393, 111 N. C. 463.

By section 22 of the act its provisions are expressly limited to the transportation of passengers, freight and cars between points within this state and the rates fixed are also thus limited. In the United States all commerce is subject to regulation, interstate commerce by Congress and internal commerce by the states.

Stone v. *Farmers Loan & T. Co.* 116 U. S. 334 (29: 645); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 215 (29: 166), 1 Inters. Com. Rep. 382; *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, (32: 229), 2 Inters. Com. Rep. 59; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 618.

Traffic arrangements and competitive conditions cannot take from the state its right to regulate domestic commerce.

Chicago, B. & Q. R. Co. v. *Dey*, 38 Fed. Rep. 663.

If such regulation can be said to affect interstate commerce in any way it is incidentally and so remotely as not to amount to a regulation of such commerce.

Ficklen v. *Shelby County Taxing Dist.* 145 U. S. 24 (36: 601), 4 Inters. Com. Rep. 79; *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192 (36: 672), 4 Inters. Com. Rep. 87; *Louisville & N. R. Co.* v. *Tennessee R. Co.* 19 Fed. Rep. 699.

A regulation of commerce, by which the revenue derived from the use of property clothed with a public trust is reduced, is not a taking of property for public use.

Varner v. *Martin*, 21 W. Va. 534; *Memphis Freight Co.* v. *Memphis*, 4 Coldw. 419; *Jenal* v. *Green Island Draining Co.* 12 Neb. 163; *Sholl* v. *German Coal Co.* 118 Ill. 427, 59 Am. Dec. 379; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Gilmer* v. *Lime Point*, 18 Cal. 229.

Sections 1 and 15 of an act of the legislature of Texas alleged to have been passed February 7, 1854, constitutes no contract between the railroad company, the state and bondholders.

Pennsylvania R. Co. v. *Miller*, 132 U. S. 75 (33: 267); *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 454 (33. 978), 3 Inters. Com. Rep. 209; *Dows* v. *Chicago*, 78 U. S. 11 Wall. 112 (20: 67); *Cross* v. *Del Valle*, 68 U. S. 1 Wall. 5 (17: 515); *Milwaukee & M. R. Co.* v. *Milwaukee & St. P. R. Co.* 73 U. S. 6 Wall. 742 (18: 856); *Bound* v. *South Carolina R. Co.* 47 Fed. Rep. 33; *Dill* v. *Shahan*, 25 Ala. 694, 60 Am. Dec. 540; *Wetmore* v. *Fiske*, 15 R. I. 354.

The act approved March 10, 1875, authorizing the consolidation, contains no provision in reference to rates.

Tomlinson v. *Branch*, 82 U. S. 15 Wall. 460 (21: 189); Beach, Railways, §§ 553, 556, 557.

The act of the legislature of the state of Texas, approved April 3, 1891, creating the railroad commission and defining its powers and duties, is valid and constitutional.

Den v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 280 (15: 376).

Though "due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding (2 Coke Inst. 47, 50; *Hoke* v. *Henderson*, 15 N. C. 15, 25 Am. Dec. 677; *Taylor* v. *Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Van Zant* v. *Waddel*, 2 Yerg. 260; *State Bank* v. *Cooper*, 2 Yerg. 599; *Jones* v. *Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Greene* v. *Briggs*, 1 Curt. 311) yet this is not universally true.

Paulsen v. *Portland*, 149 U. S. 41 (37: 641); *San Mateo County* v. *Southern Pac. R. Co.* ("*Railroad Tax Cases*,") 13 Fed. Rep. 751; *Bartlett* v. *Wilson*, 59 Vt. 35; *Eames* v. *Savage*, 77 Me. 221, 52 Am. Dec. 751; *Weimer* v. *Bunbury*, 30 Mich. 211; *Re Ryers*, 72 N. Y. 10, 28 Am. Rep. 88; *People* v. *Smith*, 21 N. Y. 598; *Re Union Elev. R. Co.* 2 L. R. A. 359, 112 N. Y. 74; *Baltimore* v. *Scharf*, 54 Md. 517; *Baltimore Belt R. Co.* v. *Baltzell*, 75 Md. 99; *Budd* v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *McMillen* v. *Anderson*, 95 U. S. 41 (24: 335); *Burlington, C. R. & N. R. Co.* v. *Dey*, 8 Iowa, 339.

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

Cooley, Const. Lim. (6th ed.) 434; Lewis, Em. Dom. § 365; *Davidson* v. *New Orleans*, 96 U. S. 105-107 (24: 620); *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 708 (28: 572); *Stuart* v. *Palmer*, 74 N. Y. 184, 30 Am. Rep. 289; *People* v. *O'Brien*, 2 L. R. A. 255, 111 N. Y. 1.

The general rule is that the method pursued should be appropriate to the case, adapted to the end to be attained, just to the parties, with notice and an opportunity to be heard before an appropriate and impartial tribunal.

Cooley, Const. Lim. (6th ed.) 694, 695; Mills, Em. Dom. §§ 84, 85; Lewis, Em. Dom. § 313; *Buffalo Bayou, B. & C. R. Co.* v. *Ferris*, 26 Tex. 588; *Rhine* v. *McKinney*, 53 Tex. 391; *Menges* v. *Albany*, 56 N. Y. 374.

Argument is unnecessary to show that railroad commissions are peculiarly appropriate tribunals to fix and establish rates. It is universally accepted law.

Stone v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Chicago, M & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (33: 970), 3 Inters. Com. Rep. 209; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S 339 (36: 176): *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 656; *Chicago & N. W. R. Co.* v. *Dey*, 2 Inters. Com. Rep. 325, 1 L. R A. 744, 35 Fed. Rep. 873; *People* v. *Harper*, 91 Ill. 366; *State* v. *Chicago, M. & St. P. R. Co.* 38 Minn. 281; *Georgia R. Co.* v. *Smith*, 70 Ga. 694; *Stone* v. *Yazoo & M. V. R. Co.* 62 Miss. 607, 52 Am. Dec. 193; *McWhorter* v. *Pensacola & A. R. Co.* 2 L. R. A. 504, 24 Fla. 417 *Wellman* v. *Chicago & G. T. R. Co.* 83 Mich. 592; *State* v. *Fremont & E. M. V. R. Co.* 22 Neb. 313; *Atlantic Exp. Co.* v. *Wilmington & W. R. Co.* 18 L. R. A. 393, 111 N. C. 463.

In all such cases, where not in conflict with the state constitution, the findings of the board of commissioners or other tribunal may be made final and conclusive.

Mills, Em. Dom. § 322; Lewis, Em. Dom. §§ 520, 536; 2 Dill. Mun. Corp. § 619; *Ex parte Fook*, 49 Cal. 402; *Rhoads* v. *Cushman*, 45 Ind. 85; *Emery* v. *Bradford*, 29 Cal. 85; *Houston T. & B. R. Co.* v. *Randolph*, 24 Tex. 332; *Re Fowler*, 53 N. Y. 63; *Williams* v. *School Dist. No. 6*, 33 Vt. 279; *Norfolk S. R. Co.* v. *Ely*, 95 N. C. 77; *Passarant* v. *United States*, 148 U. S. 219 (37: 428); *Hilton* v. *Merritt*, 110 U. S. 97 (28:83); *Quinby* v. *Conlan*, 104 U. S. 425 (26: 802); *Ex parte Fassett*, 142 U. S. 479 (35: 1087); *Fong Yue Ting* v. *United States*, 149 U. S. 714 (37: 913); Cooley, Taxn. 528, 529.

The railroad commission is a special tribunal peculiarly adapted to discharge the duties devolved upon it and invested with legislative and judicial or, certainly, *quasi* judicial powers, which are to be exercised after the manner of the legislature and the courts.

Tilley v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 659; *Re County Seat of Linn County*, 15 Kan. 500; *People* v. *Turner*, 117 N. Y. 227; *Ballard* v. *Thomas*, 19 Gratt. 14; *State* v. *Jersey City*, 35 N. J. L. 381; *Arrowsmith* v. *Harmoning*, 118 U. S. 195 (30: 243); *Keily* v. *Pittsburg*, 104 U. S. 78 (26: 658); *Wellman* v. *Chicago & G. T. R. Co.* 83 Mich. 624; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 460 (33: 982), 3 Inters. Com. Rep. 209.

Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable.

Keokuk N. L. Packet Co. v. *Keokuk*, 95 U. S. 89 (24: 381); *Allen* v. *Louisiana*, 103 U. S. 83 (26: 319); *Little Rock & Ft. S. R. Co.* v. *Worthen*, 120 U. S. 102 (30: 590); *Florida Cent. R. Co.* v. *Schutte*, 103 U. S. 142 (26: 335); *Weil* v. *Calhoun*, 25 Fed. Rep. 873.

When rates are established either by the legislature or a commission, whether they are reasonable is a legislative or administrative question, and not ordinarily the subject of judicial investigation and determination.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 460 (33: 982), 3 Inters. Com. Rep. 209; *Baltimore & O. R. Co.* v. *Maryland*, 88 U. S. 21 Wall 471 (22: 683); 4th Annual Report, Interstate Commerce Commission, 17; *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 653; *Wellman* v. *Chicago & G. T. R. Co.* 83 Mich. 623; *Georgia R. Co.* v. *Smith*, 70 Ga. 694.

The state may regulate and control the imposition of tolls.

Blake v. *Winona & St. P. R. Co.* 19 Minn. 418, 18 Am. Rep. 345.

The rights of the companies and bondholders are subordinate to those of the public.

Talcott v. *Pine Grove Twp.* 1 Flip. 45; *Gates* v. *Boston & N. Y. A. L. R. Co.* 53 Conn. 343; *State* v. *East Line & R. R. R. Co.* (Tex.) 48 Am. & Eng. R. Cas. 656; *Munn* v. *Illinois*, 94 U. S. 133 (24: 86); *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 654.

Interest of the carrier is not alone to be considered in fixing a rate, but the interest of the public is paramount and should be given its due weight.

2d Annual Report, Interstate Commerce Commission, 9; *Re Atlanta & W. P. R. Co.* 2 Inters. Com. Rep. 472; *Thurber* v. *New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep 751; *Delaware State Grange Patrons of Husbandry* v. *New York, P. & N. R. Co.* 3 Inters. Com. Rep. 554.

The courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs as fixed by the commissioners must, in so far as the courts are concerned, be left to the test of experience.

Pensacola & A. R. Co. v. *State*, 3 L. R. A. 661, 25 Fla. 310; *Storrs* v. *Pensacola & A. R. Co.* 29 Fla. 631; *Chicago & N. W. R. Co.* v. *Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 878; *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 654.

Messrs. John F. Dillon, **E. B. Kruttschnitt**, *Herbert B. Turner* and *John J. McCook*, for the Farmers' Loan & Trust Company, appellee:

This is not a suit against the state of Texas, and hence is not one within the prohibition of the 11th Amendment to the Constitution of the United States.

Pennoyer v. *McConnaughy*, 140 U. S. 1 (35: 363); *Poindexter* v. *Greenhow*, 114 U. S. 288 (29: 192); *McWhorter* v. *Pensacola & A. R. Co.* 2 L. R. A. 504, 24 Fla. 417, 37 Am. & Eng. R. Cas. 566.

The United States circuit court, sitting as a court of equity, has the fullest jurisdiction.

Chicago, B. & Q. R. Co. v. *Iowa*, 94 U. S. 155 (24: 94); *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Stone* v. *New Orleans & N. E. R. Co.* 116 U. S. 352 (29: 651); *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174 (32: 377); *Mobile* v. *Louisville & N. R. Co.* 84 Ala. 115, 36 Am. Eng. & R. Cas. 171; *Baltimore* v. *Radecke*, 49 Md. 217; *Tuchman* v. *Welch*, 42 Fed. Rep. 548; *Schandler Bottling Co.* v. *Welch*, 42 Fed. Rep. 563.

This suit being one within the jurisdiction of a court of general equity powers, it is within

the jurisdiction of the courts of the United States.

Omaha Horse R. Co. v. *Cable Tramway Co.* 32 Fed. Rep. 727.

The Texas Railroad Commission Act, in respect of fixing and enforcing rates of charges, is in violation of the Constitution of the United States. It denies to railway companies the equal protection of the laws, and deprives the companies of their property without due process of law.

Wabash, St. L. & P. R. Co. v. *Illinois*, 118 U. S. 557 (30: 246), 1 Inters. Com. Rep. 31; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 458 (33: 981); *Munn* v. *Illinois*, 94 U. S. 113 (24: 77); *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347 (28: 173); *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 307 (29: 636); *Dow* v. *Beidelman*, 125 U. S. 680 (31: 841), 2 Inters. Com. Rep. 56; *Chicago & N. W. R. Co.* v. *Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 741, 35 Fed. Rep. 866; *Pensacola & A. R. Co.* v. *State*, 3 L. R. A. 661, 25 Fla. 310, 37 Am. & Eng. R. Cas. 579.

Legislative regulation of fares and rates, is limited by the line of reasonableness; if unreasonable they deprive the company of its property without due process of law, and the question whether they are unreasonable is a judicial question.

Budd v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 (35: 176).

The Texas Railroad Commission is not a court. Its proceedings relating to the fixing of rates are administrative and not judicial.

Kilbourn v. *Thompson*, 103 U. S. 168 (26: 377); *Houston T. & B. R. Co.* v. *Randolph*, 24 Tex. 317; *Willis* v. *Owen*, 43 Tex. 41; *United States* v. *Lee*, 106 U. S. 196 (27: 171); *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567; *Interstate Commerce Com.* v. *Lehigh Valley R. Co.* 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177; *Toledo Produce Exchange* v. *Lake Shore & M. S. R. Co.* 3 Inters. Com. Rep. 831.

The Texas act is unconstitutional.

Mercer v. *Hawthorn*, 148 U. S. 172 (37: 410); *Pensacola & A. R. Co.* v. *State*, 3 L. R. A. 661, 25 Fla. 310, 37 Am. & Eng. R. Cas. 579.

The commission's rates are confiscatory.

Messrs. Alexander G. Cochran, Winslow S. Pierce and *R. S. Lovett*, for the International & Great Northern Railroad Company, Cross, complainant and appellee.

388] *Mr. Justice* **Brewer** delivered the opinion of the court:

The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is, in effect, a suit against the state of Texas, brought by a citizen of another state, and, therefore, under the 11th Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a state is to be treated as an action against the state has been of late several times carefully considered by this court, especially in the cases of *Ex parte Ayers*, 123 U. S. 443 (31: 216), by *Mr. Justice* Matthews, and *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (35: 363), by *Mr. Justice* Lamar. In the former of these cases it was said (p. 505 [229]):

"To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

And in the latter (p. 9 [365]):

"It is well settled that no action can be maintained in any Federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This *immunity [389] of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Ex parte Ayers*, 123 U. S. 443 (31: 216); *Louisiana* v. *Jumel*, 107 U. S. 711 (27: 448); *Antoni* v. *Greenhow*, 107 U. S. 769 (27: 468); *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446 (27: 992); *Hagood* v. *Southern*, 117 U. S. 52 (29: 805).

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the 11th Amendment, an action against the state. *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 (6: 204); *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 (21: 447); *Tomlinson* v. *Branch*,

82 U. S. 15 Wall. 460 [21: 189]; *Litchfield* v. *Webster County*, 101 U. S. 773 [25: 925]; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 [29: 200]; *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531 [23: 623]; *Poindexter* v. *Greenhow*, 114 U. S. 270 [29: 185]."

[390] *Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates is the state, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of state officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the state being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the state can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the state is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part.

Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act [391] under it in the matter of assessment *or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. In *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 452 [27: 992, 994], it was said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government.

"In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. See *Mitchell* v. *Harmony*, 54 U. S. 13 How. 115 [14: 75]; *Bates* v. *Clark*, 95 U. S. 204 [24: 471]; *Meigs* v. *McClung*, 13 U. S. 9 Cranch, 11 [3: 659]; *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 [10: 264]; *Brown* v. *Huger*, 62 U. S. 21 How. 305 [16: 125]; *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 363 [18: 863].

Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts. *Mercer County Supra.* v. *Coeles*, 74 U. S. 7 Wall 118 [19: 86]; *Lincoln County* v. *Luning*, 133 U. S. 529 [33: 766]; *Chicot County* v. *Sherwood*, 148 U. S. 529 [37: 546].

We need not, however, rest on the general powers of a Federal court in this respect for in the act before us express authority is given for a suit against the commission to accom [392] plish that which was the specific object of the present suit. Section 6 provides that any dissatisfied "railroad company, or other party at interest, may file a petition" "in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant." The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis county, but in Travis county. The language differing from that which ordinarily would be used to describe a court of the state was selected apparently in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts. The Circuit Court for the Western District of Texas is "a court of competent jurisdiction in Travis county. Not only is Travis county within the territorial limits of its jurisdiction, but also Austin, in that county, is one of the places at which the court is held. 23 Stat. at L. 85. It comes, therefore, within the very terms of the act. It cannot be doubted that a state, like any other government, can waive exemption from suit. Were this in terms a suit against the state, if by express statute the state had waived its exemption and consented that suit might be brought against it by name in any court of competent jurisdiction in Travis county, it might well be argued that thereby it consented to a suit, brought by a citizen of another state, in the Circuit Court of the United States for the Western District of Texas, sitting in Travis county, on the ground that the limitations of the 11th Amendment to the Federal Constitution simply create a personal privilege which can at any time be waived by the state. However, it is unnecessary to go so far as that, for

this cannot, for the reasons heretofore indicated, in any fair sense be considered a suit against the state.

Still another matter is worthy of note in this direction. In the famous *Dartmouth College Case*, 17 U. S. 4 Wheat. 518 [4: 629], it was held that the charter of a corporation is a contract protected by that clause of the National Constitution, which prohibits a state from passing any law impairing the obligation of contracts. The International & Great Northern Railroad Company is a corporation created in the state 393 of Texas. The *charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand one obligation assumed by the state was that it would not prevent the company from so constructing and operating the road. If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state which it could not repudiate. Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, is a question not as yet determined. It is at least a question which arises as to the extent to which that contract goes and one in which the corporation has the right to invoke the judgment of the courts; and if the corporation, a citizen of the state, has a right to maintain a suit for the determination of that question, clearly a citizen of another state, who has, under authority of the laws of the state of Texas, become pecuniarily interested in, equitably, indeed, the beneficial owner of the property of the corporation, may invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls. Our conclusion from these considerations is that the objection to the jurisdiction of the circuit court is not tenable, and this, whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States.

Passing from the question of jurisdiction to the act itself, there can be no doubt of the gener- 394 al power of a state to *regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. *Stone* v. *Farmers Loan & T. Co.* (*Railroad Commission Cases*) 116 U. S. 307 [29:636]. No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the state.

Specific objections are made to the act, on the ground that, by section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, cannot be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission.

It is enough to say in respect to these matters, at least so far *as this case is concerned, [395 that it is not to be supposed that the legislature of any state, or a commission appointed under the authority of any state, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a state, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity. So that if in any case, there should be any mistaken action on the part of a state, or its commission, injurious to the rights of a railroad corporation, any citizen of another state, interested directly therein, can find in the Federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the commission are not conclusive, they are at least prima facie evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains un-

challenged—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether 396] any penalties are imposed for a *violation of the rules prescribed, or whether the rates shall be conclusive or simply prima facie evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties and the provis on, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation—a tax law. There may be incorporated under such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by nonpayment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for non payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that the two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

397] *It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In *Chicago, R. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 [24: 94], and *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 [24: 97], the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by *Mr. Justice* Miller, in *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 569 [30: 244, 248], 1 Inters. Com. Rep. 31, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Stone* v. *Farmers Loan & T. Co.* (*Railroad Commission Cases*) 116 U. S. 307, 331 [29: 634, 644], and while the right of control was reaffirmed *a limitation on that [398 right was plainly intimated in the following words of the *Chief Justice:*

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of *Dow* v. *Beidelman*, 125 U. S. 680, 689 [31: 841, 843], 2 Inters. Com. Rep. 56. Again, in *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 458 [33: 970, 981], 3 Inters. Com. Rep. 209, it was said by *Mr. Justice* Bradley, speaking for the majority of the court:

"The question of the reasonableness of a

rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339, 344 [36: 176, 179], is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. *New York*, 143 U. S. 517 [36: 247], 4 Inters. Com. Rep. 45, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground. 399] *These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility *of handling, etc., it is re- [400 cognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in the case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates It is not therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of the quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question, Were the rates, as prescribed by the commission, unjust and unreasonable? The bill, it will be remembered, was filed by a second mortgagee. The railroad company was made a defendant, and filed a cross bill. Each of these bills contains a general averment that the rates are unjust and unreasonable. That in the original bill, which was filed April 30, 1892, or some six or seven months after the action of the commission, is in these words:

"Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust, and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant company or defendant receiver without serious and irreparable loss to it, and serious and irreparable injury to and destruction of the property, rights, and interests of your orator and the beneficiaries of its trust as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory, and *are unreasonably [401 low, and the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of revenues derived from the operation of said International & Great Northern Railroad, aggregating more than $200,000 per annum, and that the revenues from said railroad, so reduced and diminished, would be inadequate and insufficient to provide for the payment of the interest upon the prior obligations of the defendant railroad company, recited in paragraph 4 hereof, and the interest upon the second mortgage bonds secured by said mortgage to your orator as trustee, after providing for the expenses of operating said lines of railroad and property, and maintaining the same in proper order and good working condition, so that the traffic and business of said road, and of every part thereof shall at

all times be conducted with safety to person and property, and with due expedition."

It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character and effect of the rates, yet it is not to be ignored. There are often in pleadings general allegations of mixed law and fact, such as of the ownership of property and the like, which standing alone are held to be sufficient to sustain judgments and decrees, and yet are always regarded as qualified, limited, or even controlled by particular facts stated therein. It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable. Yet it must be noticed that at first answers were filed, tendering issue upon the matters of fact, and testimony was taken, the extent of which, however, is not disclosed by the record. After that the defendants applied for leave to withdraw their answers and file demurrers. It is not to be supposed that this was done thoughtlessly. But one conclusion *can be drawn from that action, and that is that upon the taking of their testimony defendants became satisfied that the particular facts were as stated in the bills, and that the conclusions to be drawn from such facts could not be overthrown by any other matters. Hence, if it appears that the facts stated in detail tend to prove that the rates are unreasonable and unjust, we must assume, as against the demurrers, that the general allegation heretofore quoted is true, and that there are no other and different facts which, if proved, might induce a different conclusion, and compel a different result.

What then, are the special facts disclosed in the several bills? It appears that there is a bonded indebtedness of over $15,000,000, and in addition capital stock to the amount of $9,755,000; that the bonds and stock were issued for and represent value, and that the rates theretofore existing on the road were not sufficient to enable the company to pay all the interest on the bonds. At the time suit was commenced the first mortgage bonds outstanding amounted to $7,054,000, drawing 6 per cent interest; the second mortgage bonds to $7,954,000, drawing also 6 per cent interest. The stockholders had never received any dividends whatever upon their investment, but on the contrary (as appears from the cross bill filed subsequently to the commencement of the suit) they had been forced to pay a cash assessment of over a million of dollars, or about 12 per cent of the face value of the stock, for the purpose of providing in part for the interest upon the first mortgage bonds; the holders of those bonds had been compelled to accept, and had accepted, in payment of one half of the accrued and defaulted interest—a sum exceeding $750,000—deferred certificate of indebtedness bearing interest at the rate of 5 per cent; the holders of the second mortgage bonds had been called upon to fund, and substantially all had consented to fund, passed due interest, amounting to upwards of $1,250,000, in third mortgage bonds, bearing 4 per cent interest, and they had also been required to reduce, and substantially all had agreed to reduce, the interest on their bonds to 4½ per cent per annum for the period of six *years, and thereafter [403 to 5 per cent per annum. For about three years the road had been in the hands of a receiver, appointed on account of the default of the company in the payment of its obligations. A statement in detail was incorporated in the bill of the earnings and operating expenses of the road during the years 1889 and 1890, and the first nine months of 1891, which was supplemented by a like statement in the cross bill subsequently filed of the earnings and expenses for the entire year 1891 and the first three months of 1892. These statements show the following figures:

*1889:	Earnings	$3,[illegible],185 14
	Operating expenses, exclusive of taxes	2,[illegible] 90
	Surplus	[illegible] 24
1890:	Earnings	3,[illegible] [illegible]
	Operating expenses, exclusive of taxes	3,[illegible] 09
	Surplus	[illegible] 24
1891:	Earnings	3,[illegible],641 79
	Operating expenses, exclusive of taxes	[illegible] 33
	Surplus	[illegible] 59
Three months of 1892:		
	Earnings	[illegible] 18
	Operating expenses, exclusive of taxes	[illegible] 87
	Deficit	[illegible] 65*

The bill also contains a tabular statement of the revenue per ton per mile derived from the operation of the road during the years 1883 to 1893, inclusive, as follows:

*Revenue	per ton	per mile for	1883 (in cents)	2.03
"	"	"	1884	1.90
"	"	"	1885	1.71
"	"	"	1886	1.65
"	"	"	1887	1.38
"	"	"	1888	1.33
"	"	"	1889	1.44
"	"	"	1890	1.[illegible]
"	"	"	1891 (first nine months)	1.3*

*The mileage owned and operated by [404 the company within the state of Texas amounts to 825 miles. There had been necessarily expended in cash in the construction and equipment of its road more than $50,000 per mile and it could not be replaced for less than $30,000 per mile. There is also this allegation in the cross bill:

"That the lines of railway of your orator's company, have at all times been operated as economically as practicable, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated. That for the year ending June 30, 1892, there were employed by your orator's company seventeen general officers, who received during said year an average daily compensation of $12.64, and, exclusive of its general officers, all of its employés during and for the year ending June 30, 1892, received an average daily compensation of $2.01, and that at all times your orator has secured the service of

its officers and employés as cheaply as practicable, and has employed no more than necessary, and that the above were fair and reasonable rates of pay. That at all times the International & Great Northern Railroad Company has secured all supplies, material, and property, of whatever character, for the operation of its road at the cheapest market price and at as low rates as the same could be secured, and has secured and used no more than actually necessary in the operation of the road."

In the amendment to the cross bill, filed in March, 1893, is given a table showing the actual reductions in amounts received by the railroad company for the transportation of the different classes of goods under the operation of the new tariffs up to August 31, 1892, and amounting to $159,694.51, and also a table showing the per cent of reductions as to different articles—varying from 5 per cent on cement to 54.90 per cent on grain in carloads. The bill also, in general terms, negatives the probability of any increase in amount of business to compensate for the reduction in rates, a negation sustained by the figures given in the 405 amended bill as to the *actual effect upon the receipts. It also contains a general averment that the rates on interstate business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the state.

As against these facts the attorney general presses these matters: In the table in the bill heretofore referred to, showing earnings and expenses during the years 1889 and 1890, and the first nine months of 1891, there is this item, several times repeated, "balance of income account," and this on September 30, 1891, is stated at $3,795,785.68. Of what this account is composed we are not informed (possibly there was included within it the proceeds of the land grant, which, as we are told, was made by the state to the corporation) but, whatever it includes, it was on January 1, 1889, as stated, $2,612,118.68, which would make the increase of that account during the two years and nine months to be $1,183,667. Confessedly no interest was paid during those years, and that amounted each year to something like $900,000, or nearly two millions and a half for the two years and nine months. It is obvious that, no matter what may have been in the bookkeeping of the company included in this account, or how much or from what sources in prior years the road had accumulated this balance the increase during the time stated did not equal the accruing interest. The attorney general also notices the report for the year ending June 30, 1892, made by the company to the railroad commission, a copy of which is attached as an exhibit to the amendment to the cross bill, and from that he tabulates a statement which, as he contends, shows that the earnings during that year were sufficient to pay the operating expenses and fixed charges. We give the table as he has prepared it:

406]*"Gross earnings from operation		$3,568,690 26
Less operating expenses		2,986,204 12
Income from operation		$582,486 14
To which should be added amounts expended for 'cost of road, equipment, and permanent improvements,' admitted to have been included in operating expenses		302,085 77
Dividends on (compress) stocks owned		8,020 00
Total income		$892,591 91
Deductions from Income.		
Interest on funded debt accrued during the year, viz:		
On $7,954,000 first mortgage bonds at 6 per cent	$477,240 00	
On $7,054,000 second mortgage bonds, one month, at 6 per cent	35,270 00	
On $7,054,000 second mortgage bonds, eleven months, at 4½ per cent	290,977 50	
Total interest accrued	$803,487 50	
Rental paid Colorado River Bridge Company	14,583 32	
Taxes	28,951 35	
Total deductions		$847,022 17
Surplus after paying operating expenses proper, interest accrued on bonds, taxes, etc.		$45,569 74"

But this table ignores that which is disclosed in the cross bill, to wit, $750,000 in certificates of indebtedness, bearing interest at five per cent, and $1,250,000, third mortgage bonds, bearing four per cent interest, the interest on which sums would exceed all the apparent surplus. These items *also appear in the [407 report, under the head of current liabilities, the total balance of which on July 1, 1892, is given as $3,772,062.94, which sum may not unreasonably be taken as showing by how much the company has fallen short of paying its operating expenses and fixed charges. Again, the sum of $302,085.77 appears in that table, under the description "Cost of road, equipment and permanent improvements, admitted to have been included in operating expenses," and is added to the income as though it had been improperly included in operating expenses. But before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that all of this sum was expended upon the road as it was. Among the items going to make up this sum of $302,085.77 is one of $113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails, except as included within this amount. Now, it goes without saying that in the operation of every road there is a constant wearing out of the rails and a constant necessity for replacing old with new. The purchase of these rails may be called permanent improvements, or by any other name, but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "renewals of rails and ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company. Certainly the mere title, under which these expenditures are once stated, is not sufficient to overthrow the facts so fully and clearly shown that the stockholders have never received any dividends; that in order to meet

the accumulating interest on the bonds they have had to put their hands in their pockets and advance a million and over of dollars. 408]*Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures.

Further, the attorney general asserts that there are five trunk lines, of which the International & Great Northern road is one, paralleling each other, and thus dividing the business of the territory through which they pass; that the state of Texas had made large donations of land to railroad companies, and that, as appears from its executive documents, this railroad company had received a donation of 3,852,320 acres to aid in its construction, as well as exemption of all its property from taxation for twenty-five years. He also calls attention to the financial depression which has of late years pervaded every avenue of trade, and adds a table from the report of the commissioner of agriculture of Texas, showing as to different articles produced in that state an increase in the amount of product and a decrease in the prices received therefor; all of which considerations, he earnestly insists, affect the question of the reasonableness of the rates prescribed.

None of the matters mentioned in the foregoing paragraph appear in the pleadings or elsewhere in the record, and it is, therefore, doubtful to what extent they may be taken into consideration. If we may take judicial notice of the five parallel roads, must we also assume that the existence of the other four diminishes the business of the International & Great Northern, and that, if they had never been built, all the business which now passes over the five would have been carried by the one? May not the topography of the country be such as to to prevent any of the business of the other roads from ever coming to the International & Great Northern, even if, without them, it was obliged to seek water or wagon transportation? May not the building of those other roads have increased the population and business to such an extent that the overflow has, so far from diminishing, really resulted in an increase of the business of the International & Great Northern? If there has been a division of business, has there not also been a competition by which the rates have been reduced, and reduced to such an extent as to forbid the propriety of any further reduction? If we may take judi-409]cial *notice that the state made a grant of three million and odd acres to the company, must we also take notice of the value of that land, of its sale, and the amount realized therefrom? While undoubtedly there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the state; and is the report of the commissioner of agriculture of the state to be considered as evidence before us, and accepted as substantially correct, both as to product and prices? And if the depreciation of prices, as stated in said report, be accepted as correct, will such depreciation uphold a compulsory reduction of the rates of transportation to such an extent that some of those who have invested their money in railroad transportation receive no compensation therefrom? Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the state of Texas have operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for service as to make the carrying on of that business result in a continued loss. In the one case the law is powerless to prevent injury; in the other it is used to work injury. Counsel suggest that the state itself may construct and operate railroads, and then may properly make rates so low that the business is done at a loss. They refer to the postal system of the United States which, carried on for the common welfare, not infrequently results in a loss which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast through taxation upon the general public, and all bear their proportionate share of that loss which is incurred in *securing a common benefit, while the [410 scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature. Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?

The act of 1853, to which reference has already been made, contained a section looking to the acquisition by the state of the title to railroad property. Section 17 of the acts (Tex. Gen. Laws, 1853, p. 58) is as follows:

"If the legislature of this state shall at any time make a provision by law for the repayment to any such company of the amount expended by them in the construction of said road, together with all moneys for permanent fixtures, cars, engines, machinery, chattels, and real property then in use for the said road, with all moneys expended for repairs or otherwise, and interest on such sums at the rate of twelve per centum per annum, after deducting the amount of tolls, freights, passage money, and all moneys received from the sale of lands donated by the state to said company, with twelve per centum per annum interest on all such sums, then the road, with all its fixtures and appurtenances aforesaid, and all the lands

donated to the same by the state and remaining unsold, shall vest in and revert to the state: *Provided*, That the state shall not be required to pay or allow a greater rate of interest on any amount of the money so expended by any company which shall have been borrowed from this state than the state shall have received for the same from such company."

This section, as will be perceived, provides 411] for the payment *of interest at the high rate of 12 per cent on the difference between what the company has paid out and what it has taken in, and to that extent evidences the thought of the state that justice required the return to the builders of railroads of something more than the actual cost as the condition of depriving them of the title. It is only significant, however, as an expression of the thought of the state at the time; for, were the provision ever so unjust, every corporation which, after the passage of the act, invested its money in building a road would do so with the knowledge that that was the condition upon which the investment was made, and could not, therefore, challenge its validity.

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was $40,000,000; it cannot be replaced to-day for less than $25,000,000. There are $15,000,000 of mortgage bonds outstanding against it, and nearly $10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employés have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over $150,000. Can it be that a tariff 412] which under these *circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established the stock, which represents two fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay *the interest on the bonded debt, and that 413] the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations that the decree as entered must be reversed in so far as it retains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.

Decree accordingly.

JOHN H. REAGAN ET AL., *Appts.*,
v.
THE MERCANTILE TRUST COMPANY,
Trustee, ET AL.
(No. 1.)

(See S. C. Reporter's ed. 413-418.)

Railway company subject to state regulation—rates established by railroad commission.

1. The Texas & Pacific Railway Company is, as to business done wholly within the state, subject to

the control of the state in all matters of taxation, rates, and other police regulations.

2. So much of the decree of the United States circuit court in this case as restrains the state railroad commissioners from proceeding under the railroad commission act to establish reasonable rates and regulations is set aside, but so much of it as restrains the enforcement of the rates already established is affirmed.

[No. 1167.]

Argued April 13, 1894. Decided May 26, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the Texas & Pacific Railway Company from continuing in effect the rates or tariffs of the Railroad Commission of Texas, and perpetually enjoining the defendants, The Railroad Commission of Texas, and John H. Reagan *et al.*, members of said commission, and Charles A. Culberson, attorney general of said state and their successors, from instituting any suits to recover penalties under the law of Texas, of April 3, 1891, or under or by virtue of any of the tariffs or orders of said commission, etc., and also perpetually enjoining said railroad commission and said Reagan *et al.*, from making any further tariff or tariffs, etc., and also decreeing that the rates and tariffs heretofore made by said commission, and described in the complaint are unreasonable, unfair, and unjust, and that they are cancelled and null and void. *Reversed in part, and affirmed in part.*

The facts are stated in the opinion.

Messrs. **C. A. Culberson,** *Atty. Gen. of Texas,* **H. C. Coke** and *W. S. Simkins* for appellants.

Messrs. **John F. Dillon, E. B. Kruttschnitt, John J. McCook, Winslow S. Pierce,** *Alexander G. Cochran, R. S. Lovett* and *T. J. Freeman* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The case is similar to that just decided, in which the same parties were appellants and the Farmers' Loan & Trust Company and the International & Great Northern Railroad Company, appellees. It was commenced by the Mercantile Trust Company in the same court against the appellants and the Texas & Pacific Railway Company, with like purpose to restrain the enforcement of the railroad commission act, and with like result. The Mercantile Trust Company was trustee in a deed of trust executed by the Texas & Pacific Railway Company to secure an issue of bonds, and, as a citizen of New York, invoked the jurisdiction of the Federal court.

There are some matters of difference between the two cases which call for special notice. The Texas & Pacific Railway is a corporation organized under the laws of the United States (16 Stat. at L. 573) and by reason of that fact it is earnestly insisted by counsel for it and the Trust Company that it is not subject to the control of the state, even as to rates for transportation wholly within the state. The argument is that it receives all its franchises from Congress; that among those franchises is the right to charge and collect tolls, and that the state has not the power, therefore, in any manner to limit or qualify such franchise. This is an important question and deserves consideration, even though in respect to other matters the facts should present a case exactly parallel to that just decided and calling for a like decision; because if the state has no control in the matter the decree should not be affirmed in part but *in toto.*

We are of the opinion that the contention of the railway* and trust companies cannot [415 be sustained, and that the reasoning in the cases of *Thomson* v. *Union Pac. R. Co.* 76 U. S. 9 Wall. 579 [19: 792] and *Union Pac. R. Co.* v. *Peniston,* 85 U. S. 18 Wall. 5, 36 [21: 787, 793], leads to this conclusion.

In the first of those cases these facts appeared: The Union Pacific Railway Company (Eastern Division) a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road to become one link in the transcontinental line known as the Union Pacific system. After its construction, the legislature of Kansas having enacted a law laying certain taxes upon its property, a bill was filed to restrain the collection of those taxes, on the ground that the property of the company was mortgaged to the United States, and that it, under the Congressional grant, was bound to perform certain duties and ultimately pay five per cent of its net earnings to the United States, an obligation which would be greatly hindered if the taxes imposed should be collected. But this contention was not sustained, and while it was said by the Chief Justice delivering the opinion of the court, that Congress had the power to provide an exemption from state taxation in such a case, there was no exemption in the absence of legislation to that effect. This decision was followed by that in the other case, in which a like exemption was sought of the property belonging to the Union Pacific Railroad Company, a corporation created, like the Texas & Pacific Railway Company, by an Act of Congress, and also like the Kansas company, aided by the government in lands and bonds, but here, too, by a majority of the court, the claim of exemption was denied. *Mr. Justice* Strong, in delivering the opinion of the court, said:

"It is, therefore, manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitutions, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of *their power. A tax upon [416 their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thomson* v. *Union Pacific.* It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or

troops, or munitions of war that is taxed, but it is exclusively the real and personal property of the agent, taxed in common with all other property in the state of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government, and, if it is not, it is prohibited by no constitutional implication."

Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the state, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the Act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the 417]nation from this *corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislature of the state, passed in 1873 in respect to it, we are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations.

Another matter of difference between the two cases is this: The entire mileage of the International & Great Northern Railway was within the limits of the state of Texas, while the Texas & Pacific Railway Company owns and operates several hundred miles of road outside the limits of the state. No reference is made in the briefs of counsel to this difference, and probably there is nothing in the facts stated in the bill and cross bill in respect to the earnings, operating expenses, and incumbrances of the property which would in any way affect the conclusion as to the reasonableness of the rates imposed; and we only notice the difference now to guard against the inference that such a fact is always without significance in the consideration of questions as to the reasonableness of rates imposed in one of the states within which the line of the carrier runs.

Beyond these two matters of difference we see nothing that calls for any comment. It is true the figures in respect to earnings, operating expenses, incumbrances, reduction of revenue, etc., are not the same in this as in that case, but still, relatively to each other, they have the same significance, and there are in the bills and cross bills the same general averments. It would be useless, therefore, to encumber the record with a mass of figures for the sake of making it clear that the same conclusion must be reached here as in that case.

*In this case also, as in that, the decision [418 is that so much of the decree of the circuit court as restrains the defendants from proceeding under the railroad commission act to establish reasonable rates and regulations is set aside, but so much of it as restrains the enforcement of the rates already established is affirmed. The costs in this court will be divided between the parties.

JOHN H. REAGAN ET AL., *Appts.*,
v.
THE MERCANTILE TRUST COMPANY, Trustee, ET AL.
(No. 2.)

JOHN H. REAGAN ET AL., *Appts.*,
v.
THE MERCANTILE TRUST COMPANY, Trustee, ET AL.

(See S. C. Reporter's ed. 418, 419).

Cases followed.

The cases of Reagan v. Farmers Loan & T. Co. and Reagan v. Mercantile Trust Co., *ante*, pp. 1014, 1028, followed, and the same decision and decrees made as in those cases.

[Nos. 1168, 1169.]

Submitted April 13, 1894. Decided May 26, 1894.

APPEALS from decrees of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the railroad companies, defendants, from putting or continuing in effect the tariffs of the railroad commission of Texas, mentioned in the complaint, and perpetually enjoining defendants, the railroad commission of Texas, and the attorney general of that state *et al.*, from instituting any suits for the recovery of penalties under the law of Texas, of April 3, 1891, or under or by virtue of any of the tariffs or orders of said railroad commission, etc., and perpetually enjoining said railroad commission from making or issuing any further tariffs or orders, and decreeing that all rates and tariffs heretofore made by said commission and described in the complaint are unreasonable, unfair, and unjust, and declaring them cancelled, void and of no effect, etc. *Affirmed in part, and reversed in part.*

The facts are stated in the opinion.

Messrs. **C. A. Culberson**, Atty. Gen. of Texas, **H. C. Coke** and *W. S. Simkins* for appellants.

Messrs. **John F. Dillon, E. B. Kruttschnitt, John J. McCook, W. S. Pierce,** *Alexander G. Cochran* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

These are cases in which, as in those just decided, the tariff established by the Texas Railroad Commission was challenged, and with like result. The St. Louis Southwestern Rail-
419]way Company, named in the first of these cases, is called by counsel for defendants in their brief "a reorganized bankrupt concern." Its road has a total mileage, including main line and branches, of 572 miles. It would seem to be a railroad which was unwisely built, and one whose operating expenses have always exceeded its earnings. Counsel say that "it is familiarly known in Texas as a 'teazer,' and, if it ever passes beyond this interesting but unprofitable stage, even its friends will be surprised." We are not advised, and we can hardly be expected to take judicial notice of what is meant by the term "teazer," but it is clearly disclosed by the record that this was an unprofitable road.

The Tyler Southeastern Railway Company, named in the second suit, has a short road of ninety miles, and also appears as a "reorganized bankrupt concern," and one whose road has been operated with constant loss. In the record in each case is found two annual reports returned to the railroad commission, one for the year ending June 30, 1891, and the other for that ending June 30, 1892. Comparing the statements in these reports, defendants' counsel say that the business of the roads has largely increased since the establishment of the rates made by the commission, and urge that no complaint can be made of action which has resulted so favorably. But an examination shows that the report for the year ending June 30, 1891, includes only the earnings and operating expenses for the single month commencing June 1, 1891, when the new company took possession and commenced operations; and so the enormous increase spoken of is simply the difference between the earnings and expenses for twelve months and those for one month. The bills, with their amendments, allege a decrease in the tonnage as well as a decrease in the rates.

We think, therefore, the cases come within the reasoning of the prior opinions, and that it will not do to hold that, because the roads have been operating in the past at a loss to the owners, it is just and reasonable to so reduce the rates as to increase the amount of that loss. Hence, the decrees here will be like those ordered in the prior cases.

420] JOHN H. REAGAN, ET AL., *Appts.*, *v.* THE FARMERS LOAN & TRUST COMPANY, Trustee, ET AL. (No. 2).

(See S. C. Reporter's ed. 420.)

Cases followed.

This case is controlled by the cases of Reagan v. Farmers Loan & T.Co (No.1) Reagan v.Mercantile Trust Co. (No.1) and Reagan v. Mercantile Trust Co. (No.2) *ante*, pp. 1014, 1028, 1030, and a like decision and decree made herein.

[No. 1170.]

Submitted April 13, 1894. Decided May 26, 1894.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas, perpetually enjoining the Gulf, Colorado & Santa Fé Railroad Company, from continuing in effect the rates and tariffs of the railroad commission of Texas, described in the complaint, etc., and perpetually enjoining the railroad commission of Texas, and John H. Reagan *et al.*, and Charles A. Culberson, attorney general of said state, and their successors, from instituting any suits from the recovery of penalties, under the law of Texas of April 3, 1891, or under or by virtue of any of said rates or tariffs, etc., and further perpetually enjoining said commission and the members thereof, from making or issuing any further rates or tariffs, etc., and decreeing that the rates and tariffs heretofore made and issued by said commission and described in the complaint are unreasonable, unfair, and unjust, and cancelling them and declaring them to be null and void, etc. *Reversed in part and affirmed in part.*

The facts are stated in the opinion.

Messrs. **C. A. Culberson,** *Atty. Gen. of Texas, H. C. Coke* and *W. S. Simkins* for appellants.

Messrs. **John F. Dillon, E. B. Kruttschnitt, John J. McCook, H. B. Turner, Geo. R. Peck** and **J. W. Terry** for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

This case is controlled by the opinions in the four preceding cases. There are one or two differences of fact, but nothing affecting the merits of the controversy. The Gulf, Colorado & Santa Fé Railroad Company was incorporated by the state of Texas, but a part of its line was constructed through the Indian Territory under authority of an Act of Congress. The figures as to earnings, etc., are also different, but they tend to the same result as to the reasonableness of the rates.

A like decree will be entered in this as in the former cases.

THE PITTSBURG, CINCINNATI, [421 CHICAGO & ST. LOUIS RAILWAY COMPANY, *Plffs. in Err.*, *v.* VICTOR M. BACKUS, as Treasurer of Marion County, Indiana, ET AL.

(See S. C. Reporter's ed. 421-438.)

State taxation—state decision—notice in tax proceedings—Indiana law of March 6, 1891—notice of hearing—due process of law—equal protection of the laws—classifications—mileage basis—decision of special tribunal—evidence of value—immaterial evidence—erroneous assessment.

1. Legislation providing for the assessment of railroad property by a state board, while all other

NOTE.—*As to what is due "process of law,"* see note to Pearson v. Yewdall, 24: 436.

As to 15th Amendment to United States Constitution, its construction and effect, see note to United States v. Reese, 23: 563.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

property in the state is assessed by county officials, is not obnoxious to any provision in the Federal Constitution.

2. The decision of the supreme court of Indiana in this case that the constitution of that state authorizes just the method of assessment adopted in this case, is conclusive upon this court.

3. A statute which names the time and place for the meeting of the assessing board, is sufficient notice in tax proceedings; personal notice to the taxpayer is unnecessary.

4. The construction placed by the supreme court of the state on the Indiana act of March 6, 1891, that the railroad companies are given the right to be present and to be heard before the state board of tax commisioners, is conclusive upon this court.

5. Notice of the valuation and a hearing after the determination by the assessing board as well as before is not necessary: a hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital.

6. Rehearings, or new trials, are not essential to due process of law, either in judicial or administrative proceedings; one hearing, if ample before judgment, satisfies the demand of the Constitution in this respect.

7. Because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, the latter are not therefor denied the equal protection of the laws.

8. The power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing.

9. The Indiana act of March 6, 1891, does not permit nor require the assessment and valuation of property outside the state; it does not require that the valuation of the property within the state shall be absolutely determined upon a mileage basis.

10. Whenever a question of fact is submitted to the determination of a special tribunal, if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.

11. The aggregate value of the entire property of a railroad company which runs through several states, is evidence properly receivable by a board of state assessors and bears upon the question of value of that part in the state making the assessment.

12. A comparison of the assessment placed by the board of state assessors upon the property of a railroad company with that placed by it upon other roads, or portions of roads, within the state, is immaterial.

13. Testimony that the value placed upon the property of a railroad company by the board of state assessors was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a milage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state is not sufficient to impeach its determination.

14. The Indiana Act of March 6, 1891, providing for the assessment of railroad property by a state board of tax commissioners, is constitutional.

[No. 899.]

Argued March 27, 28, 1894. Decided May 28, 1894.

IN ERROR to the Supreme Court of the State of Indiana, to review a decree of that court, affirming the decree of the Superior Court of Marion county, in that state, in favor of the defendants, Victor M. Backus, Treasurer of said county, *et al.*, in an action brought by The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, to restrain the collection of taxes, upon the property of said company. *Affirmed.*

See the same case below, 133 Ind. 625.

Statement by *Mr. Justice* **Brewer:**

On March 6, 1891, the legislature of the state of Indiana passed an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency" (Laws 1891, pp. 199–291) which, expressly repealing "all laws and parts of laws within the purview of this act," provided in itself a complete and comprehensive system of taxation. By it all property of individuals and ordinary corporations was subject to valuation and assessment by county officers, while the assessment of railroad property was committed to a state board of tax commissioners, composed of the governor, secretary of state, auditor of state, and two appointees of the governor. To this board, in addition to *the assessment of railroad [422 property, was given the duty of equalizing the assessment of real estate throughout the state, as well as of entertaining appeals from the decisions of the several county boards. This method of assessing railroad property by a state board, as distinguished from the assessment of ordinary property through county officers, was not by this act for the first time introduced into the legislation of Indiana, though by it some changes were made in the organization of the state board, and in the details of procedure.

By section 129 the board was required to "convene in the office of the auditor of state, on the first Monday of August each year, for the purpose of assessing railroad property and equalizing the assessment of real estate, as provided in this act," and "is hereby given all the powers given to county boards of review." By section 132 authority was given to adjourn from time to time with a proviso that "the duration of their sessions shall not

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation: whether a contract or not; not implied, see note to Tucker v. Ferguson, 22: 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

exceed forty days." Section 3 is in these words:

"Sec. 3. All property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation."

In section 4 it is provided: "Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder."

By section 8 personal property was to be listed for taxation as of the first day of April in each year.

The property of railroad corporations was divided into two classes—railroad track and rolling stock—and by section 78 and 80 defined as follows:

"Sec 78. Such right of way, including the superstructures, main, side or second track and turnouts, turn-table, telegraph poles, wires, instruments and other appliances, and the stations and improvements of the railroad company on such right of way (excepting machinery, stationary engines, and other fixtures which shall be considered personal property) shall be held to be real estate for the purpose of taxation, and denominated 'railroad track.'

"Sec. 80. The movable property belonging **423]** to a railroad *company shall be held to be personal property, and denominated, for the purpose of taxation, 'rolling stock.'"

Between the first of April and the first of June of each year the railroad companies were required to make certain reports to the county auditors. Section 85 is as follows:

"Sec. 85. At the same time that the lists or schedules as hereinbefore required to be returned to the county auditor the person, company, or corporation running, operating, or constructing any railroad in this state shall, under the oath of such person, or the secretary or superintendent of such company or corporation, return to the auditor of state sworn statements or schedules, as follows:

"*First.* Of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the state.

"*Second.* The rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this state.

"*Third.* Showing the number of ties in track per mile, the weight of iron or steel per yard used in the main and side tracks, what joints or chairs are used in track, the ballasting of road, whether graveled, stone, or dirt, the number and quality of buildings or other structures on 'railroad tracks,' the length of time iron or steel in track has been used, and the length of time the road has been built.

"*Fourth.* A statement or schedule showing:

"1st. The amount of capital stock authorized and the number of shares into which such capital stock is divided.

"2d. The amount of capital stock paid up.

"3d. The market value, or if no market value, then the actual value of the shares of stock.

"4th. The total amounts of all indebtedness except for current expenses for operating the road.

"5th. The total listed valuation of all its tangible property in this state. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of state."

*Section 137 provides: **[424**

"Sec. 137. Said board shall also assess the railroad property, denominated in this act as 'railroad track' and 'rolling stock,' at its true cash value, and said board is hereby given the power and authority, by committee or otherwise, to examine persons or papers."

Between April 1, 1890, and April 1, 1891, the plaintiff in error, plaintiff below, was created by the consolidation of several corporations theretofore existing. Its entire length of main track was 1145.87 miles, of which 617.42 miles were in Indiana, 27.99 in Illinois, 403.33 in Ohio, 19.48 in West Virginia, and 47.65 in Pennsylvania. The Indiana portion of the property belonging to this corporation, including both railroad track and rolling stock, was assessed in 1890 at $8,558.053. The assessment of the like property under the act of 1891 amounted to $22,666.470. Thereafter and on April 19, 1892, the company commenced this suit in the superior court of Marion county, to restrain the collection of taxes based upon the assessment of 1891, on the double ground that the act of 1891 was unconstitutional, and that if constitutional, it had been so administered as to create an illegal assessment of the company's property. A tender was made of the amount which would be due according to the valuation placed upon the property in 1890, and, as we understand, this amount has been, under an arrangement between the parties, paid into the different county treasuries. Issue having been joined, the case was heard and a decree rendered finding the equity of the case with the defendants, and denying the application for an injunction. On appeal to the supreme court of the state this ruling was sustained (133 Ind. 513) and to reverse the final decree of that court the plaintiff sued out this writ of error.

Messrs. **John M. Butler,** *S. O. Pickens, Alpheus H. Snow,* and *John M. Butler, Jr.,* for plaintiff in error:

The opinion of the supreme court of Indiana is, in no degree whatever, binding upon this court.

Piqua Branch of State Bank v. *Knoop,* 57 U. S. 16 How. 391, 392 (14: 986); *Ohio L. Ins. & T. Co.* v. *Debolt,* 57 U. S. 16 How. 433 (14: 1004); *Walker* v. *Marks,* 84 U. S. 17 Wall. 651 (21: 745); *Norton* v. *Shelby County,* 118 U. S. 439 (30: 185); *Gormley* v. *Clark,* 134 U. S. 348 (33: 913); *Stutsman County* v. *Wallace,* 142 U. S. 306 (35: 1022); *McPherson* v. *Blacker,* 146 U. S. 22 (36: 873).

The Act of March 6, 1891, denies due process of law to these plaintiffs, respecting the assessment and valuation, for taxation, of their "railroad track" and "rolling stock," in that it does not require any notice to be given to them of the assessments and before said assessments and valuations are made final and absolute; it does not require the state board of tax commissioners to grant to plaintiffs any hearing or opportunity to be heard, for the corrections of errors.

After said assessments and valuations are agreed upon by said state board, and before

they are made final and absolute, it gives to the state board of tax commissioners arbitrary to deny to plaintiffs any hearing at any time.

14th Amendment, § 1.

Due process of law is intended to secure the individual from the arbitrary exercise of the powers of government.

Westervelt v. *Gregg*, 12 N. Y. 209, 62 Am. Dec. 160; *Den* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 276 (15: 374); *Stuart* v. *Palmer*, 74 N. Y. 195, 30 Am. Rep. 289; *San Mateo County* v. *Southern Pac. R. Co.* 13 Fed. Rep. 722.

Three elements,—a competent tribunal, knowledge given to the accused of the charge made against him, and an opportunity given to the accused to defend against such charge,—are of necessity inherent in due process of law.

Railway corporations are persons, within the intent and meaning of these constitutional provisions.

Santa Clara County v. *Southern Pac. R. Co.* 118 U. S. 394 (30: 118); *Pembina Consol. S. Min. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650), 2 Inters. Com. Rep. 24; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 (32: 585); *Home Ins. Co.* v. *New York*, 134 U. S. 606 (33: 1031); *Cooper* v. *Wadsworth Board of Works*, 14 C. B. N. S. 181; *Scott* v. *Toledo*, 36 Fed. Rep. 385; *Palmer* v. *McMahon*, 133 U. S. 669 (33: 776); *Spencer* v. *Merchant*, 125 U. S. 355 (31: 767); *Yick Wo* v. *Hopkins*, 118 U. S. 369 (30: 226).

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority, so as practically to make unjust and illegal discriminations, the denial of equal justice is still within the prohibition of the Constitution.

Henderson v. *Wickham*, 92 U. S. 259 (23: 543); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *Ex parte Virginia*, 100 U. S. 339 (25: 676); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Soon Hing* v. *Crowley*, 113 U. S. 703 (28: 1145); *Paulsen* v. *Portland*, 149 U. S. 30 (57: 637); *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

A hearing or an opportunity to be heard is absolutely essential.

Patten v. *Green*, 13 Cal. 325; *Ireland* v. *Rochester*, 51 Barb. 414; *Garvin* v. *Dausman*, 114 Ind. 429; *Campbell* v. *Dwiggins*, 83 Ind. 482; *Ty'er Twp.* v. *State*, 83 Ind. 565; *Fries* v. *Brier*, 111 Ind. 66; *Johnson* v. *Lewis*, 115 Ind. 492; *McEneney* v. *Sullivan*, 125 Ind. 409.

"Due process of law" requires that the law must give the taxpayer, as a matter of right, an opportunity to be heard.

Hurtado v. *California*, 110 U. S. 535 (28: 230); *Dent* v. *West Virginia*, 129 U. S. 123 (32: 626); *Williams* v. *Albany County Suprs.* 122 U. S. 163 (30: 1089); *State* v. *Dodge County*, 20 Neb. 595; *State* v. *Northern Belle Min. & M. Co.* 12 Nev. 89; *South Platte Land Co.* v. *Buffalo County Comrs.* 7 Neb. 253; *Sioux City & P. R. Co.* v. *Washington County*, 3 Neb. 30; *Patten* v. *Green*, 13 Cal. 325; *People* v. *Reynolds*, 28 Cal. 111; *Los Angeles* v. *Los Angeles City Water Works Co.* 49 Cal. 638; *Cleghorn* v. *Postlewaite*, 43 Ill. 429; *Darling* v. *Gunn*, 50 Ill. 424; *McConkey* v. *Smith*, 73 Ill. 313; *First Nat. Bank of Shawneetown* v. *Cook*, 77 Ill. 622; *People* v. *Ward*, 105 Ill. 620; *Phillips* v. *Stevens Point*, 25 Wis. 594; *Matheson* v. *Mazomanie*, 20 Wis. 191; *Griswold* v. *Union School Dist. of Bay City*, 24 Mich. 262; *People* v. *Saginaw County Suprs.* 26 Mich. 262; *Thomas* v. *Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Whiteford Twp.* v. *Phinney*, 53 Mich. 130; *Phillips* v. *New Buffalo*, 64 Mich. 683; *Leavenworth County Comrs.* v. *Lang*, 8 Kan. 281; *Kansas Pac. R. Co.* v. *Russell*, 8 Kan. 558; *Griffith* v. *Watson*, 19 Kan. 23; *Relfe* v. *Columbia L. Ins. Co.* 11 Mo. App. 374; *Pulaski County Board of Equalization Cases*, 49 Ark. 518; *Brown* v. *Denver*, 7 Colo. 305; *Griffin* v. *Mixon*, 38 Miss. 424; *State* v. *Mulford*, 43 N. J. L. 550; *State* v. *Utter*, 33 N. J. L. 183; *Philadelphia* v. *Miller*, 49 Pa. 440; *Ulman* v. *Baltimore*, 11 L. R. A. 224, 72 Md. 587.

The Act of March 6, 1891, denies to these plaintiffs in error due process of law.

The state board of tax commissioners had no jurisdiction to assess and value, for taxation, the corporate franchises of these plaintiff railway corporations. The only corporate franchise of this company that could be subjected to taxation in Indiana, would be the corporate franchise granted by Indiana, and strictly limited to the railway situated within the boundary lines of Indiana.

Ohio & M. R. Co. v. *Wheeler*, 66 U. S. 1 Black, 297 (17: 133); *Muller* v. *Dows*, 94 U. S. 447 (24: 208); *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527 (27: 1020); *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 375 (34: 368); *Racine & M. R. Co.* v. *Farmers Loan & T. Co.* 49 Ill. 331, 95 Am. Dec. 595; *Quincy R. Bridge Co.* v. *Adams County*, 88 Ill. 615; *Chicago & N. W. R. Co.* v. *Auditor General*, 53 Mich. 79; *California* v. *Central Pac. R. Co.* 127 U. S. 1 (32: 150), 2 Inters. Com. Rep. 153.

The act of March 6, 1891, denies the equal protection of the laws to these plaintiffs.

San Mateo County v. *Southern Pac. R. Co.* 13 Fed. Rep. 722; *Knowlton* v. *Rock County Suprs.* 9 Wis. 419; *Weeks* v. *Milwaukee*, 10 Wis. 258; *Lumsden* v. *Cross*, 10 Wis. 284; *State* v. *Winnebago, L. & F. R. P. R. Co.* 11 Wis. 35; *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 158 (25: 905); *McComb* v. *Bell*, 2 Minn. 295; *Howell* v. *Bristol*, 8 Bush, 493; *Cincinnati Southern R. Trustees* v. *Guenther*, 19 Fed. Rep. 395; *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 31 (25: 992); *Ex parte Virginia*, 100 U. S. 339, 347 (25: 676, 679); *Strauder* v. *West Virginia*, 100 U. S. 303 (25: 664); *Barbier* v. *Connolly*, 113 U. S. 31 (28: 924); *Neal* v. *Delaware*, 103 U. S. 370 (26: 567); *Lent* v. *Tillson*, 140 U. S. 325 (35: 424); *Gilman* v. *Sheboygan*, 67 U. S. 2 Black, 515 (17: 308); *German Nat. Bank of Chicago* v. *Kimball*, 103 U. S. 735 (26: 470); *Albany County Suprs.* v. *Stanley*, 105 U. S. 305 (26: 1044); *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Garvin* v. *Dausman*, 114 Ind. 429; *Campbell* v. *Dwiggins*, 83 Ind. 473; *Kuntz* v. *Sumption*, 2 L. R. A. 655, 117 Ind. 1.

The act of March 6, 1891, permits and, in effect requires the state board of tax commission to assess and value for taxation, in Indiana, the business, business capacity, instruments, properties, facilities, corporate franchises and earnings of the P. C. C. & St. L. R. Co., owned, used, possessed, and earned by it in

states other than Indiana, as an interstate corporation, engaged in the transportation of interstate commerce.

Cleveland, P. & A. R. Co. v. *Pennsylvania* ("*State Tax on Foreign Held Bonds*") 82 U. S. 15 Wall. 319 (21: 186); *Rotterman* v. *Western U. Teleg. Co.* 127 U. S. 424 (32: 232), 2 Inters. Com. Rep. 59; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1 (24: 708); *Leloup* v. *Mobile*, 127 U. S. 648 (32: 314), 2 Inters. Com. Rep. 134; *Philadelphia & S. M. SS. Co.* v. *Pennsylvania*, 122 U. S. 336 (30: 1201), 1 Inters. Com. Rep. 308; *Western U. Teleg. Co.* v. *Seay*, 132 U. S. 473 (33: 409), 2 Inters. Com. Rep. 726; *McCall* v. *California*, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181; *Crutcher* v. *Kentucky*, 141 U. S. 47 (35: 649); *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460 (26: 1067); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114 (34: 394), 3 Inters. Com. Rep. 178; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34 (29: 785); *Fargo* v. *Stevens*, 121 U. S. 230 (30: 888), 1 Inters. Com. Rep. 51; *Lyng* v. *Michigan*, 135 U. S. 166 (34: 153), 3 Inters. Com. Rep. 143; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158), 1 Inters. Com. Rep. 382; *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192 (36: 672), 4 Inters. Com. Rep. 87; *Indiana* v. *Pullman Palace Car Co.* 16 Fed. Rep. 193; *Vermont & C. R. Co.* v. *Vermont Cent. R. Co.* 10 L. R. A. 562, 63 Vt. 1; *Chicago & N. W. R. Co.* v. *Auditor General*, 53 Mich. 79.

Messrs. **Alonzo Greene Smith**, Atty. Gen. of Indiana, **William A. Ketcham**, *Albert J. Beveridge*, and *John W. Kearn*, for defendants in error:

Neither the correctness of the judgment of the state board of tax commissioners as to what really was "the true cash value" of appellant's "railroad track" and "rolling stock," nor the correctness of the construction of the tax law of Indiana by the supreme court of Indiana, nor any alleged defect or "vice of the law", except as the defect is charged to be a violation of the Federal Constitution, can come before this court which adjudges Federal questions only.

Taxation of all property, at its true cash value, thus securing equality of burdens, is the spirit of the Indiana tax law of 1891.

The supreme court of Indiana, construed this law to give to railways, full notice and full opportunity to be heard as a matter of right. This construction of the state law by the state court is conclusive.

Elmwood v. *Marcy*, 92 U. S. 294 (23: 713); *Post* v. *Kendall County Supvrs.* 105 U. S. 669 (26: 1205); *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359 (25: 185).

The mode of valuing railroad property for taxation under this statute is due process of law.

Cincinnati, N. O. & T. P. R. Co. v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 335 (29: 418); *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 239 (33: 895); *Adsit* v. *Lieb*, 76 Ill. 198; *Pacific Hotel Co.* v. *Lieb*, 83 Ill. 608; *Porter* v. *Rockfork, R. I. & St. L. R. Co.* 76 Ill. 598; *State* v. *Runyon*, 41 N. J. L. 104; *Cincinnati, N. O. & T. P. R. Co.* v. *Com.* 81 Ky. 511; *New York* v. *Davenport*, 92 N. Y. 610; *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 7 L. R. A. 374, 52 Ark. 529; *Hannibal & St. J. R. Co.* v. *State Board of Equalization*, 64 Mo. 294.

The 14th Amendment is not to be interpreted as preventing such latitude in the enactment of laws as would prevent the practical operation of the government itself.

Legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

Bell's Gap R. Co. v. *Pennsylvania*, *supra*; *Home Ins. Co.* v. *New York*, 134 U. S. 594 (33: 1025); *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339 (35: 1035), 3 Inters. Com. Rep. 810; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205 (32: 107).

Wherever the constitutionality of such laws has been questioned the laws have been upheld.

Missouri River, Ft. S. & G. R. Co. v. *Morris*, 7 Kan. 210; *Francis* v. *Atchison, T. & S. F. R. Co.* 19 Kan. 303; *Dubuque* v. *Chicago, D. & M. R. Co.* 47 Iowa, 196; *Central Iowa R. Co.* v. *Wright County Supvrs.* 67 Iowa, 199; *Carlisle County Treasurer* v. *Pullman Palace Car Co.* 8 Colo. 320; *Cincinnati, N. O. & T. P. R. Co.* v. *Com.* 81 Ky. 492; *St. Louis, I. M. & S. R. Co.* v. *Worthen*, 7 L. R. A. 374, 52 Ark. 529; *Porter* v. *Rockford, R. I. & St. L. R. Co.* 76 Ill. 564; *Louisville & N. A. R. Co.* v. *State*, 25 Ind. 180, 87 Am. Dec. 358.

The railroad companies are not denied the equal protection of the laws, in the mode by which the board arrives at a judgment of the "true cash value" of their "railroad track" and "rolling stock."

Maine v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Porter* v. *Rockford, R. I. & St. L. R. Co.* *supra*; *Kansas Pac. R. Co.* v. *Riley County Comrs.* 20 Kan. 141; *St. Louis, V. & T. H. R. Co.* v. *Surrell*, 88 Ill. 535; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 (31: 790); *Atty. Gen.* v. *Western U. Teleg. Co.* 141 U. S. 40 (35: 628).

The board was not bound to take the railroad company's appraisement. It might seek its information where, when and in what manner it chose.

Case v. *Dean*, 16 Mich. 12; *St. Louis, V. & T. H. R. Co* v. *Surrell*, *supra*; *Lowell* v. *Middlesex County Comrs.* 9 L. R. A. 356, 152 Mass. 380; *Sterling Gas Co.* v. *Higby*, 134 Ill. 568.

Mere classification of property, business and even citizens, made for the purpose of effectuating government, are not covered by the 14th Amendment.

Horn Silver Min. Co. v. *New York*, 143 U. S. 305 (36: 164), 4 Inters. Com. Rep. 57; *Hall* v. *De Cuir*, 95 U. S. 503 (24: 553); *Bowman* v. *Lewis* ("*Missouri* v. *Lewis*") 101 U. S. 22 (25: 989); *Soon Hing* v. *Crowley*, 113 U. S. 703 (28: 1145); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Wurts* v. *Hoagland*, 114 U. S. 606 (29: 229); *Walston* v. *Nevin*, 128 U. S. 578 (32: 544); *Natal* v. *Louisiana*, 139 U. S. 621 (35: 288); *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 (35: 1051); *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 512 (29: 463); *Hayes* v. *Missouri*, 120 U. S. 68 (30: 578); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253).

There is nothing in the Constitution or laws of the United States which prevents a state

from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction.

Pullman Palace Car Co. v. *Haywood*, 141 U. S. 36 (35: 621); *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 (35: 994), 3 Inters. Com. Rep. 807; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365 (27: 419); *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117 (32: 94).

425] **Mr. Justice* **Brewer** delivered the opinion of the court:

The decision of the supreme court of the state removes from this case all questions of conflict between the act and the constitution of the state, and the only matter remaining for our consideration is whether there is in the act as administered any trespass upon rights which the Federal Constitution secures to the plaintiff. Notwithstanding the elaborate attack made both in brief and argument upon this act it seems to us that its constitutionality has been practically settled by decisions of this court, especially those in *Taylor* v. *Secor* (*State R. Tax Cases*) 92 U. S. 575 [23: 663], and *Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky* ("*Kentucky R. Tax Cases*") 115 U. S. 321 [29: 414]. In both of those cases legislation providing for the assessment of railroad property by a state board, while all other property in the state was assessed by county officials, was held to be obnoxious to no provision in the Federal Constitution. Counsel deny the applicability of those two cases, on account of differences between the constitutions of Illinois and Kentucky and that of Indiana, the constitution of Illinois expressly authorizing the legislature to classify property for taxation, and only requiring uniformity as to the class of property upon which the particular law operates, and that of Kentucky containing no provision requiring taxes to be levied by a uniform method upon all descriptions of property. A sufficient answer to this is that the decision of the supreme court of Indiana in this case is conclusive upon us that the constitution of that state authorizes just the method of assessment adopted in this case.

It is contended specifically that the act fails of due process of law respecting the assessment, in that it does not require notice by the state board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form, **426]** before *the final adjudication. But the difficulty with his argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board, and that is sufficient in tax proceedings; personal notice is unnecessary. In "*State R. Tax Cases*," 92 U. S. 610 [23: 672], are these words, which are also quoted with approval in the *Kentucky R. Tax Cases:*

"This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right, or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked."

Again, it is said that the act does not require the state board to grant to the railroad companies any hearing or opportunity to be heard for the correction of errors at any time after the assessments have been agreed upon by the board, and before they are made final and absolute, or before the final adjournment of the board, and also that it gives to the board arbitrary power to deny to plaintiffs any hearing at any time; but the fact and the law are both against this contention. The plaintiff did appear before the board, and was heard by its counsel and through its officers, and the construction placed by the supreme court of the state on the act—a construction which is conclusive upon this court—is that the railroad companies are given the right to be present and to be heard.

It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board as well as before, we are unable to concur with that view. A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, *satisfies the **[427** demand of the Constitution in this respect. It not infrequently happens in this, as in all other courts, that decisions are announced and judgments entered on the last day of the term, and too late for the presentation or consideration of any petitions for rehearing or motions for a new trial. Will any one seriously contend that a judgment thus entered is entered in defiance of the requirements of due process of law, and that a party, having been fully heard once upon the merits of his case, is deprived of the constitutional protection because he is not heard a second time?

Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so, and the power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classificasion as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing. Prior to the passage of the Court of Appeals Act by Congress, in 1891, a litigant in the circuit court, if the amount in dispute was less than $5000, was given but a single trial and in that court, while if the amount in dispute was over that sum the defeated party had a right to a second hearing and in this court. Did it ever enter into the thought of any one

that such classification carried with it any denial of due process of law?

Again the Act is challenged as permitting and requiring the assessment and valuation of property outside the state. This contention is based largely on the provision in section 80 that the "rolling stock shall be listed and taxed in the several counties . . . in the proportion that the main track used or operated in such county . . . bears to the length of the main track used or operated by such person, company, or corporation," and the requirement in the schedule to be returned to the audit-**428**] or *of state of a statement of the amount of capital stock and indebtedness. We do not think that the matters referred to justify any such imputation. It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the state. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property the language expressing such intention must be clear. Section 79, which refers to the matter of "railroad track," in terms provides that "the value of 'railroad track' shall be listed and taxed in the several counties, townships, cities, or towns in the proportion that the length of the main track in such county, township, city, or town bears to the whole length of the road in this state, except the value of the side or second track, and all the turnouts, and all station houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county, township, city, or town in which the same are located." And while section 80, treating of rolling stock, does not repeat this express limitation, yet it is manifestly implied, not merely from its following immediately after section 79, and from the general scope of the act, but also from the schedule required to be returned to the auditor of state, the first and second clauses of which are as follows:

"*First.* Of the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the state.

"*Second.* The rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this state."

It is obvious that the intent of this act was simply to reach the property of the railroad within the state, and these provisions in respect to apportionment relate simply to apportionment between the different counties, townships, towns, cities, etc., within the state. No intent to **429**] the contrary can be deduced *from the provision requiring the corporation to file a statement of its total stock and indebtedness, for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the state. The stock and the indebtedness represent the property. As said by *Mr. Justice* Miller in *State R. Tax Cases*, 92 U. S. 605 [23: 670]:

"When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock."

In *Franklin County* v. *Nashville, C. & St. L. R. Co.* 12 Lea, 521, 539, the supreme court of Tennessee, in a well considered opinion, which was quoted with approval by this court in *Columbus Southern R. Co.* v. *Wright*, *ante*, p. 238, thus referred to the means of ascertaining the value of a railroad track:

"The value of the roadway at any given time is not the original cost, nor *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Counsel sought in argument to narrow the meaning of the words *"railroad track"[**430** and "rolling stock" as though the two did not include the entire railroad property; but evidently the supreme court of the state construed, and as we think properly, the two terms as embracing all which goes to make up what is strictly railroad property. By section three of the act, it is provided that all property in the state shall be subject to taxation unless expressly exempted. By section four, that when the property of a corporation is taxed to the corporation the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property, or any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms, "railroad track" and "rolling stock." Obviously it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the state to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called "railroad property." And when the statute provides that such property shall be assessed at its "true cash value" it means to require that it shall be assessed at the value which it has, as used, and by reason of its use.

When a road runs through two states it is,

as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two states is ascertained the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless, it is ordinarily true that when a railroad consists of a single continuous line the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by **431**]this court several times *as eminently fair. Thus, in *State R. Tax Cases*, 92 U. S. 608 [23: 671] it was said:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

And again, on page 611 [672]:

"This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. *Minot* v. *Philadelphia, W. & B. R. Co.* ("*Delaware R. Tax*") 85 U. S. 18 Wall. 206 [21: 888]; *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492 [22: 595].

The mileage basis of apportionment was also sustained in *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530 [31: 790]; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613], 3 Inters. Com. Rep. 595; *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217 [35: 994], 3 Inters. Com. Rep. 807; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386 [35: 1051]; *Columbus Southern R. Co.* v. *Wright*, *ante*, p. 238. It is true there may be exceptional cases, and the testimony offered on the trial of this case in the circuit court tends to show that this plaintiff's road is one of such exceptional cases, as for instances, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities and such extra rolling such stock. But whether in any particular case matters are taken into consideration by the assessing board does not make against the validity **432**] of the law, because it does not *require that the valuation of the property within the state shall be absolutely determined upon a mileage basis.

Our conclusion, therefore, is, that this act is not obnoxious to any of the constitutional objections made to it. There remains the further question whether, in the actual administration thereof in this case, there has been any illegal assessment of the property of the plaintiff. It is charged that the valuation was increased from $8,538,053 in 1890 to $23,666,470 in 1891, and it is not to be denied that such a great increase suggests that which is unfortunately too common—an effort to cast an unreasonable proportion of the public burdens upon corporate property. It is stated by counsel for plaintiff in their brief that the increase from 1890 to 1891 in the valuation of all other than railroad property in the several counties through which its road extends was only 43 per cent, while, as appears, that of the property of the plaintiff was more than 150 per cent. Still, it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the state board, can be adjudged illegal.

The bill of exceptions discloses these proceedings on the hearing: The plaintiff offered the record of the action of the state board for the year 1890, showing an assessment, as heretofore stated, so much less than that of 1891, which record was rejected as irrelevant and immaterial. Thereupon the plaintiff offered the record of the proceedings of the board in 1891, which was admitted. This recited the appearance of the plaintiff by its officers, and that they were heard as to the proper valuation. It also contained a table by counties of the assessment as made by the board, closing with this certificate:

"Making liberal allowances for all proper deductions, the state board of tax commissioners has fixed the values of the respective railroads and parts of roads within the state of Indiana for taxation on the first day of April, 1891, as hereinbefore set forth.

*"In arriving at the basis for the esti- [**433** mate of said values the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same."

The return made by the plaintiff to the auditor of state for the year 1891, in accordance with the requirements of the statute, was also given in evidence, which return was upon a blank furnished by the auditor, and shows an aggregate valuation of about $8,090,000. This return was sworn to by the general manager and secretary of the company. The second vice president and general counsel of the company was called as a witness, and, after testifying to his familiarity with the property, and its value, was asked its value in 1890, but, on objection, this testimony was ruled out. He was permitted, however, to give testimony as to the value in 1891, and his answer fixed the aggregate at $8,538,053, the same value that was placed upon the property by the state

board in 1890. He was asked to state the average cash value per mile of the company's property in Indiana and in the other states into which the company's road extended, treating the portion in each state as constituting a unit, separate and distinct from those of the portions in the other states, but an objection to this was sustained, and the testimony offered ruled out. He then testified as to the terminal facilities in the cities of Chicago and Pittsburgh belonging to the plaintiff, and their value, and the absence of terminal facilities of any particular value in any of the cities in Indiana. He was then asked if the plaintiff owned any rolling stock which was used exclusively in one of the five states in which it did business, but this question was ruled out. In response to further questions he testified that the plaintiff had no rolling stock used exclusively within the state of Indiana for special puposes. Certain questions were also asked as to the notice or knowledge which the plaintiff had of the determination made by the state board in 1891 as to the valuation, but we have heretofore held that it is immaterial whether it had any notice 434] *thereof after the decision and prior to the adjournment of the board. The assistant engineer of the plaintiff was also called as a witness, and producing a written statement which he had presented to the state board prior to its determination, which statement goes at length into the mileage in the different states, the gross earnings, per cent of earnings, and the value of the track, testified that the facts in such written statement were true. Another witness, the assistant comptroller of the plaintiff, was asked what per cent of the gross receipts of its Indiana business was derived from commerce, beginning and ending wholly within the state and what from interstate business; but, on objection, this testimony was ruled out. The secretary of state, who was a member of the state board, was also called, and testified that the members of the board did not make an official examination or inspection of the railroad track and rolling stock of the plaintiff, being personally acquainted therewith; that they did not summon before them, or examine under oath, any person or persons acquainted with the true cash value of the property. The plaintiff also offered the return made by the Terre Haute & Indianapolis Railroad Company to the auditor of state for the year 1891, prepared upon the same form as that upon which the plaintiff's return was made, but it was ruled out as irrelevant and immaterial, as well as the action taken by the state board in respect to the valuation of the property of such road. This was, in substance, all the testimony offered by the plaintiff.

The defendant simply called the secretary of state, who testified that in assessing the plaintiff's property no assessment was made, except upon the railroad track and rolling stock of plaintiff within the state, and no assessment was made of any property of value outside the state.

Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the state board, and in this conclusion we concur. The true cash value of the plaintiff's property in the state of Indiana in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the state board. Whenever a question of fact is thus submitted *to the determination of a[435 special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the state government than it rightfully should. The contention is rather that the board made a grievous mistake in placing so high a value, and that it took into consideration property outside of the state, and gave to the property within a value partly deduced from that without the state. The testimony, however, does not sustain this contention.

The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by first ascertaining the total value of the company's property, and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to wit, the value of that part of the company's road in the state of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value as compared with the*general line of the road[436 does not prove that the board did not take those peculiar matters into consideration. On the contrary, the reasonable presumption is that if its attention was called by the company to those facts it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company. Indeed, its certificate is affirmatively that it took into consideration "all other matters appertaining thereto that would assist the board in arriving at a true cash value" of the parts of the road with the state of Indiana. That the aggregate value of the entire property of the company was evidence properly receivable and bearing upon the question of value of that part in Indiana is a proposition which, as we have heretofore said, is clearly established both on reason and authority. There is no evidence that the board had before it or consid-

ered any matter in reaching its determination which was not properly receivable and properly to be considered. A comparison of the assessment placed by the board upon the property of this plaintiff with that placed by it upon other roads, or portions of roads, within the state is immaterial unless coupled with an offer to show an identity in value, so that the case narrows itself down to this: Is testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, sufficient to impeach its determination? This question must be answered in the negative. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meagre testimony.

These are all the questions presented in this record, and notwithstanding the shadow cast upon the action of the board by this large increase in valuation, we are forced to the conclusion not only that the act is not open to the 437 objections *made to its constitutionality, but also that there is no sufficient testimony to impeach the conclusion and determination of the state board. The judgment of the supreme court of the state of Indiana is, therefore, affirmed.

Mr. Justice **Jackson** did not hear the arguments in these cases or take any part in their decision.

Mr. Justice **Harlan** dissenting:

The statute of Indiana of March 6th, 1891, as construed by the supreme court of that state, authorized the state board of tax commissioners, in assessing the "railroad track" and "rolling stock" of the company in the state, to ascertain the market value of its property and interests of every kind, within and without the state, including capital stock, bonds, earnings, franchise, equipment, etc.; and, that being done, to take as the value of the company's track and rolling stock in Indiana for taxation such proportion of that aggregate amount as the number of miles of its road in that state bore to the aggregate miles of its road or roads within and without the state. And by this rule of valuation the state board of tax commissioners seem to have been governed. In the official report by the board of its proceedings for 1891, showing the basis on which the values of the railroads and parts of roads within the state had been fixed, it is said that, "in arriving at the basis for the estimate of said values the board has considered the cost of the construction and equipment of said roads, the market value of the stocks and bonds, and the gross and net earnings of each of said roads, and all other matters appertaining thereto that would assist the board in arriving at a true cash value of the same." The forms of printed returns supplied to railroad companies show that they were required to report such values and earnings in respect of all their property of every kind, wherever situated. Under the mode of assessment pursued, property was taxed in Indiana that had no situs there, which was used in interstate commerce outside of Indiana, and could not properly be included in the company's railroad track and rolling stock in that state. I am of opinion that the statute as construed and *enforced by the state im- 438 posed illegal burdens upon interstate commerce under the guise of a valuation for purposes of taxation of property within the state. The board had no authority to impart to the value of railroad track and rolling stock, within the state, any part of the value of the company's various interests and property without the state.

There was some contention at the bar as to whether the state board, in fact, proceeded according to the rule of valuation to which I have referred. If I am in error in saying that it appears, affirmatively, from the record, that the board applied that rule, there can be no doubt that the state court construed the statute as authorizing the adoption of such a rule. It is equally clear that evidence to prove that the board acted upon that rule was offered and excluded, and that a proper exception was taken. Such action upon the part of the court was itself sufficient to raise the question whether the statute, as interpreted by the state court, and as administered by the state authorities, was not obnoxious to the objection that it permitted illegal burdens to be imposed, under the guise of local taxation, upon interstate commerce, and the taxation of property not within the jurisdiction of Indiana.

Without referring to other grounds discussed at the bar, I dissent from the opinion and judgment in this case upon the grounds above stated.

I dissent upon the same grounds from the opinion and judgment in cases 908 and 900.

I am authorized by *Mr. Justice* **Brown** to say that he also dissents.

(No. 900.)

Mr. Justice **Brewer** delivered the opinion of the court.

*Case No. 900, brought by the Indianap- 439 olis & Vincennes Railroad Company to impeach the assessment made by the same board, in the same year, of its property, is so nearly like this in its material features that no separate statement of the special facts is necessary, and in that case, too, the judgment of the supreme court of the state of Indiana will be affirmed.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*,

v.

VICTOR M. BACKUS, as Treasurer of Marion County, Indiana.

(See S. C. Reporter's ed. 439-447.)

Case followed—review of state court—valuation of property—railroad—interstate commerce—value of railroad—continuous road—state power to tax—rule of taxation—property engaged in interstate commerce.

1. Pittsburg, C. C. & St. L. R. Co. v. Backus, *ante*, p. 1031, followed.
2. It is not within the province of this court to review any question as to the admission or rejection of testimony in the state court which does not bear directly upon some matter of a Federal nature.
3. If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property, and then determines the value of that within the state, upon the mileage basis, that is not a valuation of property outside of the state, if no special circumstances exist to distinguish between the conditions in the two states such as terminal facilities of enormous value in one and not in another.
4. It is not necessary that the assessing board of a state in order to keep within the limits of state jurisdiction shall treat the part of a railroad within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road.
5. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, this is not placing a burden upon interstate commerce, beyond the power of the state, simply because the value of that railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing.
6. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately; it is the aggregate of those values plus that arising from a connected operation of the whole.
7. When a railroad runs into two states each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road.
8. While no state can impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it has the unquestioned right to place a property tax on the instrumentalities engaged in such commerce.
9. The rule of property taxation is that the value of the property is the basis of taxation; the value of property results from the use to which it is put and varies with the profitableness of that use.
10. The rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled the same as

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NOTE.—*As to what is due "process of law,"* see note to Pearson v. Yewdall, 24: 436.

As to 14th Amendment to United States Constitution, its construction and effect, see note to United States v. Reese, 23: 563.

As to direct taxes, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County, 10: 1022.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations, see note to Providence Bank v. Billings, 7: 959.

As to exemption from taxation; whether a contract or not; not implied, see note to Tucker v. Ferguson, 22: 805.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

State and Federal power over commerce; what is a regulation of interstate commerce; license tax on peddlers, agents and drummers; police power.

The power of Congress to regulate commerce between the states attaches only upon the actual delivery of property to a common carrier for transportation, or the actual commencement of its transfer to another state and continues until it has reached such other state and becomes mingled with the general mass of property therein. Re Greene, 52 Fed. Rep. 104.

Shipments between points within the same state do not constitute interstate commerce because made on a railroad which extends into another state. Campbell v. Chicago, M. & St. P. R. Co. 17 L. R. A. 443, 4 Inters. Com. Rep. 203.

A statute denying the right of a corporation of another state to bring an action within the state until it has filed its articles of incorporation therein is inoperative as to an action brought for the purchase price of goods sold within the state by commercial agents or drummers, as this constitutes interstate commerce. Bateman v. Western Star Mill. Co. 4 Inters. Com. Rep. 260.

The imposition by the state of a franchise tax based upon the capital of a telegraph company employed within the state is not an imposition on interstate commerce. People v. Campbell, 70 Hun, 507.

The legislative regulation of tolls for the use of a bridge owned by a domestic corporation and connecting two states is not a regulation of interstate commerce. Com. v. Covington & C. Bridge Co. 14 Ky. L. Rep. 836, 54 Am. & Eng. R. Cas. 461.

Making a railroad company liable for fires set by its engines or on its right of way is not a regulation of commerce among the states. McCandless v. Richmond & D. R. Co. 18 L. R. A. 440, 38 S. C. 103.

A license fee imposed by a city upon each pole and a mile of wire erected by a telegraph company is not invalid as a restraint upon the instruments of interstate commerce and communication. Philadelphia v. Postal Teleg. Cable Co. 67 Hun, 21.

A state revenue law making the occupation of sample sellers and solicitors a privilege, and requiring all persons selling goods by sample to, or taking orders from consumers, to pay an annual license or privilege tax, is a tax upon interstate commerce in so far as it applies to nonresident drummers selling within the state, for nonresident principals, goods at the time situated or to be manufactured without the state. Hurford v. State, 91 Tenn. 669.

The ordinance of the city of Chicago requiring a license fee for steam tugboats navigating the Chicago river, which boats were engaged in the coasting and foreign trade and in towing vessels engaged in interstate commerce is invalid. Harmon v. Chicago, 147 U. S. 396 (37: 216.)

property engaged in commerce within the state, this does not cast a burden on interstate commerce.

[No. 908.]

Argued March 27, 28, 1894. Decided May 26, 1894.

IN ERROR to the Supreme Court of the State of Indiana, to review a decree of that court, affirming the decree of the superior court of Marion county, in that state, in favor of the defendant, Victor M. Backus, treasurer of said county, in an action brought by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff, to restrain the collection of taxes upon the property of said company, etc. *Affirmed.*

The facts are stated in the opinion.

Mr. **John T. Dye** for plaintiff in error.

Messrs. **Alonzo Greene Smith,** Atty. Gen. of Indiana, **William A. Ketcham,** *Albert J. Beveridge* and *John W. Kern* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

This case is similar to the two just decided, in that it was a suit brought by this plaintiff in the same court, challenging an assessment of its railroad property for the same year, by the same board, with the same result both in the trial and supreme court of the state. Hence it is useless to reconsider the questions decided in those cases as to the constitutionality of the act itself, or those which depend solely upon like testimony. There was, however, in the trial of this case a more elaborate effort to show that the state board included in its assessment the value of property outside the state, and also that the valuation placed nominally upon the property within the state was largely based upon interstate business done by the plaintiff, and thus, as is claimed, to that extent, placed a direct burden upon interstate commerce, which, it is conceded, is beyond the power of the state to cast. It becomes necessary, therefore, to notice a little in detail the testimony which was received, as well as that which was excluded on the hearing.

It may be premised that there was much testimony of a character similar to that given in the other cases. Beyond that, there was a large amount of testimony received as well as some offered and rejected for the purpose of showing what was presented to the board for consideration, the method by *which it [441 reached its conclusions, and the elements which entered into its estimate of value. The principal witness relied on in respect to these matters was the secretary of state, a member of the board. By him it was proved that no witness was sworn and examined, and no inquiry made in that way, as to the value of this property. It appeared that the return made by the company was before the board for consideration. The court ruled out an offer to prove that outside of such return no books, papers, or documents, except Poor's Manual and the Investor's Guide, were produced before the board, or considered by it in making the assessment; that Poor's Manual was used by it for data upon which to

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State legislation prohibiting the sale of an article imitating or resembling butter cannot interfere with the sale of oleomargarine imported from another state, in the original package bearing a United States revenue stamp, by a person holding a United States license for its sale. Waterbury v. Egan, 3 Misc. 355.

A state law is void as an interference with interstate commerce in so far as it requires original packages of baking powder, not deleterious to health, manufactured in another state, by citizens thereof and imported into the former state, to be labeled in any particular manner, and imposes a penalty for such sale when not so labeled. *Re* Ware, 53 Fed. Rep. 788.

A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package, except on a sale of seed in open bulk by farmers to other farmers or gardeners, is void as to seed brought from another state and sold in original packages. Re Sanders, 18 L. R. A. 549, 52 Fed. Rep. 802.

The police power of a state is subordinate to that of Congress to regulate commerce between the states. Com. v. Paul, 10 Pa. Co. Ct. 332.

The power of Congress to regulate commerce among the states does not embrace commerce which is completely internal or between different parts of the same state. Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 (36: 672).

In the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state does not render that business foreign which is otherwise domestic. Lehigh Valley R. Co. v. Pennsylvania, *supra.*

A state statute requiring railway officers to assign the passengers to coaches or compartments set apart for the race to which they belong is a regulation of commerce, which, though valid as applied to domestic passengers, is unconstitutional as applied to interstate passengers. State v. Hicks, 44 La. Ann. 770.

The Maine statute which makes railroad tickets good for six years, with the right of the holder to stop off at usual stopping places, cannot be held to apply to a ticket purchased in Canada for a continuous passage over defendant's road from that Dominion through Vermont and New Hampshire into Maine, since, applied to such a case, the statute would be unconstitutional as interfering with both state and foreign commerce. Lafarier v. Grand Trunk R. Co. 84 Me. 286.

The regulation of the charges of a grain elevator is not a regulation of interstate commerce, although the grain passing through it is brought from another state. Budd v. New York, 143 U. S. 517 (36: 247). 4 Inters. Com. Rep. 45.

A statute prohibiting the shipment out of the state of oysters taken in the waters of the state, while they are in shells, and also prohibiting the taking of such oysters by any person who is not a resident of the state, is not unconstitutional as a regulation of interstate commerce. State v. Harrub, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 95 Ala. 176.

A state statute prohibiting game birds to be killed for the purpose of conveying them out of the state is not an unlawful interference with interstate commerce. State v. Geer, 13 L. R. A. 804, 61 Conn. 144, 3 Inters. Com. Rep. 732.

N. Y. Laws 1846, chap. 62, imposing a duty upon foreign goods sold at auction, as applied to sales not in the original packages in which they were imported, but in the separate packages contained in such original packages, is not an unauthorized interference with commerce by the state. People v. Wilmerding, 62 Hun, 391.

A state statute compelling the shipment of

base the assessment; and specifically that this was the only evidence which it had as to the number of miles owned and leased by the plaintiff, the state in which they were located, and the various incumbrances upon the different lines of road included in the system belonging to the plaintiff. It was shown that plaintiff appeared before the board by its officers, with such statements as they desired to make, and also that other individuals (especially an attorney representing Marion county, one of the counties through which the road of the plaintiff runs) appeared and made arguments. A series of questions was put to the witness, of which this is a sample:

"Q. In the assessment of the Cincinnati, La Fayette & Chicago Railway, extending from Templeton, Indiana, to the Illinois state line," (one of the lines in plaintiff's system and included in the assessment) "in arriving at the basis for the estimate of the value which you placed upon the main line of that road, did you consider the market value of any stocks; and, if so, of what stocks did you consider the market value?"

—but the court ruled the question out on the ground that it was an attempt to inquire into the mental processes of members of the board. At the time counsel for the defendant stated:

"We desire to let the record show at this point, may the court please, that the defendant will interpose no objection to any question asked by the plaintiff as to whether or not the state board of tax commissioners assessed and 442]valued any *bonds, stocks or anything else outside of the state, and that we will not object to any question asked any member of the state board of tax commissioners as to whether or not that board assessed anything else than railroad track and rolling stock inside of the state of Indiana."

The plaintiff did not, however, apparently care to take advantage of this offer. Other questions were put to the witness, like the following:

"In assessing the Indianapolis & St. Louis Railroad, you placed the main track at $27,900 per mile, while you assessed the main track of the Terre Haute & Indianapolis Railroad at $21,800 per mile, being $6000 per mile less than the track of the St. Louis division of the three C's & St. L. or the I. & St. L. railroad. Now, in making this assessment, $21,800 per mile, or $27,900 per mile upon the main track of the St. Louis division of the three C's & St. L., did you or not consider the gross earnings of the three C's & St. L. railway, including earnings derived from carrying freight and passengers from points within to points without the state of Indiana or through the state of Indiana, while engaged as a common carrier in interstate commerce?"

—but the court sustained objections to all of them. The witness was also asked, but not permitted to answer:

"Q. Did you fix the value upon the St. Louis division of the three C's & St. L. railway—I mean did the board—as returned to the auditor of state separately or did you value that road as a part of the three C's & St. L. system in Ohio and in Indiana, and did

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freight within a certain time after delivery, under a penalty for default, is not an unconstitutional regulation of interstate commerce as to freight for shipment out of the state as it does not tend to trammel or obstruct, but to expedite such commerce. Bagg v. Wilmington, C. & A. R. Co. 14 L. R. A. 596, 109 N. C. 279.

A statute prohibiting the manufacture, sale or offer for sale, of any article in imitation of yellow butter, but providing that it shall not prohibit the sale of oleomargine in its real character, free from anything that looks like butter, is not void as a regulation of commerce, even as applied to the sale of oleomargine in the original packages in which it was brought from another state. Com. v. Huntley, 15 L. R. A. 839, 156 Mass. 236.

A merchandise broker may be required as a condition of obtaining a license for that business, to pay a license fee, and, in addition, 2½ per cent upon his gross commission from the business, including that which is wholly interstate. Ficklen v. Shelby County Taxing Dist. 145 U. S. 1 (36:601), 4 Inters. Com. Rep. 79.

A provision of the Federal Constitution prohibiting discrimination by states against the produce, etc., of other states, is not violated by Mo. Rev. Stat. §§ 7211, 7212, 7217, prohibiting the peddling of patent medicines from place to place without a license, and fixing the license fee for peddling. State v. Smithson, 106 Me. 149.

One soliciting orders for goods from house to house cannot refuse to comply with the terms of a police ordinance regulating such business, which applies to all alike, on the ground that he is engaged in interstate commerce because he is working for a person domiciled in another state, and simply exhibits samples and takes orders which are filled by another agent or by express. Titusville v. Brennan, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 143 Pa. 642.

A city ordinance imposing a license on persons canvassing for goods or books within the city is an attempt to regulate interstate commerce in so far as it affects a canvasser for one doing business in another state, even though he has a branch office within the city to supply canvassers. *Re* Nichols, 48 Fed. Rep. 64.

A license fee demanded of a manufacturer's agent employed to sell goods by sample in Louisiana, the good being shipped directly from the factory in another state to the purchaser, is illegal as a tax on interstate commerce. McClellan v. Pettigrew, 44 La. Ann. 356.

Persons engaged in showing samples of goods manufactured by their principal at his residence in another state, and in taking orders for such goods, which are transmitted to the principal to be filled, cannot be compelled to pay a license tax by the state in which they are operating, whether they are within its statutory definition of peddlers or not. *Re* Spain, 14 L. R. A. 97, 47 Fed. Rep. 208.

A statute requiring express companies doing business in a state to pay a license tax of $500 where they operate less than 100 miles and $1000 for over 100 miles, is unconstitutional as an attempted regulation of interstate commerce. Com. v. Smith, 92 Ky. 38.

A state may, until legislation on the subject by Congress, authorize the erection of a bridge across a navigable river within the state not in the line of general commerce. State v. Leighton, 83 Me. 419.

The police power of a state cannot be exercised over interstate transportation of subjects of commerce. Com. v. Chesapeake & O. R. Co. 3 Inters. Com. Rep. 398.

A state cannot prohibit the running of freight

you, having reached a unit of value by considering the whole system, distribute that unit of value according to mileage over the operated and leased lines and parts of roads in Indiana of the plaintiff?"

Another series of questions was propounded, of which the following is one:

"Q. Did you or not, in assessing and fixing the value of the St. Louis division and of the Chicago division and of the leased and operated lines of the three C's & St. L. railway in the state of Indiana, place or add anything to the value of said lines by reason of the fact that it had a franchise?"

443] *Objections were made by the defendant to these questions, which were sustained, but afterwards, when the witness was again on the stand the objections were withdrawn, whereupon the plaintiff withdrew all the questions except the one which we have last quoted, and to that the witness answered, "We did not; no, sir."

These references are probably sufficient to fully present the questions for consideration. It will not be claimed that it is within the province of this court to review any question as to the admission or rejection of testimony which does not bear directly upon some matter of a Federal nature. It will be noticed that no testimony was ruled out showing, or tending to show, what was in fact valued and assessed by the state board. There was also direct testimony that no franchise belonging to the plaintiff was estimated in making the assessment. The inquiry, therefore, in view of the testimony received and that offered and rejected is narrowed to these two matters: First. If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property and then determines the value of that within the state, upon the mileage basis, is that a valuation of property outside of the state, and must the assessing board, in order to keep within the limits of state jurisdiction, treat the part of the road within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road. Second. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, is this placing a

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trains on Sundays, so far as they are engaged in interstate commerce. Com. v. Chesapeake & O. R. Co. *supra*.

A state statute prohibiting freight trains running on Sunday between sunrise and sunset, except with livestock or perishable freight or to complete a trip which can be finished before 9 A. M., is invalid as a regulation of commerce, so far as it applies to interstate freight trains. Norfolk & W. R. Co. v. Com. 13 L. R. A. 107, 3 Inters. Com. Rep. 671, 88 Va. 95.

A contract of shipment to a city in the same state as the place of shipment is not interstate commerce, although the yards in which the freight is unloaded extend into another state, and the freight is actually unloaded in such other state, and the place of business of the consignee is also therein. Scammon v. Kansas City, St. J. & C. B. R. Co. 41 Mo. App. 194.

A package of intoxicating liquors in the possession of a carrier in transit from one state to another for delivery in the latter is interstate commerce and under the exclusive jurisdiction of Congress; and state process for its seizure before broken or delivered to the consignee is void. State v. Intoxicating Liquors, 3 Inters. Com. Rep. 581, 83 Me. 158.

Ark. Act of April 3, 1889, to regulate the sale of wine in Arkansas, in so far as it authorizes the sale of wine made from grapes grown on premises within the state, and prohibits the sale of wine, made out of grapes grown out of the state, violates the Federal Constitution. State v. Deschamp, 3 Inters. Com. Rep. 576, 53 Ark. 490.

A state cannot, under the guise of exerting its police powers or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states. Brimmer v. Rebman, 138 U. S. 78 (34. 862), 3 Inters. Com. Rep. 485; Voight v. Wright, 141 U. S. 62 (35. 678).

A state act making it a misdemeanor to sell cattle without inspection, before slaughter within the state, violates the commerce clause of the Federal Constitution. State v. Klein, 3 Inters. Com. Rep. 573, 126 Ind. 68.

The exaction of a license fee for the privilege of purchasing goods to be shipped to another state is not unconstitutional as a tax upon interstate commerce. Rothermel v. Meyerle, 9 L. R. A. 566, 3 Inters. Com. Rep. 315, 136 Pa. 250.

A license tax on peddlers is not an unconstitutional regulation of commerce. Re Wilson, 12 L. R. A. 624, 8 Mackey, 341, State v. Emert, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, 103 Mo. 241.

A law which imposes a license tax on peddlers is an attempted regulation of commerce and unconstitutional so far as it applies to one going from house to house selling by samples, forwarding the orders to his principal in another state, and on receipt of the goods delivering them personally. *Ex parte* Murray, 3 Inters. Com. Rep. 574, 93 Ala. 78; McLaughlin v. South Bend, 10 L. R. A. 357, 126 Ind. 171.

The solicitation of orders for books within a city by an agent who is, like his principal, a citizen of another state to which all orders are sent to be filled, such agent neither delivering the books nor collecting any money, constitutes interstate commerce and an ordinance requiring a license for doing such business is void. Re White, 11 L. R. A. 284, 3 Inters. Com. Rep. 531, 43 Fed. Rep. 913.

One bringing goods into Kentucky from another state for the purpose of peddling them is liable, the same as a citizen of Kentucky, to pay a peddler's license imposed by the Kentucky statute, and to all the penalities for refusing to do so. The statute does not violate the interstate commerce clause of the United States Constitution. Rash v. Farley, 91 Ky. 344.

A tax on the privilege of selling fertilizers is a tax on the fertilizers and therefore invalid, so far as it relates to fertilizers brought from other states, being a tax on interstate commerce. American Fertilizing Co. v. North Carolina Board of Agriculture, 11 L. R. A. 179, 3 Inters. Com. Rep. 552, 43 Fed. Rep. 609.

A state statute which requires from the agent of an express company not incorporated by the laws of that state a license from the auditor of public accounts before he can carry on any business for such company in the state, and imposing a fine for the violation of the statute, is repugnant to the power of Congress to regulate commerce among the states, where a part of the business

burden upon interstate commerce, beyond the power of the state, simply because the value of that railroad as a whole is created partly—and perhaps largely—by the interstate commerce which it is doing?

With regard to the first question, it is assumed that no special circumstances exist to dis-
444] tinguish between the *conditions in the two states, such as terminal facilities of enormous value in one and not in another. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed. A notable illustration of this was in the New York Central Railroad consolidation. Many years ago the distance between Albany and Buffalo was occupied by three or four companies, each operating its own line of road, and together connecting the two cities. The several companies were united and formed the New York Central Railroad Company, which became the owner of the entire line between Albany and Buffalo, and operated it as a single road. Immediately upon the consolidation of these companies, and the operation of the property as a single, connected line of railroad between Albany and Buffalo, the value of the property was recognized in the market as largely in excess of the aggregate of the values of the separate properties. It is unnecessary to enter into any inquiry as to the causes of this. It is enough to notice the fact. Now, when a road runs into two states each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of

done by the agent is interstate business. Crutcher v. Kentucky, 141 U. S. 47 (35: 649).

A state tax on the business of buying and selling "futures" is not a tax on interstate commerce, although the business is carried on by the agent of a citizen of another state, who solicits orders within the state imposing the tax, to be executed out of it. Alexander v. State, 10 L. R. A. 859, 86 Ga. 246.

A state statute which requires railroads to provide separate accommodations for the white and colored races is within the power of the state, and is not a regulation of interstate commerce. Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587 (33: 784), 3 Inters. Com. Rep. 801.

A state statute compelling railroad companies to furnish double decked cars for sheep, under a penalty for failure to do so and limiting the price per carload, is void as an attempted regulation of commerce, when applied to interstate shipments. Stanley v. Wabash, St. L. & P. R. Co. 8 L. R. A. 549, 3 Inters. Com. Rep. 176, 100 Mo. 435.

N. Y. Laws 1887, chap. 116 as amended by N. Y. Laws, 1888, chap. 189, relating to the heating of steam passenger railroad cars, are police regulations, and are not unconstitutional as being interstate commerce regulations. People v. New York, N. H. & H. R. Co. 55 Hun, 409.

A license tax assessed, under the Pennsylvania act, against a railroad company which is a corporation of Virginia, for keeping an office in Philadelphia for the use of its officers, stockholders, agents and employés, is unconstitutional as a tax upon interstate commerce, when the company is engaged in interstate commerce. Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114 (34: 394), 3 Inters. Com. Rep. 178.

The Kentucky statute requiring resident agents of foreign express companies to obtain a license from the state auditor, and to pay the fee therefor, is not void as an attempt to regulate interstate commerce. Crutcher v. Com. 89 Ky. 6, 40 Am. & Eng. R. Cas. 29.

The business of an agent being to solicit passenger traffic out of California into and through other states to New York city, is a part of interstate commerce, which cannot be restricted or taxed by a municipal corporation. McCall v. California, 136 U. S. 104 (34: 391), 3 Inters. Com. Rep. 181.

A state statute prohibiting the sale of goods by hawkers or peddlers is not void as a regulation of commerce, where there is no discrimination against nonresidents or goods from out of the state. Com. v. Gardner, 7 L. R. A. 666, 133 Pa. 284.

A state tax on stove range agents selling goods which are in the state, not taking orders as drummers, is not unconstitutional as a regulation of interstate commerce. Hynes v. Briggs, 41 Fed. Rep. 468.

A state statute requiring a license from every peddler or itinerant trader by sample or otherwise, unless he is a disabled soldier of the state, is unconstitutional as a regulation of commerce. Wrought Iron Range Co. v. Johnson, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 84 Ga. 754.

An ordinance requiring a license tax from peddlers and declaring that all persons selling goods from house to house by retail, from samples or otherwise, shall be deemed peddlers, is, so far as relates to sales made for residents or other states, void as a regulation of commerce in violation of the Constitution of the United States. Re Kimmel. 3 Inters. Com. Rep. 114, 41 Fed. Rep. 775.

A state statute requiring a privilege tax of an express company for doing business in the state is unconstitutional, as the business is an agency of commerce. United States Exp. Co. v. Hemmingway, 39 Fed. Rep. 60.

A general license tax on a telegraph company doing business in different states affects its entire business, interstate as well as domestic, and is unconstitutional. St. Louis v. Western U. Teleg. Co. 39 Fed. Rep. 59.

A tax, under state laws, for the privilege of using the streets, on each telegraph or telephone pole erected or used by any company which is not, by ordinance, taxed for city purposes on its gross income, is a regulation of commerce and void. St. Louis v. Western U. Teleg. Co. *supra*.

The imposition of a license tax on a foreign traveling agent, selling goods by sample for his principal doing business without the state, is a regulation of interstate commerce and invalid. State v. Agee, 83 Ala. 110; Ft. Scott v. Pelton, 39 Kan. 764; Asher v. Texas, 128 U. S. 129 (32: 368), 3 Inters. Com. Rep. 241.

the entire property that which would exist if the miles of road within the state were operated 445]*separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states, and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taxing a mileage share of that in Indiana is not taxing property outside of the state.

The second question must also be answered in the negative. It has been again and again said by this court that while no state could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among many other cases, *Marye* v. *Baltimore & O. R. Co.* 127 U. S. 117 [32: 94]; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [35: 613], 3 Inters. Com. Rep. 595.

The rule of property taxation is that the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the state. An 446]*attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt. Take for illustration, property whose sole use is for purposes of interstate commerce, such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same, one between Cincinnati and Newport, and another twenty miles below and where there is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board in either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this court, a ruling demanded by the harmonious relations between the states and the national government, has affirmed that the full discharge of no duty entrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. All that has been decided is that, beyond the taxation of property, according to the rule of ordinary property taxation, no state shall attempt to impose the added burden of a license or other tax for the privilege of using, constructing, or operating any bridge, or other instrumentality of interstate commerce, or for carrying on of such commerce. It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, *and the rule of all property taxation is 447] the rule of value, and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what cannot be done directly—that is, to cast a burden on interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden upon its free exercise. We answer this question, therefore, in the negative.

These are the only matters which seem to distinguish this case from the two preceding, and, therefore, the judgment of the supreme court of Indiana is affirmed.

Mr. Justice **Jackson** did not hear the arguments in this case or take part in its decision.

THE INTERSTATE COMMERCE COMMISSION, *Appt.*,

v.

W. G. BRIMSON ET AL.

(See S. C. Reporter's ed. 447-490.)

Act to Regulate Commerce—power of Congress—appropriate means—judiciary—compelling testimony before Interstate Commerce Commission—due process of law.

1. The 12th section of the Act of Feb. 4, 1887, as amended in 1889 and 1891, is constitutional and valid, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the Interstate Commerce Commission.
2. Congress has plenary power, subject to the limitations imposed by the Constitution, to prescribe the rule by which commerce among the several states is to be governed.
3. Congress may, in its discretion, employ any appropriate means, not forbidden by the Constitution, to carry into effect, and accomplish the objects of, a power given to it by the Constitution.
4. The judiciary can only inquire whether the means devised by Congress in the execution of a power granted are forbidden by the Constitution.
5. A proceeding to compel the attendance of a witness before the Interstate Commerce Commission, or to require him to answer questions put to him, or to compel the production of books, documents or papers in his possession is a case of which, under the Constitution, a court of the United States may take cognizance.
6. In matters of contempt, a jury is not required by "due process of law;" courts possess the power to punish for contempt.

[No. 883.]

Argued April 16, 17, 1894. Decided May 26, 1894.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Illinois, dismissing a petition filed by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce" of February 4, 1887, and amended by the Acts of March 2, 1889, and Feb. 10, 1891, invoking the aid of the circuit court in requiring the attendance and testimony of witnesses and the production of documents, books and papers, in a case before the said Interstate Commerce Commission. *Reversed, and cause remanded for further proceedings.*

See same case below, 53 Fed. Rep. 476, 480.

Messrs. **Lawrence Maxwell, Jr.**, *Solicitor Gen.*, and **Geo. F. Edmunds**, for appellant:

The Constitution declares that Congress shall have power "to regulate commerce with foreign nations and among the several states."

The power to regulate commerce necessarily and confessedly includes the power to provide all means fairly adapted to the complete exercise of the power.

One (and perhaps the most salutary of all) of these means is the establishment of a national, official body, by whatever name styled, to put into execution the principles and regulations declared by law, and in so doing, and, as essentially and indispensably a part thereof, to investigate the course and practice of interstate commerce as carried on by whomsoever engaged in it, and so to ascertain whether or not it is carried on according to the requirements of law.

Congress possessed the power of making it the legal duty of every such carrier and of every other person having knowledge of the subject under consideration, to appear, on due summons, before the Commission and produce the papers and give the evidence it or he might possess legitimately relating to the matter so lawfully under consideration.

Congress, having imposed it, could provide the natural and necessary means of compelling performance, as well as punishing nonperformance of such duty.

The natural, necessary and only lawful means of compelling the performance of any legal duty (except payment of taxes and military service, etc.) is by the exertion of the judicial power. This is done by an application to a court, in whatever mode or form the law may provide, by the party entitled to have the duty performed, against the party complained of.

Such a proceeding as that in this case by a party having a statutory standing as complainant against a party who has refused to perform a duty that a valid statute required him to perform is, within the very letter as well as the spirit of the Constitution a "case" and a "controversy," which the judicial power was established to hear, try, and determine.

It is a due and constant exercise of the judicial power to command the performance of any duty that any person or corporation is legally bound to perform, either to the public or to an individual, and to do it under such modes and forms of procedure as the legislative power shall have prescribed. If Congress has no power to impose such a duty the judiciary can neither compel a performance nor punish a nonperformance. But if Congress

NOTE.—*As to power of Congress to regulate commerce*, see note to Gibbons v. Ogden, 6: 23 and to Brown v. Maryland, 6: 678.

As to tonnage tax, see note to Inman SS. Co. v. Tinker, 24: 118.

As to interstate commerce; regulation of; power of Congress, how far exclusive, see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute, when valid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid, see note to Harmon v. Chicago, 37: 216.

As to powers of court to punish for contempt, see note to *Ex parte* Robinson, 22: 205.

That there is no review of decree punishing for contempt; limits to rule, see note to New Orleans v. New York Mail SS. Co. 22: 354.

As to what is "due process of law," see note to Pearson v. Yewdall, 24: 436.

has and exercises the power to impose such a duty, no matter to whom it may be imputed, the judiciary is bound (if the law has so provided) to hear the complaint of the party seeking performance, and to decide whether the other party owes the duty demanded, and, if the duty is found to exist, to decree its performance.

This is both a "case" and a "controversy" arising under the laws of the United States, and to which the United States were, in substance and effect, parties. The controversy had two opposing parties legally interested in it. It was brought into court by one of them, praying redress and the performance of a legal obligation against the other. The court had been given jurisdiction of that very class of cases and controversies. The mode of procedure was provided for by law.

The admitted jurisdiction of the courts to hear and determine complaints by the Commission for disobedience of their final orders upon carriers is of precisely the same legal character as the jurisdiction here invoked.

It is the province of the legislative and not of the judicial power to say what the form of procedure and remedy shall be in every case of an officer or person who has refused to do that which a valid law has required him to do, subject of course to the provisions requiring jury trial, etc., not applicable here. In cases like the present one, the legislative power has declared that the procedure shall be of the character employed in this case.

The judiciary cannot constitutionally compel affirmative obedience to any part of the interstate commerce acts if it cannot do it as to this part of them.

Hayburn's Case, 2 U. S. 2 Dall. 409 (1: 437); *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 818 (6: 223); *United States* v. *Ferreira*, 54 U. S. 13 How. 45 (14: 44); *United States* v. *Ritchie*, 58 U. S. 17 How. 525 (15: 236); *Den* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272 (15: 372); *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 613; *Ex parte Fassett*, 142 U. S. 479 (35: 1087); *Passavant* v. *United States*, 148 U. S. 214 (37: 426); *Fong Yue Ting* v. *United States*, 149 U.S. 698 (37: 905); *Re Pacific R. Com.* 32 Fed. Rep 241; *Canal & L. Comrs.* v. *Willamette Transp. & L. Co.* 6 Or. 219; *People* v. *State Ins. Co.* 19 Mich. 392; *Re Lippman*, 3 Ben. 95; *Re Meador*, 1 Abb. (U. S.) 317; *Re McLean*, 37 Fed. Rep. 648.

As the decree of the court below was based solely upon the question of the power of the court to act at all, the matter of the relevancy of the questions asked and of the papers called for is not open for consideration here.

Passavant v. *United States*, 148 U. S. 214 (37: 426); Circuit Court of Appeals Act, March 5, 1891, §§ 5, 6.

But if the propriety of the action of the Commission is now open for review, then it is insisted that the questions refused to be answered and the papers refused to be produced were relevant to the subject-matter under consideration by the Commission.

If these companies were engaged in interstate commerce, there was nothing connected with any part of their affairs that the commission had not a right and was not bound, in case of complaint, to know, not only who were the owners of their stock and the controllers of their roads, but whether they or their officers were owners or interested in the steel company, whose interstate business they were transacting. The hearing had just begun. The statements of these officers were not conclusive, and had the questions been answered, and the books produced their denials might have been overcome perhaps by their own evidence. But the examination was suspended at the threshold by the necessity of applying to the court in the manner before stated.

Perfectly analogous to the jurisdiction contended for here are many instances of immemorial jurisdiction where the principal and final matters were not before the court called upon to act. Among these are:

Injunctions to stay waste, etc., pending suits at law to try titles (*Eckardt* v. *Board*, 113 U. S. 537 (28: 1116); *Kinsler* v. *Clarke*, 2 Hill, Eq. 617); certiorari (Story, Eq. Pl. § 18); bills to perpetuate testimony (Story, Eq. Jur. § 1512. See also Act of 1787, § 30); bills for examination of witnesses (Story, Eq. Pl. § 19; and see Act of 1827, § 2); bills of discovery (Story, Eq. Pl. § 19); and the judicial course on letters rogatory. 10 Stat. at L. 630; 12 Stat. at L. 769; Rev. Stat. 4071; *Nelson* v. *United States*, Pet. C. C. 235; *Mexico* v. *Arrangoas*, 5 Duer, 634; *Kuehling* v. *Leberman*, 9 Phila. 160; *Re Spanish Consul at New York*, 1 Ben. 225.

No court of the United States can exercise any other than judicial power, and it cannot exercise judicial power without having a "case" or a "controversy" before it. How, then, can all these courts exercise power in all these varied instances otherwise than under the very principle before stated, that is, that it is the exertion of judicial power to pass and act upon the application of a party demanding relief in respect to another who is bound by law to do the thing asked, and that such an application in the form prescribed by law is a "case" and if disputed is a "controversy?"

Messrs. **E. Parmalee Prentice**, *James C. Hutchins* and *Charles S. Holt*, for appellees:

This investigation was in its nature judicial, and authority to make it could not lawfully be conferred by Congress upon the Interstate Commerce Commission, which is in its nature an administrative and not a judicial body.

1 Kent, Com. 304; *United States* v. *Ferreira*, 54 U. S. 13 How. 45 (14: 44).

The Interstate Commerce Commission is an administrative body.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567.

The inquiry which the Commission was pursuing was judicial.

It is not one of the constitutional means included in the power to regulate interstate commerce, to delegate to a non-judicial body the duty of inquiring whether such commerce is carried on according to the "requirements of law." The proposition thus laid down by counsel is that Congress may authorize com-

pulsory inquiry by a non-judicial body for the purpose of discovering and punishing past violations of law. A more startling proposition has seldom been asserted in this court. These violations are, if anything, crimes, punishable by heavy penalties of fine and imprisonment, and the investigation of the question whether crime has been committed is not an administrative act within any possible construction of the language. Such an inquiry is a function of the courts, with their historic appropriate machinery of the grand jury.

Com. v. *Jones*, 10 Bush, 725; Cooley, Const. Lim. (5th ed.) 109, 110.

Whether we look, therefore, at the prescription of duty, or at the enforcement of duty, we find no place for the operation of the Commission in such an investigation as this.

Re Pacific R. Com. 32 Fed. Rep. 251.

The Commission is in no respect a judicial body. Under our system of government such a body cannot conduct such an inquiry.

Kilbourn v. *Thompson*, 103 U. S. 168 (26: 377); *Boyd* v. *United States*, 116 U. S. 616 (29: 746).

The power of visitation is a power applicable only to ecclesiastical and eleemosynary corporations. The visitation of civil corporations is by the government itself, through the medium of the courts of justice.

2 Kent, Com. (13th ed.) 300.

The state has authority to interfere to ascertain whether or not the course pursued by a civil corporation is in excess of corporate power.

Waterman, Corp. 668; *Atty. Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. 371.

Even if Congress could empower the Commission to make this investigation, still it could not empower this court to grant the order applied for; because, whether the character of the inquiry is judicial or non-judicial, the question does not here arise in a case or controversy as required by the Constitution.

The Federal Constitution, limits the judicial power of the United States and only "cases" and "controversies" can find an entrance into the Federal courts.

Chisholm v. *Georgia*, 2 U. S. 2 Dall. 432 (1: 435).

A case, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law.

Story, Const. § 1646; *Osborn* v. *United States*, 22 U. S. 9 Wheat. 745 (6: 205); *Smith* v. *Adams*, 130 U. S. 173 (32: 897); *Hayburn's Case*, 2 U. S. 2 Dall. 409 (1: 436); *United States* v. *Todd*, 54 U. S. 13 How. 52 (14: 47) *note*.

The language of the Act does not make it the duty of any carrier or other person to furnish information, but simply confers authority upon the Commission to inquire into the management of the business of all common carriers subject to the provisions of the Act.

United States v. *Mitchell*, 58 Fed. Rep. 993; *United States* v. *Hudson*, 11 U. S. 7 Cranch, 42 (3: 259); *United States* v. *Lancaster*, 2 McLean, 431.

But even if it were held that there is an implied "duty" as broad as the "right conferred by the Act," that is not broad enough to cover the duty here insisted on.

If the duty exists it must be one that is expressly or by implication contained in and defined by the Act of Congress.

The only possible definition of the duty asserted by counsel for the Commission in this case is, that it consisted in furnishing to the Commission all books, papers and information which the Commission might see fit to ask for. This is simply arming the Commission with unlimited powers of inquisition. Under the guise of a duty it empowers the Commission to create as many separate duties as it sees fit, and the very act of creation is a legislative act. If Congress delegate power in these broad terms, it can delegate any power whatever.

The application to the court is not for a decision whether the information is necessary, but for the enforcement of a duty which is assumed by the hypothesis to have been previously created. It must then have been either created by the Commission, acting as a legislature, or adjudged by the Commission, acting as a court. Either hypothesis is fatal.

When the Commission asks the question, either a duty to answer is thereby finally established or it is not. If it is finally established, then the act of the Commission is a legislative act, which is in the first place beyond the power of the Commission; but if valid, the court has no power to do anything except enforce it or punish its violation, without inquiry as to the materiality or necessity of the information sought. This makes the court the mere ministerial agent of the Commission.

If the duty is not established finally, but only provisionally (*i. e.* subject to the court's inquiry as to its propriety and necessity) then the court is called upon to take part in a legislative act, which is wholly beyond its competency; and what bears especially on the point now in hand, the supposed "case or controversy" consisting of the assertion on one side, and denial on the other, of an established duty, becomes a mere advisory inquiry whether it is lawful and expedient that a duty shall be established.

The provision of section 12 of the Interstate Commerce Act, under which this proceeding was taken, is, that the Commission "may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, documents, etc."

This application is stamped from the outset with the marks of its purely ancillary character.

It is only by splitting up the investigation into minute fragments that the Commission can find any part of it to submit to the court for judicial action. If it had been attempted to carry on this entire investigation in the first instance by petition to the court, it would not have been possible to pretend that it made a case or controversy of which the court could take cognizance. A part cannot be greater than the whole, and the Commission cannot set in motion the judicial power by dismembering their case and bringing a small fragment into court to be decided and returned to them for such use as they may choose to make of it.

Moreover, if each refusal of a witness to an-

swer a question in such an investigation may be made the subject of a separate judicial inquiry, under the guise of enforcing a duty, there may be as many separate controversies as there are questions. It follows also that each controversy thus submitted to the court gives the right of appeal to the defeated party. Thus, the extraordinary spectacle would be presented of this court or of the court of appeals deciding in succession a series of objections to evidence, arising in a controversy carried on before another and non-judicial tribunal. It is a perversion alike of language and of thought to speak seriously of this as a proper method of judicial action.

The courts have uniformly and repeated refused to recognize as "cases or controversies" questions arising at a preliminary stage before the judicial power is called into exercise, or subject to revision by another department after the courts have done with them.

United States v. *Ritchie*, 58 U. S. 17 How. 525 (15: 236); *Election Suprs. Case*, 114 Mass. 247; *Ex parte Siebold*, 100 U. S. 399 (25: 727).

The court will look at the nature of the right, and not merely at the form in which it is asserted, to determine whether there is or is not a "case" for judicial consideration.

Den v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 282-284 (15: 376, 377).

The case at bar is fatally defective, both as to substance, and form, and can by no possibility gain any standing in a Federal court.

The application is an attempt to borrow the process of contempt for use in an administrative inquiry, and it has no other substantial purpose.

The right of trial by jury as guaranteed by the Constitution forbids the creation of new methods of procedure in cases involving private rights.

Scott v. *Neely*, 140 U. S. 106 (35: 358); *Putnbaugh* v. *Smith*, 131 Ill. 199.

The judicial process of contempt is not a legitimate method for the enforcement of executive or legislative command.

Kilbourn v. *Thompson*, 103 U. S. 168 (26: 377); *Langenberg* v. *Decker*, 16 L. R. A. 108, 131 Ind. 471; *Wyatt* v. *People*, 17 Colo. 252.

The mere ownership of the stock in the switching roads by the steel company would not constitute a violation of the Interstate Commerce Law.

Pullman Palace Car Co. v. *Missouri Pac. R. Co.* 115 U. S. 587 (29: 499).

Mr. Justice **Harlan** delivered the opinion of the court:

This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July 1892 by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and amended by the acts of March 2, 1889 and February 10, 1891. 24 Stat. at L. 379, chap. 104; 25 Stat. at L. 855, chap. 382; 26 Stat. at L. 743, chap. 128; 1 Rev. Stat. Supp. 529, 684, 891.

The petition was based on the 12th section of the Act authorizing the Commission to invoke [457] the aid of any court of the *United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476, 480.

The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property, wholly within one state and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory. But they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "railroad" as used in the Act includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" includes all instrumentalities of shipment or carriage.

All charges made for services rendered or to be rendered *in the transportation of pas-[458] sengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. § 1.

Any carrier subject to the provision of the Act, directly or indirectly, by special rate, rebate, drawback, or other device, charging, demanding, collecting, or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property, than it charges, demands, collects, or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the Act expressly declares to be unlawful. § 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular per-

son, company, firm, corporation, or locality, or to any particular description of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular kind of traffic, to undue or unreasonable prejudice or disadvantage in any respect. And carriers subject to the porvisions of the Act are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewih, and not to discriminate in their rates and charges between such connecting lines; but this regulation does not require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. § 3.

It is made unlawful for any carrier subject to the provisions of the Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially sim-[459] ilar circumstances and conditions, *for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this does not authorize the charging and receiving as great compensation for a short as for a longer distance. Upon application to the Commission, the carrier may in special cases, after investigation by that body, be authorized to charge less for longer than for short distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section. § 4.

It is also made unlawful for any carrier subject to the provisions of the Act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance is deemed a separate offense. § 5.

Another section of the Act provides for the printing and posting by carriers of their rates, fares, and charges for the transportation of passengers and property, including terminal charges, classifications of freight, and any rules or regulations affecting such rates, fares, and charges, including the rates established and charged for freight received in this country to be carried through a foreign country to any place in the United States; forbids any advance or reduction in such rates, fares, and charges, so established and published, except upon public notice, of which changes the Commission shall be notified; requires every carrier to file with the Commission copies of all contracts, agreements, or arrangements with other carriers relating to any traffic affected by the provisions of the Act, as well as copies of schedules of joint tariffs of rates, fares, or charges for passengers and property over continuous lines or routes operated by more than one carrier; declares it to be unlawful for any carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of *persons or property, or [460] for any services in connection therewith between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time; authorizes in addition to the penalties prescribed for neglect or refusal to file or publish rates, fares, and charges, a writ of mandamus to be issued by any circuit court of the United States in the judicial district wherein the principal office of the carrier is situated, or wherein such offense may be committed, and if such carrier be a foreign corporation, in the judicial circuit wherein it accepts traffic, and has an agent to perform such service, to compel compliance with the above provisions of the section relating to schedules of rates, fares, and charges—such writ to issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of the Act, and the failure to comply with its requirements being punishable as and for a contempt; and empowers the commissioners, as complainants, to apply, in any such circuit court of the United States, for a writ of injunction against the carrier, to restrain it from receiving or transferring property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the 1st section of the Act, until the carrier shall have complied with the provisions last referred to. § 6.

So a common carrier subject to the provisions of the Act is forbidden to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some *necessary purpose, and [461] without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of the Act. § 7.

By the 11th section a commission is created and established, to be known as the Interstate Commerce Commission, and to be composed of five commissioners, appointed by the President, by and with the advice and consent of the Senate. § 11.

Other sections give a right of action to the persons injured by the acts of carriers done in violation of the statute; prescribe penalties against carriers for illegal exactions and discriminations; and indicate how the provisions of the statute may be enforced against carriers by the Commission.

The 12th section (26 Stat. at L. 743, chap. 128) the validity of certain parts of which is involved in this proceeding, provides as follows: "That the Commission hereby created shall have authority to inquire into the man-

agement of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

462] *"Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

"The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take *such deposition to the opposite party or [463 his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"Every person deposing as herein provided shall be cautioned and sworn (or affirm if he so request) to testify the whole truth; and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with Commission. All depositions must be promptly filed with the Commission.

"Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States." § 12.

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause:

Prior to the 14th of June, 1892, informal complaint was made to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company of Illinois, the Joliet & Blue Island Railway Company, and the Chicago & Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and *places without [464 to cities and places within Illinois, in connection, respectively, with the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburg, Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, the Chicago & Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka & Santa Fé Railway Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway

Company, and the Chicago, Milwaukee & St. Paul Railway Company; that it had also caused to be incorporated under the laws of Wisconsin, the Milwaukee, Bay View & Chicago Railway Company, for the purpose of operating its switches and side tracks at or near Milwaukee, in that state, and engaging in traffic or traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, in connection with the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago & Northwestern Railway Company; and that said Illinois Steel Company owned and controlled the above named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the Act to Regulate Commerce, and obtaining special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such a manner as to give the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the Commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had been and 465] *were still engaged in the transportation of property by railroad in connection with the other companies named "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies, so owned, controlled, and operated, had filed with the Commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges as required by the Act of Congress.

The Commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates, as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated, to file with the Commission the above contracts, agreements, and tariffs.

An order was thereupon made by the Commission, which recited the facts of the informal complaint made to it, and required each of the above mentioned companies to make and file in its office in Washington, a full, complete, perfect, and specific verified answer, setting forth all the facts in regard to the matters complained of and responding to the following questions:

1. Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

2. Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers?

*3. Have the companies above alleged [466 to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company; and if so, to what amount?

The order further required all of the companies named to appear before the Commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the Commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet & Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the Interstate Commerce Act, or had resulted in obtaining for the Illinois Steel Company special, illegal, unjust, or unreasonable rates in interstate traffic or in securing to that company illegal, undue, or unreasonable preferences.

The Commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads, which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpœnaed to testify before the Commission was William G. Brimson, the president and manager *of the five [467 roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching — switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them; mainly our business it with the Illinois Steel Company. This is the great proportion of our business." In reply to the

question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the Commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon the demand of the Commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Stirling, the first vice president of the Illinois Steel Company, was also examined as a witness, and after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the Steel Company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the Commission issued [468] a subpœna *duces tecum*, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpœna was issued to William R. Stirling, as first vice president of the Steel Company, commanding him to appear before the Commission and produce the stock books of that company. Keefe and Stirling appeared in answer to the subpœnas, but refused to produce the books or either of them so ordered to be produced.

The Commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Stirling to appear before that body and answer the several questions propounded by them and which they had respectively refused to answer, and requiring Keefe and Stirling to appear and produce before the Commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Stirling in the present proceeding, besides insisting that the question propounded to them, respectively, were immaterial and irrelevant were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the producton of books, papers and documents, and authorizes the circuit court of the United States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the 12th section of the Act unconstitutional and void, so far as it authorizes or requires the circuit court of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument [469] or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Art. 3, § 2) and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. at L. 434, chap. 866) the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The circuit court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a non-judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a non-judicial body." *Re Interstate Commerce Commission*, 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476, 480.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an Act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of [470]

which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, is warranted by that instrument.

The Constitution expressly confers upon Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and to make all laws necessary and proper for carrying that power into execution. Art. 1, § 8. While the completely internal commerce of a state is reserved to the state itself, because never surrendered to the general government, commerce, the regulation of which it committed by the Constitution to Congress, comprehends traffic, navigation and every species of commercial intercourse or trade between the United States, among the several states, and with the Indian tribes. *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 193, 194 [6: 23, 69]. "It may be doubted," this court has said, "whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefor, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full convention of its necessity." *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 446 [6: 678, 688]; *Philadelphia & S. M. SS. Co.* v. *Pennsylvania*, 122 U. S. 326, 346 [30: 1200, 1205], 1 Inters. Com. Rep. 308. "In the matter of interstate commerce," this court, speaking by *Mr. Justice* Bradley, has declared, "the United 471]*States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 494 [30: 694, 695], 1 Inters. Com. Rep. 45. The same principle was announced by the present Chief Justice in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148 [32: 637, 639].

What is the nature of the power thus expressly given to Congress, and to what extent and under what restrictions, may it be constitutionally exerted?

This question was answered when *Chief Justice* Marshall said that it was the power "to prescribe the rule by which commerce is to be governed." "This power," the Chief Justice continued, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments." *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 189, 196, 197 [6: 23, 68, 70].

Congress thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce among the several states is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular Act of Congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution?

*The general principle applicable to this [472 subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316, 421, 423 [4: 579, 605], it was said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Guided by these principles, we proceed to inquire whether the twelfth section of the Interstate Commerce Act, so far as it authorizes the present proceeding, assumes to invest the circuit courts of the United States with functions that are not judicial.

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one state to another, is a proper regulation of interstate commerce, or that the object Congress has in view by the Act in question may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed,

and is plainly adapted to the object intended to 473] be accomplished. The same *observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the Act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the Act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a Commission established for the purpose of enforcing that Act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principal of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." 17 U. S. 4 Wheat. 316, 409 [4: 579, 602]. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry with- 474] out *entrenching upon the domain of another department of the government. That it may not do with safety to our institutions. *Union Pac. R. Co.* v. *United States* ("*Sinking Fund Cases*") 99 U. S. 700, 718 [25: 496, 501].

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

It is to be observed that independently of any question concerning the nature of the matter under investigation by the Commission —however legitimate or however vital to the public interests the inquiry being conducted by that body—the judgment below rests upon the broad ground that no *direct* proceeding to compel the attendance of a witness before the Commission, or to require him to answer questions put to him, or to compel the production of books, documents or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which under the Constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial. And the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although by the established doctrine of the courts a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because and *only [475 because its road is a public highway established primarily for the convenience of the people and to subserve public objects, and, therefore, subject to governmental control. *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 657 [34: 295, 302].

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument, which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by *Chief Justice* Marshall, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 819 [6: 204, 223]. And in *Den* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 284 [15: 372, 377], *Mr. Justice* Curtis, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, nor on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial deter-

mination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in *Smith* v. *Adams*, 130 U. S. 173 [32: 897]. *Mr. Justice* Field, speaking for the court, said that the terms "cases" and "controversies" in the Constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceed-
476] ings *established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an Act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally entrusted to an administrative body for investigation—is, we repeat, not disputed and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United
477] States and those *who dispute the validity of an Act of Congress and seek to obstruct its enforcement. And those issues made in the form prescribed by the Act of Congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an Act of Congress declaring it to be an offense against the United States for any one to refuse to testify before the Commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it. And the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form, and *direct in its operation*, for the prompt and conclusive determination of this dispute.

*As the circuit court is competent un-
478] der the law by which it was ordained and established to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding judicial in form and instituted for the determination or distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the Commission, except through criminal prosecutions or by civil actions to recover penalties imposed for non compliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the states is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the Act of Con-

gress is clear and strong. *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 128 [3: 162, 175]. In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. **479**] *Kilbourn* v. *Thompson*, *103 U. S. 168, 190 [26: 377, 386]. We said in *Boyd* v. *United States*, 116 U. S. 616, 630 [29: 746, 751]—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employés of the sanctity of a man's home, and the privacies of his life. As said by *Mr. Justice* Field in *Re Pacific R Commission*, 32 Fed. Rep 241, 250, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees. This court has already spoken fully upon that general subject in *Counselman* v. *Hitchcock*, 142 U. S. 547 [35: 1110], 3 Inters. Com. Rep. 816. We need not add anything to what has been there said. Suffice it in the present case to say that as the Interstate Commerce Commision, by petition in a circuit court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits.

480] *It may be proper to state in this connection that after the decision in *Counselman* v. *Hitchcock*, the Interstate Commerce Act was amended by an Act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the Commission, whether such subpœna be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the Act of Congress, entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpœna or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollers, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. at L. 443, chap. 83. But that Act was not in force when this case was determined below. Nor does it reach the question whether a proceeding like the present one can be maintained in a circuit court of the United States.

In the course of the argument at the bar our attention was *called to *Hayburn's Case*, [**481** 2 U. S. 2 Dall. 409 [1:436], and *United States* v. *Ferreira*, 54 U. S. 13 How. 40, 46 [14: 42, 44], as announcing principles not in harmony with the views we have expressed in this opinion.

Hayburn's case was an application for a mandamus to be directed to the Circuit Court of the United States for the District of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pension list of the United States in conformity with an Act of Congress, approved March 23, 1792, chap. 11, which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and to regulate claims to invalid pensions. This court took the case under advisement, but as Congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to Hayburn's case, we are informed of the views expressed at the circuit by different members of this court in relation to the Act of 1792. They concurred in holding that it was not in the power of Congress to assign to the courts of the United States any duties except such as were properly judicial, and to be performed in a judicial manner; and that the duties assigned

to the circuit courts were not of that description, and were not contemplated by the Act of Congress as of that character; and, consequently, that the Act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by *Chief Justice* Taney, under the direction of this court, and found in 54 U. S. 13 How. 52 [14:47], an account is given of *United States* v. *Todd*, which also involves the validity of the Act of 1792, so far as it imposed upon the circuit courts duties relating to pensions. And it is there stated that *Chief Justice* Jay and *Justice* Cushing, upon further reflection, became satisfied that the power conferred by the Act of 1792 on the circuit court as a court could not be construed as giving such power to the judges of the court as commissioners.

The same general principles were announced in Ferreira's case, which arose under the treaty [482] of 1819 between Spain and *the United States, and under certain acts of Congress passed to carry a particular article of that treaty into execution. The case came before this court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want of jurisdiction in this court raised the question whether the district judge exercised judicial power, strictly speaking, under the Constitution. The motion to dismiss was sustained. *Chief Justice* Taney, referring to the statutes under which the d istrict judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear in behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission." 54 U. S. 13 How. 40, 46, 47 [14:42, 44].

*It thus appears that the Act of 1792, [483 above referred to, attempted to impose upon the courts of the United States duties purely administrative in their character. So, also, the acts of Congress involved in Ferreira's case conferred no authority upon the district judge to determine finally any questions of a judicial nature, and, without requiring any petition to be filed, and without empowering the district attorney to enter an appearance for the United States, so as to make it a party to the proceeding, or to authorize a judgment against it, gave that officer the power only of adjusting, without the presence of parties, certain claims, the allowance and payment of which, after being so adjusted, were made to depend wholly upon the discretion of the Secretary of the Treasury.

Some allusion should be made in this connection to *Gordon* v. *United States*, 117 U. S. appx. p. 697 and *Re Sanborn*, 148 U. S. 222 [37:429].

In Gordon's case, the question was whether this court had jurisdiction to review the action of the Court of Claims in respect to a claim examined and allowed in the latter court under an Act of Congress (12 Stat. at L. 65, chap. 92, §§ 5, 7, 14) which, among other things, provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims, until after an appropriation therefor should be estimated by the Secretary of the Treasury, and an appropriation to pay it be made by Congress. Under that Act neither the Court of Claims nor this court could do anything more than certify their opinion to the Secretary of the Treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimates of private claims, and if he decided in favor of the claimant, it rested with Congress to determine whether it would or would not make an appropriation for its payment. Neither the Court of Claims nor this court could, by any process, enforce its judgment; and whether the claim was paid or not, did not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress.

The appeal of Gordon was dismissed upon the ground that Congress could not "authorize or require this court to express *an opinion [484 on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said *Chief Justice* Taney, "is a part and an essential part, of every judgment, passed by a court exercising judicial power. It is no judgment, in the legal sense of term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jur-

jsdiction; yet it is the whole power that the court is allowed to exercise under this Act of Congress." p. 702. See *De Groot* v. *United States*, 72 U. S. 5 Wall. 419 [18:700].

In Sanborn's case, above cited, the same principles were announced. That case arose under an Act of Congress of March 3, 1887 (24 Stat. at L. 505, chap. 105) one section of which provided that "when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted. § 12. This court dismissed an appeal from a finding of the Court of Claims, under this Act. Referring to the cases of Hayburn, Todd, Ferreira, and Gordon, above cited, it observed: "Such a finding is not made obligatory on the department to which it is reported —certainly not so in terms—and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. **485**] The finding or conclusion *reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by Congress." p. 226 (431).

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the circuit courts of the United States by the 12th section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson* v. *Dunn*, 19 U. S. 6 Wheat. 204 [5:242], and in *Kilbourn* v. *Thompson*, 103 U. S. 168, 190 [26:377,386], of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, *as already suggested—the validity of [**486** which is not questioned—of compelling a witness to testify before the Interstate Commerce Commission, to answer questions propounded to him relating to the matter under investigation and which the law makes it his duty to answer, and to produce books, papers, etc. is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offence against the United States punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the Act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish, namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the Interstate Commerce Act, that provided by the 12th section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual *effort, would subject commerce among[**487** the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in Gordon's case, one in which the United States seeks from the circuit court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered

that will be conclusive upon the parties until reversed by this court. And that judgment may be enforced by the process of the circuit court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of Sanborn's case, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

488] *This view is illustrated by the case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, 728 [37: 905,918], which arose under the Act of May 5, 1892, chap. 60, prohibiting the coming of Chinese persons into the United States. That Act provided for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country unless such persons shall establish, by affirmative proof, to the satisfaction of a justice, judge or commissioner of the United States before whom he might be brought and tried, his lawful right to remain in the United States. It also authorized the arrest of such person by any customs official, collector of internal revenue, or United States marshal, and taken before a United States judge. This court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, defendant, and a judge—*actor, reus et judex*. 3 Bl. Com. 25; *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738,819 [6: 264,223]. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute."

Another suggestion thrown out in argument against the validity of the 12th section of the Interstate Commerce Act, in the particular adverted to, is that the defendants are not accorded a right of trial by jury. If, as we have endeavored to show, this proceeding make a case or controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case, the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the *Commission; for, in a judicial sense, [489] there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the circuit court, is determined adversely to the defendants and they refuse to obey, not the order of the Commission, but the final order of the court. And, in matters of contempt, a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands. Rev. Stat. § 725, 1 Stat. at L. 83; 4 Stat. at L. 487; *United States* v. *Hudson*, 11 U. S. 7 Cranch. 32 [3: 259]; *Anderson* v. *Dunn*, 19 U. S. 6 Wheat. 204, 227 [5: 242, 247]; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 510 [22: 205, 207]; *Ex parte Terry*, 128 U. S. 289, 302, 303 [32: 405, 408]; *Cartwright's Case*, 114 Mass. 230, 238. Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.

We are of opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

*In view of the conclusion reached [490] upon the only question determined by the circuit court, what judgment shall be here entered? The case was heard below upon the petition of the Commission and the answers of the defend-

ants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the circuit court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of inquiries before the Commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

Dissenting: *Mr. Justice* **Brewer**, *The Chief Justice, Mr. Justice* **Jackson**. *Mr. Justice* **Field** was not present at the argument of this case and took no part in the consideration or decision of it.

GEORGE L. COREY, ET AL., *Appellants,*
v.
CATHERINE R. TOLAND, *Appellee.*

(Not officially reported.)

Possession; notice of title.

The decision of the supreme court of the territory of Utah, that an occupant's possession of land is actual notice of his title and ownership to all persons; and that the recording statute do not change that rule; and that a deed made by such occupant under the mistaken belief that his lands were subject to several mortgages, will be set aside,—affirmed in this court by a divided court.

[No. 201.]

Argued Jan. 11, 12, 1894. Affirmed Jan. 15, 1894.

APPEAL from a decree of the Supreme Court of the territory of Utah, reversing the judgment and decree of the District Court for the First Judicial District of the said territory, that a deed made by plaintiff, Catherine R. Toland, to the defendants, George L. Corey, *et al*, of lands in Ogden City, Weber county, in said territory, is a valid deed, and that she surrender possession of said lands, etc. Said decree of said supreme court of said territory also directed the said district court to enter a decree in accordance with its opinion, below given. *Affirmed.*

The following is the opinion of the supreme court of the territory of Utah:

Blackburn, *J.:* This action is brought by the appellant for the cancellation of a deed to the respondents to a part of a lot in Ogden City, Utah, on the ground of fraud and inadequacy of consideration.

It appears by the complaint and answer that the appellant owned a life estate in the premises and her son, Isaac A. Crawford, owned the remainder; that he conveyed his interest to William Toland, the husband of the appellant, and he conveyed the same to her; but that these deeds were not put upon record until the mortgages hereinafter mentioned were given and recorded, but they were made and delivered prior to the giving of these mortgages. It further appears that the said Crawford and appellant had given a mortgage on these premises to one Doon for $350, and after that, without the knowledge of the appellant and after she had acquired the fee in the premises, Crawford without her knowledge or consent, gave two other mortgages on the premises to said Doon to secure separately $150 and $117.75, and after that Crawford, without appellant's knowledge, gave two other mortgages on the premises to the respondents to secure debts due them from him. All these mortgages were duly recorded and prior to the record of the deeds conveying the fee in the premises to the appellant.

On the 10th day of August, 1885, Doon brought suit to foreclose his three mortgages against the appellant and made the respondents parties, and before judgment, appellant, to pay off these mortgages and for no additional consideration, made the deed this action seeks to have set aside. The whole amount called for by the mortgages was $1230.60.

The allegations of the complaint, which are denied by the answer, are to the effect that the mortgages given to Doon, except the one for $350, were given with notice of appellant's full ownership of the premises and Crawford had no interest whatever to encumber, and that the mortgages to respondents were taken with like notice; that the deed to respondents this action seeks to set aside was obtained by misrepresentation and other improper conduct by the respondents and others associated with them in the transaction; that appellant was poor, in bad health, and without friendly advice, and thus forced to sign the deed against her will; that the consideration was grossly inadequate, and that the deed was not voluntarily acknowledged and not delivered on her authority or by her. The first question is, Did Doon and the respondents have actual notice of the deed of Crawford to Toland and Toland to appellant at the time of making these mortgages by Crawford, these deeds being unrecorded? The appellant was in the possession of the premises, occupying them as a home, and this fact was well known to respondents and the agent of Doon, and it is not pretended that Doon or the respondents had ever heard of the deeds by which appellant claimed title; but the contention of counsel is that appellant's exclusive and notorious possession of the premises was actual notice to Doon and the respondents of her title. Our statute requires actual notice and constructive notice is not sufficient. The demands of the statute are answered, if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry and which would, if possessed, lead to actual knowledge of the state of the title; and this is actual notice. 2 Pom. Eq. §§ 597, 598, *et seq.*

The appellant was in the actual occupancy of the premises, and actual occupancy is

enough to put parties dealing with the premises upon inquiry. 2 Pom. Eq. § 616, *note* 3, § 617. But the contention of the respondents is that the possession of the appellant was consistent with the title shown by the record, and therefore the mortgagees were under no obligation to look beyond the record and were authorized to consider her possession as under life estate only. On this question the authorities are both ways. Pom. Eq. § 616, *note* 3, § 617. We think the better doctrine is that an occupant's possession is actual notice of his title, and all persons with notice of such possession must, at their peril, take notice of his full title in the premises, no difference what the record shows.

Until the recording statutes were enacted possession was notice of ownership, and a conveyance made by a party out of possession was void. The purpose of these statutes was not to change the rule that possession was evidence of title and notice to all the world of ownership, but to afford the means of preserving the chain of title and give notice of the ownership of unoccupied lands. It would be an unwarranted application of the recording acts to say that they destroy the effects of occupancy as notice and evidence of ownership. We think, therefore, that a person at his peril deals with or purchases real estate of one in the possession of another, although said possession may be consistent with the record title. It is easy to find out the real situation by inquiry of the party in the possession, and it is his duty to do so. The conclusion therefore is that none of these mortgages, except the one for $330, were liens upon the premises of appellant. It is also contended by respondents that appellant, well knowing these things, assumed these mortgages and paid them off and settled the foreclosure suit with her eyes open by making the conveyance she now seeks to have cancelled; that, if she acted under a mistake of law and not of fact, she is bound by it; that parties are bound to know the law, and a court of equity will not interfere to cancel a contract made under a mistake of law.

This is true as a general proposition; but it is only applicable when the mistake is as to the general law, not to a case where a party is mistaken as to the effect of existing circumstances in relation to his private rights. Pom. Eq. §§ 841–843 and notes. This case comes within the latter rule. The appellant made the deed under the mistaken belief that her premises were subject to these several mortgages, and that she had no remedy but to pay them off or lose her land, life estate, and home, and be turned out of doors, and by entering into this contract, and respondent, taking advantage of this mistake, procured the deed; and this is the character of mistake that equity will relieve against.

Again, appellant was not at arm's length with respondents. She was a woman not acquainted with the rules of business; was weak and nervous and troubled because of the situation. The respondents were business men, aided by legal counsel, anxious to get their debts paid, and the agent of Doon was a lawyer and pressing to get Doon's money. The respondents and Nelson many times visited appellant and urged her to settle and pay these mortgages, telling her in substance that her deeds were not worth the paper they were written upon; that her property was liable, and that unless she paid them they would be foreclosed, and she would lose her home, life estate, and all. Pressed in this manner and worried by her helpless condition and misled by the representations of the respondents and those acting with them, she yielded and made the deed. It is true she had a friend or pretended friend to advise her, but he was stupidly ignorant or was in the interest of the other party, for he counseled with them and advised her to do what they wished, and so clearly against her interest that he must have acted in consort with them.

When she signed the deed she did it under strong protest and she said, in making her acknowledgment, that she did not do it voluntarily and willingly; that she was forced to it: Four men were present for and in the interest of the respondents and her pretended friend acting also in their interest. She was alone, no one to utter a word in her behalf, her pretended friend acting against her. In this situation and influenced by the statement of all these men that to make the deed and cancel the debt was altogether the best thing she could do, and this in face of the fact, as the uncontradicted evidence shows, she was parting with the property at less than half its value; also she labored under the impression that she could not sell the premises with these mortgages outstanding. Why did not this lawyer or these business men, or some one of them, tell her they would assist her in selling the property for its full value and deduct out of the purchase money the amount of the mortgages and give her the balance?

The only fair conclusion from the evidence is that these respondents and the lawyer acting them misled this woman as to her legal rights and over-persuaded her to deed away her own property for less than half its value to pay debts that neither she nor her property were liable for. This may have been a sharp business transaction, but it was not to the honor of those who participated in it. Every case in equity is determined on its own peculiar facts —on its own merits. Precedent and authority are only useful to prompt the judicial conscience of the chancellor and aid him in arriving at an equitable decision. Therefore we think this contract was inconscionable and ought to be set aside.

The $350 mortgage is a lien upon the land, and the decree ought to be that the deed be cancelled; that the appellant pay this mortgage and interest by a day to be named by the court, and in default of payment the premises be sold on the time and terms property is sold on the foreclosure of mortgages by the provisions of the statute, and out of the proceeds this mortgage and interest be paid and the remainder be paid to appellant.

This cause is reversed and remanded with direction to the district court to have entered a decree in accordance with this opinion, and that the respondents pay the costs of this court and the costs of the court below up to date.

We concur.

(Signed) Zane, *C. J.*
Anderson, *A. J.*

Messrs. **A. A. Hoehling, *Jr.*, Samuel Shellabarger,** and **J. M. Wilson,** for appellants.

Mr. **O. B. Hallam,** for appellee.

By the court: *Decree affirmed with costs by a divided court.*

JAMES STEEL, Administrator of Ben. Holladay, deceased, *Appt.*,

v.

THE PHENIX INSURANCE COMPANY OF BROOKLYN.

(Not officially reported.)

Insurance Law.

The decision of the circuit court of appeals in this case, that the conduct of the insurance company waived the limitation clause of the policy requiring suit to be commenced within twelve months after the fire, and that such limitation did not commence to run until after the expiration of the sixty days which was allowed to the company to pay the loss, after the proofs of loss were furnished,—affirmed by a divided court.

[No. 886.]

Submitted January 18, 1894. Affirmed Jan. 29, 1894.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to review a decree reversing the decree of the Circuit Court of the United States for the District of Oregon, with costs, and remanding the cause with direction to said circuit court to render a judgment in favor of complainant, in a suit brought by D. P. Thompson, receiver, plaintiff, against the Phenix Insurance Company of Brooklyn, defendant, to reform a policy of fire insurance and to recover the amount due on the policy. *Affirmed by a divided court.*

See same case below, *sub nom. Holladay* v. *Phenix Ins. Co.* 7 U. S. App. 325. See also *Thompson* v. *Phenix Ins. Co.* 25 Fed. Rep. 296, 11 Sawy. 276, 136 U. S. 275 (34: 408); *Steel* v. *Phenix Ins. Co.* 47 Fed. Rep. 863.

The following is the opinion of the Circuit Court of Appeals:

Hawley, *J.*: On the 21st day of April, 1884 the Phenix Insurance Company of Brooklyn in consideration of three hundred dollars, subject to the terms and conditions expressed in a policy of insurance, insured "E. S. Kearney, receiver for *Holladay* v. *Holladay*, against loss or damages by fire to the amount of five thousand dollars as follows: $4000 on their one half interest in the four story frame building occupied as a hotel and known as the Claredon Hotel. . . . Portland, Oregon, $1000 on their one half interest in the hotel furniture while contained therein to make good unto the said assured, their executors, administrators, and assigns all such immediate loss or damage, not exceeding in amount the sum or sums insured —as shall happen by fire to the property so specified from the 27th day of April, 1884, at 12 o'clock at noon, to the 27th day of April, 1885, at 12 o'clock at noon, the amount of loss or damage . . . to be paid sixty days after the proofs of the same required by the company shall have been made by the assured and received at the office in Chicago." This policy contained thirteen specific conditions, beside several notes and paragraphs. The tenth provided for the selection of arbitrators in the event the amount of the loss could not be determined by mutual agreement. The thirteenth reads as follows: "13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim and statute of limitation to the contrary notwithstanding."

At the time of the execution and the delivery of this policy the insurance company well knew that the title to said property was in dispute in the suit of *Holladay* v. *Holladay*, and that said Kearney was in possession of the property merely as the receiver in said suit and had no interest therein of any nature except as such receiver.

On May 14, 1884, an order was made in said suit accepting the resignation of said Kearney as receiver and appointing D. P. Thompson as receiver in his stead. On the 19th day of May, 1884, the said Thompson duly qualified as such receiver, and thereafter, on the night of the same day, the said insured property, without any fault, failure, neglect, or omission on the part of said Kearney, Thompson, or of any other person, was totally destroyed by fire, and a loss was sustained in a sum greater than the amounts specified in the policy.

This suit was commenced on the 10th day of July, 1885, thirteen months and twenty-one days after the fire, by Thompson, as the successor of Kearney in the receivership, to reform the policy so as to be made payable to the receiver and his successors in office, for the benefit of whom it might concern, and for a decree to recover the amount due upon said policy.

A demurrer to the original bill was sustained on the ground that the plaintiff's right of action was barred because the suit was not commenced "within twelve months next after the date of the fire from which the loss occurred." *Thompson* v. *Phenix Ins. Co.* 25 Fed. Rep. 296, 11 Sawy. 276.

An amended bill was thereafter filed alleging conduct on the part of the insurance company which, it was claimed, amounted to a waiver of the limitation of time for the commencement of the suit. A demurrer to this bill was also sustained and the suit dismissed. From that decree an appeal was taken to the Supreme Court of the United States, and the decree was reversed upon the ground that the allegations of the amended bill showed a waiver of the limitation as to the time of bringing the suit. *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287 (34: 408).

On July 12, 1886, Thompson was removed

from the receivership and G. W. Widler and Joseph Holladay were appointed in his place. Thereafter the suit of *Holladay* v. *Holladay* was decided in favor of Ben. Holladay and the receivers were discharged. On July 8, 1887, Ben. Holladay died, and on June 3, 1889, James Steele, his administrator, was made plaintiff in this suit. Thereafter this suit was again tried, and the court held that the allegations of the amended bill were not sustained by the evidence and dismissed the suit. *Steel* v. *Phenix Ins. Co.* 47 Fed. Rep. 863. From this decree the present appeal is taken.

1. Can the policy be reformed?

The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to the receiver or his successor in office, and thereby conform to the intention of the parties,—if any reformation in that respect is necessary—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject. It is, however, proper to state in this connection that we are of opinion that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable plaintiff to maintain the suit as a representative of the interest of Holladay in said property.

2. Are the allegations of the amended bill as to the conduct of the insurance company in delaying the commencement of the suit sustained by the evidence? These allegations are, in substance, that the insurance company, by its duly authorized agents, assured the plaintiff, about thirty days after the fire and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was paid to the company, which, by its agents, again assured the plaintiff that the loss would be paid as soon as action could be taken: that after sixty days had elapsed from the delivery of the proofs of loss the company, by its agents, repeatedly gave the same assurances, and that by reason of such promises and assurances the plaintiff neglected "for some time after sixty days from the delivery of the proofs of loss to bring suit for the recovery of the loss sustained." The testimony in support of these allegations is very brief.

It is admitted that the payment of the premium of three hundred dollars was made on the 27th of June, 1884, as alleged in the bill. Thompson testified that the agent of the company stated to him "that the premium had not been paid, and that it would facilitate settlement; that he paid it; that he threatened to bring suit against the company if the loss was not paid: that the agent offered to settle by paying one half of the amount specified in the policy rather than have any suit about it; that he refused to accept this offer; that the agent then told him that he thought that the company would pay the amount; he thought they would, but he was not authorized to pay; he thought they would pay it and advised me not to bring a suit; it would complicate matters somewhat, and he thought I had better not do it; urged me not to do it;" that this was very soon after the sixty days expired. "I cannot give the date or time; I have no date, and it has been a good many years since." That he was first informed that the company would not pay the loss after the sixty days had expired in which to make the proofs; that after this the agent of the company promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answer from them; that he could not give the exact time when he gave up any hope of negotiating with the company for a voluntary settlement; that it may have been one month, it may have been two, or it might have been three months from the expiration of the sixty days. The answer of the company alleges that notice was given to Thompson on the 31st day of August, 1884, "that the defendant denied any liability upon said policy and did refuse and would at all times refuse to pay said loss."

The insurance company rely upon an answer given by Thompson to a question propounded to him to show that there was no delay in bringing the suit which was caused by any conduct upon the part of the company. The question and answer is as follows: "Q. Did you delay bringing a suit in consequence of those statements made to you by the agent? A. I cannot say now; I do not remember."

This answer of the witness must be taken with reference to the other portions of his testimony which stated the facts, showing beyond any controversy that the bringing of the suit was delayed for one, two, or three months—some time after the expiration of the sixty days.

The supreme court, in deciding that the allegations in the amended bill were sufficient, said:

If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due to the conduct of the company, it cannot avail itself of the limitation of twelve months. *Curtis* v. *Home Ins. Co.* 1 Biss. 485, 487; *Ide* v. *Phœnix Ins. Co.* 2 Biss. 333; *Grant* v. *Lexington F. L. & M. Ins. Co.* 5 Ind. 23, 25, 61 Am. Dec. 74; *Mickey* v. *Burlington Ins. Co.* 35 Iowa, 174, 180, 14 Am. Rep. 494. In the case last cited it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought.

The following authorities are to the same effect: *Ames* v. *New York U. Ins. Co.* 14 N. Y. 264; *Killips* v. *Putnam F. Ins. Co.* 28 Wis. 483, 9 Am. Rep. 506; *Dwelling House Ins. Co.* v. *Brodie*, 4 L. R. A. 458, 52 Ark. 11; *St. Paul F. & M. Ins. Co.* v. *McGregor*, 63 Tex. 404.

In the Texas case the court said:

If the course of conduct pursued by the appellant was such as to induce the appellee to believe that the loss would be adjusted and paid without suit, and for this reason suit was not brought within the time prescribed, then, under the well settled principles applicable to

such cases this action may be maintained on the policy even after the expiration of the time therein prescribed.

The views expressed by the Supreme Court of the United States are as applicable to the evidence in this case as to the allegations of the bill. The most that was claimed in the bill was that by the conduct of the insurance company the plaintiff was delayed in bringing the suit for some time after sixty days from the delivery of the proofs of loss, and this is shown by the evidence.

3. The contention of the insurance company is that its conduct, in any event, only prevented this suit from being brought for five months after the fire, and that this only amounted to a waiver of so much of the limitation, and that, as there still remained seven months—a reasonable time—within which to bring suit, the action is barred because not brought "within twelve months next after the date of the fire." Is this contention sound?

Is it supported by any substantial reason?

When does the twelve months' limitation commence to run?

Is it from the date of the fire or from the expiration of sixty days after the proofs of loss were furnished.

Numerous and respectable authorities can be found in support of either view, and, inasmuch as they are in direct conflict, it becomes the duty of this court, upon the first presentation of the question, to determine which view is sustained by the weight of reason and ought in justice to be followed.

In several of the authorities where these questions have been discussed, the policies of insurance provided that no suit could be sustained unless brought within six or twelve months "after the loss shall have occurred" instead of "after the fire," and some of the cases intimated that the language should be construed differently. We are however, of opinion that there is no real or substantial difference in principle between the meaning of the words "loss" or "fire" as used in the polices. The loss occurrs at the time of the fire.

If the provision in the policy is to be construed solely with reference to the language of the clause in which the limitation is expressed, independent of any other fact or condition expressed in other clauses of the policy, then, of course, the suit cannot be maintained unless brought, "within twelve months next after the date of the fire from which such loss shall occur."

It is the duty of courts however, to arrive at the intention of the parties by an examination and consideration of the entire instrument, its various clauses and conditions, and the objects and purposes which the parties had in view at the time of the execution, acceptance, and delivery of the policy.

In determining the intention of the parties, it is our duty to examine the whole instrument in order to ascertain, if possible, the true meaning of clauses which, in a certain light, might be deemed contradictory, and to gather from the various clauses the real object and purpose which the parties intended by the instrument as a whole. When this is ascertained, then the language of the clause in controversy must be so interpreted as to give full force and effect to the true intention of the instruments as a whole.

With these general rules applicable to the construction of all written instruments, whether it be a deed, contract, or policy of insurance, we shall proceed to an examination and review of certain other conditions in the policy.

After the fire the insured is required to give notice of any loss and to make the necessary and satisfactory proofs thereof, and the company is allowed sixty days after such proofs have been received at the home office in Chicago to pay the amount of loss or damage sustained. Under this clause no suit could be commenced until after sixty days at least from the time of the fire. This would leave only ten months instead of twelve months within which time suit could be commenced.

In the 13th condition, the one wherein suit is allowed to be brought "within twelve months next after the fire," is an express proviso that no suit against the company shall be maintained in any court "until after an award shall have been obtained fixing the amount of such claim." As there has been no award in this case, it follows that, if the award clause is to be considered of full force and effect and construed solely with reference to the language used in this particular clause, then the remaining ten months has expired by the literal interpretation of independent clauses which of themselves are plain, clear, and unambiguous it actually happens in the case that the right of action was barred before it accrued under other provisions, and this condition of affairs is accomplished without any act, fault, or negligence on the part of the insured. This, in itself, justifies us in going beyond the mere words of any particular clause in order to ascertain the meaning of the clause and the intention of the parties.

The insurance company, it is true, does not rely upon the award clause, and we refer to it simply to illustrate the weakness of its contention, that another clause, upon which it does rely, should be literally construed because the the language used therein is clear, plain, and unambiguous.

The company might have claimed that, according to the award clause the suit was brought too soon; but such contention would be manifestly absurd. Why? Because it is evident that the parties never intended that such a result should be accomplished under the facts in this case.

This is made perfectly clear by a reference to the other provisions in the policy to the effect that the amount of the loss or damage might be determined by mutual agreement between the parties, and in the event of their failing to agree, then arbitrators might be chosen: and it appearing that the company, after five months of occasional promises to pay, finally decided that it would not pay the loss, this conduct was, of course, a waiver of the the right to rely upon the award clause. Upon like reasoning, why should not their conduct in causing a delay of time in the bringing of the suit, when suit was threatened, be a waiver of the time in the limitation clause?

A policy of insurance which contains conditions reducing the statutory time for the com-

mencement of any suit thereon ought in justice and equity to be so construed, if reasonable under all its terms, as to give the full period of time mentioned in the policy, freed from the provisions of all other clauses of the policy, or from the conduct of the insurance company limiting or attempting to limit the time actually given in the limitation clause.

This, it appears to us, is the consistent and logical view that ought to be taken of such policies of insurance. It is fair to the insurance company and just to the insured. It would prevent either party from taking any undue or improper advantage of the other.

The unwary could not be led into a trap and caught by any misrepresentation or delusive promise. The condition in this policy which provides that no suit can be maintained for the loss incurred unless "commenced within twelve months next after the date of the fire" should therefore be construed, in the light of all the other clauses and conditions, to mean twelve full months, not ten months nor seven months nor one month nor one day, in which to bring the suit, exclusive of the time when suit could not be brought either by other clauses or by any conduct of the company preventing the insured from bringing suit. In this case the right to bring suit being postponed in one clause of the policy for sixty days after the proofs of loss were furnished, the twelve months' limitation contained in another clause does not commence to run until after the expiration of the sixty days. This suit was, therefore, brought in time.

The construction we have given to this policy is in accordance with common sense, which is said to be the soul and spirit of the law. It is in unison with sound, legal, and universally recognized interpretations of written instruments as well as with the justice and equity of the case. It is correct in principle, and is supported by the great weight of the authorities.

Friezin v. *Allemania F. Ins. Co.* 30 Fed. Rep. 352; *Vette* v. *Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Spare* v. *Home Mut. Ins. Co.* 17 Fed. Rep. 568; *Chandler* v. *St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *New York* v. *Hamilton F. Ins. Co.* 39 N. Y. 45, 100 Am. Dec. 400; *Steen* v. *Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297; *Ellis* v. *Council Bluffs Ins. Co.* 64 Iowa, 507; *Miller* v. *Hartford F. Ins. Co.* 70 Iowa, 704; *Barber* v. *Fire & M. Ins. Co.* 16 W. Va. 658 37 Am. Rep. 800; *Murdock* v. *Franklin Ins. Co.* 7 L. R. A. 572, 33 W. Va. 407; *Case* v. *Sun Ins. Co.* 83 Cal. 473; *Owen* v. *Howard Ins. Co.* 87 Ky. 574.

In *Friezen* v. *Allemania F. Ins. Co. supra*, the fire occurred June 23, 1885. Proof of loss was made July 31, 1885. The loss was not payable until sixty days after proof of loss. Suit was commenced February 24, 1886, 7 months and one day after the fire, but within 5 months and 24 days after the sixty days after the proof of loss. The policy provided that no suit should be sustainable unless commenced within six months after the fire had occurred. Bunn, *J.*, held that the suit was commenced in time; "that what the parties contemplated was that, after the loss became due and payable, the assured should have six months within any part of which time he might bring this suit."

In *Vette* v. *Clinton F. Ins. Co. supra*, where the provision in the policy was the same as in Friezen case except the word "loss" is used instead of the word "fire." Thayer, *J.*, in delivering an oral opinion, hit the nail squarely on the head by saying that he could not see any "good reason for construing the special statute of limitations imported into this contract in such way as to make it operative during a period when, by virtue of other stipulations of the contract, the right of action was suspended."

In *Chandler* v. *St. Paul F. & M. Ins. Co. supra*, the court said: "It is natural that the parties should have intended to refer the commencement of the period of limitation to the date when the cause of action accrued, and that the time during which the assured could not sue should not be counted as part of the year within which they were required to sue."

In *Steen* v. *Niagara F. Ins. Co. supra*, the court said: "The intention of the defendant was to give the insured a full period of twelve months within any part of which he might commence his action; and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger. Not only was the remedy postponed, but the liability even did not exist at the time of the fire nor until it was fixed and ascertained according to the provision of the policy. Having thus made the doing of certain things and a fixed lapse of time thereafter conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in condition to bring an action. Under any other construction the two conditions are inconsistent with each other."

The language used in the various conditions of the policy is that of the insurance company. Admitting, then, for the sake of the argument, that it could be fairly claimed that two different constructions might be placed upon the language used in the policy, it is, nevertheless, a wise and well-settled rule, sanctioned and sustained by all the authorities, that the construction should be adopted which is most favorable to the insured; and in case of any doubt or uncertainty as to the meaning of words or of inconsistent or contradictory provisions in the policy as inserted by the company, they are to be construed most strongly against the company.

As the insurance company prepares the contract and embodies in it such conditions as it deems proper, it is in duty bound to use language in the various provisions of the policy in such a manner that the insured cannot be mistaken or misled as to the duties and burdens thereby imposed upon him.

The courts have uniformly held that the various conditions of a policy of insurance

must be strictly construed against the company and liberally in favor of the insured. This principle is applied to all class of insurance policies, whether fire, life, accidental, or other kinds. *First Nat. Bank of Kansas City* v. *Hartford F. Ins. Co.* 95 U. S. 673 [24: 563]; *Moulor* v. *American L. Ins. Co.* 111 U. S. 335 [28: 447]; *Wallace* v. *German-American Ins. Co.* 41 Fed. Rep. 742; *Cotten* v. *Fidelity & C. Co.* 41 Fed. Rep. 506; *De Graff* v. *Queen Ins. Co.* 38 Minn. 501; *Kratzenstein* v. *Western Assur. Co.* 5 L. R. A. 799, 116 N. Y. 59; *Burkhard* v. *Travellers Ins. Co.* 102 Pa. 262; *Philadelphia Tool Co.* v. *British American Assur. Co.* 132 Pa. 241; *Rogers* v. *Phenix Ins. Co.* 121 Ind. 577; *Illinois Mut. Ins. Co.* v. *Hoffman*, 132 Ill. 523; *Meyer* v. *Queen Ins. Co.* 41 La. Ann. 1000.

In *Wallace* v. *German-American Ins. Co. supra*, McCreary, *J.*, in construing the award clause in the policy, said: "If the words employed of themselves or in connection with other language used in the instrument or in reference to the subject matter to which they relate are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the insured."

In *Kratzenstein* v. *Western Assur. Co. supra*, the court said: "Where an insurance contract is so drawn as to be manifestly ambiguous, so that reasonable and intelligent men on reading it would honestly differ as to its meaning, the doubt should be resolved against the company, because it prepared and executed the agreement and is responsible for the language used and the uncertainty thereby created."

In *First Nat. Bank of Kansas City* v. *Hartford F. Ins. Co.* there was a provision in the policy that if the insured in his application makes any erroneous representation or omits to make known any fact material to the risk, then the "policy shall be void." The insured made an overestimate as to the value of his property without any fraudulent intent. The insurance company contended that under any proper construction of the contract the assured warranted absolutely and without limitation the truth of the statement as to the value of his property. The court held that this contention could not be sustained, and based its conclusion "upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the courts should lean against that construction which imposes upon the insured the obligations of a warranty. The company cannot complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

The judgment of the circuit court is reversed and the cause remanded with direction to the court to render a judgment in favor of complainant, as prayed for in the amended bill.

McKenna, *J.*, dissenting.

I am unable to agree with my associates in their construction of the policy of insurance, and therefore think that this suit was not brought in time.

The provision of the policy is as follows:

"It is expressly provided and mutually agreed that no suit or action . . . shall be sustainable . . . unless such suit or action shall be commenced within 12 months next after the date of the fire from which such loss shall occur" . . .

This provision would seem to need no interpretation in other words than its own. It is so clear and direct as to baffle attempts to make it more so.

I know of no way to express concrete time except by commencing at a certain date or event, and the latter because it indicates a date, and running a certain duration after or to a date or event after. The duration or the interval marks the period not only as to length but especially as to time before and time after, distinguishing it, therefore, and establishing it, the period commencing at the initial date or event and immovable from it. This is important. The provision of the policy, therefore, is not 12 months to bring a suit only, but 12 months within which to bring a suit and to do other things; not 12 months to sue after all conditions precedent have been removed or performed, but 12 months within which to remove or perform all conditions precedent and to bring a suit. Substantially different things—as different as a period commencing at one date is different from a period commencing at another date, as different as the year 1891 is is from the year 1892. I do not think the rights of either party to the policy are subserved by confounding these differences.

Limitations of time bringing suit on policies are sustained by authority, but with the qualification that they must be reasonable. If the conditions of the policy, therefore, cannot be performed within the period stated and a proper time be left for bringing suit the limitations would be unreasonable. If they should be used to delay or mislead they would be held to be suspended or waived, as was announced by the Supreme Court in this case on a former appeal

Thompson v. *Phenix Ins. Co.* 136 U. S. 209 [34: 413].

If the parts did intend to "expressly provide and mutually agree," to limit the right of suit within a particular period commencing at the fire—an unambiguous and impressive incident—how else could they so aptly and adequately express than they did? How otherwise could they have so bounded and identified the period if they meant a fixed period, not a movable period? "12 months next after the fire" is unambiguous. This is conceded by my associates, but its certainty is made to yield to other provisions of the policy not more certain and which are entirely for the benefit of the defendant company. If the policy is to be construed most strongly against the insurer why not put it the other way and make the other provisions yield to the provision for suit, and, as the company has stipulated that the insured shall have "12 months next after the fire" to bring suit, say that he shall have the whole of them and all provisions suspending or lessening

them shall be void? This way is as good as the other, and both bad, because neither accommodate the full purpose of the parties as I conceive it, which is that the insured shall have time to investigate a claim, arbitrate it, may be, and the insured shall have a reasonable time to sue. Any policy that does not secure the latter would, as we have seen, be declared unreasonable; once secured it cannot be embarrassed by the acts of the insurer. This, we have also seen, was declared by the Supreme Court in this case.

Did the defendant company waive the provision requiring suit to be brought 12 months after the fire? I do not think the allegations of the complaint that the plaintiff failed to sue by reason of the conduct of the company is sustained by the evidence.

Mr. **George H. Williams** for appellant.
Mr. **L. B. Cox** for appellee.

By the Court:—Judgment affirmed with costs by a divided court, and cause remanded to the Circuit Court of the United States for the District of Oregon with directions to set aside the decree entered by that court and to enter a decree in favor of complainant as prayed for in the amended bill.

PULLMAN PALACE CAR CO., *plff. in err.*, *v.* JEANNIE CAMPBELL.

(Not officially reported.)

Recovery for indecent assault by sleeping car porter.

The plaintiff having recovered, in this case, damages for an indecent assault made upon her by a sleeping car porter, while she was a passenger in one of defendant's cars,—this court, by a divided court, affirms the judgment.

[No. 344].

Submitted April 24, 1894. Decided April 30, 1894.

IN error to the Circuit Court of the United States for the Northern District of Iowa, to review a judgment in favor of Jeannie Campbell, plaintiff, against Pullman Palace Car Co. defendant, for eleven thousand dollars damages, for an indecent assault made upon her, accompanied with improper proposals to her, by the negro porter employed by defendant on a sleeping car of defendant, while plaintiff was a passenger in said car.

The allegations of plaintiff's petition are as follows: that defendant is a corporation engaged in furnishing cars for hire to passengers traveling by rail, and holding itself out as furnishing care, protection and attention, and opportunity to retire to bed at night in separate berths under the protection of defendant and its servants and employés.

That on Feb. 15 and 16, 1890, defendant was so as aforesaid engaged in running and operating a car between Chicago, Ill. and Sioux City, Iowa, in connection with the regular passenger train on the Chicago, Milwaukee & St. Paul railway, which arrived in Sioux City from Chicago on the morning of Feb. 16, 1889, and that plaintiff was a passenger on said car, holding a first class railroad ticket and a ticket from defendant entitling her to a seat and full berth on said car from Chicago to Sioux City, etc.

That at the station of Manilla, Iowa, the defendant's conductor in charge of said car left the same in charge of the negro porter employed by defendant on said car for the remainder of the trip to Sioux City, and was at no time thereafter present in said car to afford care, attention and protection to plaintiff; that plaintiff was the only through passenger to Sioux City, and during the latter part of the night preceding the arrival of said train at Sioux City, and after said conductor had left said car and after all other passengers had left said car and while plaintiff was alone in said car with said porter, and while plaintiff was alone in her berth, and lying therein, said porter came to her said berth, and forcibly and against the will and remonstrances of plaintiff made an outrageous and indecent assault upon plaintiff's person, and insisted upon getting into said berth with plaintiff and having sexual intercourse with her, and threatened to effect his purpose by force, and informed her that there was no other person on said car to hear her cries for help or answer them; that plaintiff was compelled to and did use her utmost strength and force to escape from said porter, and did escape from him and gained the ladies' closet on said car and locked herself therein, and was compelled to and did remain therein with slight and insufficient clothing until daylight, through fear of further violence from said porter, and after leaving said room first before reaching Sioux City said porter threatened to kill her if she ever told any one what had occurred.

That by means of said assault and threats plaintiff suffered an intense nervous shock and severe and permanent injury to her spine, and was sick and delirious, and suffered a miscarriage, and for six weeks endured most intense agony, and has since remained and still is sick and suffering great pain and agony.

That prior to said injuries plaintiff was strong and healthy, and that by reason of said injuries she has suffered a permanent nervous shock and derangement of her nervous system and will for the remainder of her life be subject to nervous disorder and derangement, and has become weak and debilitated and unable to peform her household duties, and permanently unfitted to perform the duties of a wife or mother; that she is a married woman and was with child at the time of such assault, and suffered a miscarriage by reason of said injuries, and has been put to great expense for nurses, physicians, medicine, etc.—to her damage, $20,000.

Defendant in its answer admitted that it was a corporation and that at the time aforesaid it was engaged in operating said car on said road and trip and that plaintiff was a passenger therein holding a first class railroad ticket and ticket for a seat and berth in said sleeping car of defendant, and denied every other allegation of plaintiffs petition.

On the trial the jury rendered a verdict for the plaintiff for eleven thousand dollars damages. Various objections and exceptions were

taken during the trial and to the charge to the jury which so far as they seem to have been relied upon are given in the brief of plaintiff in error.

Upon the trial of said cause the court gave the following, among other, instructions to the jury, showing the relations between defendant and the railroad company, etc.: "In this case now on trial before you the plaintiff, Mrs. Campbell, claims damages against the defendant, The Pullman Palace Car Company, in the sum of twenty thousand dollars for injuries which she claims were caused to her when she was an occupant of a sleeping car furnished by defendant for use as a sleeping car upon a train of passenger cars operated by the Chicago, Milwaukee & St. Paul R'y Company between Chicago, Illinois, and Sioux City, Iowa, such injury being alleged to have been caused by the misconduct of a porter employed by the defendant upon said sleeping car. Before passing to a statement of the particular issues to be submitted to you in this cause it is proper for me to instruct as to the relation existing between the Pullman Company and persons occupying the sleeping cars furnished by the defendant company for the use of the traveling public. As I construe the contract between the defendant and the Chicago, Milwaukee & St. Paul Railway Company, the Pullman Company agrees to furnish for the use of the public what are commonly known as sleeping cars, which, when in use, form part of the trains run by the railway company for the transportation of passengers along its lines of railway. The Pullman Company, by thus furnishing cars to be used as sleeping cars by the traveling public, does not assume towards the persons occupying such cars the relation of a common carrier; it does not undertake the duty of transporting passengers to their destination; that duty is assumed by the railway company, and for the performance thereof the passenger must look to the company managing the railroad, and the Pullman Company is not liable for injuries received by the occupants of its cars for accidents connected with the movement of the train, nor is it responsible for the negligence or misconduct of the persons charged with the duty of operating the train of which the sleeping car may form a part. Whilst, however, it assumes no responsibility for the mere transportation of the persons occupying its cars and does not occupy the relation of common carrier to them, it nevertheless does assume certain duties and obligations to its patrons and becomes bound to the exercise of reasonable care in the performance thereof.

The Pullman Company, by its mode of managing their sleeping cars, represent to the traveling public that they may be occupied with reasonable safety and comfort as sleeping cars, and by receiving payment for the use thereof the company agrees with its patrons that it will exercise ordinary care to secure the comfort and safety of those using the same for the purposes for which such cars are furnished.

The person or persons placed in charge of such sleeping cars by the Pullman Company is bound, as the employé of the company, to the exercise of ordinary care for the protection and comfort of persons using such car in accordance with the regulations of the company, and if such person either through failure to exercise proper care or by willful misconduct on his part, permits or causes an injury to happen to an occupant of a sleeping car placed under his charge the Pullman Company will be liable for the damages caused thereby.

In the answer filed in this cause the defendant admits that on the 15th and 16th days of February, 1889, it was engaged in operating a sleeping car on the line of the Chicago, Milwaukee & St. Paul Railway Company between Chicago, Ill., and Sioux City, Iowa, in connection with the regular passenger train, reaching Sioux City in the morning, and admits, also, that the plaintiff was a passenger upon the passenger train in question, and had purchased and paid for a ticket from defendant for a seat and berth in said sleeping car belonging to the defendant.

There is no conflict in the testimony adduced by the parties, plaintiff and defendant, touching the fact that the plaintiff was an occupant of the sleeping car which left Chicago on the 15th and reached Sioux City on the morning of the 16th of February, 1889. It thus appears that the plaintiff was rightfully an occupant of said sleeping car at the time named, and while in said car, while it was being conveyed to Sioux City, the plaintiff was entitled to demand of defendant the exercise on its part of ordinary care to secure her the safe and comfortable use of said sleeping car and its conveniences for the purpose for which said car was placed in said train.

In the performance of its duties in this respect the defendant company would be responsible for the willful misconduct, if any there was, of its own employés placed in charge of said sleeping car, when such misconduct was of such a nature as to interfere with the safe and comfortable use of said car by the plaintiff for sleeping car purposes."

Messrs. **John S. Runnels** and **William Burry**, for plaintiff in error:

The assignments of error relied upon by plaintiff in error are:

1st. The court below erred in holding and charging the jury that the plaintiff in error was liable for the assault, even though it was made by the porter when not engaged in the performance of the service for which he was employed, but was caused by his willful misconduct and to gratify his lust.

2d. The court below erred in excluding testimony concerning the duties of train conductor and brakeman.

3d. The conduct and remarks of the court below were such as to prejudice the jury against plaintiff in error, to discredit its witnesses, and to prevent a fair and impartial trial.

The result of the case depended on conflicting testimony. The testimony for defendant was much the stronger and should have prevailed. The case of the plaintiff below rested entirely on her own evidence, and she contradicted herself.

By the contract between the railroad company and plaintiff in error, under which the sleeping car was operated, the railroad

company had complete control of the car and of its movements and received all the transportation money of passengers travelling in it. The sleeping car conductors were subject to the rules of the railroad company, and therefore under control of the train conductor. Only as the porter attended to the peculiar arrangements of the sleeping car was he the representative of the plaintiff in error. In *Pullman Palace Car Co.* v. *Smith*, 73 Ill. 360, it was held that the Pullman Company was neither a common carrier nor an innkeeper, and in *Pennsylvania Co.* v. *Roy*, 102 U. S. 451 (26: 142), it was held that a sleeping car was part of the railroad company's train, was under its charge, and that the sleeping car employés were employés of the railroad company. It is only, therefore, when the porter is acting within the scope of his duty to and employment by the plaintiff in error that his acts are its acts, in such sense that it is liable for them.

The distinction as to sleeping car employés, and the limits of the liability of the sleeping car company for the unauthorized acts of its servants, are well stated in a case that arose in Louisiana. The court held that the railroad company was liable but that the sleeping car company was not; that the sleeping car employés were, in law, the servants and employés of the railroad company, and their negligence or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company.

Williams v. *Pullman Palace Car Co.* 40 La. Ann. 87.

In general, the master is liable for the fault or negligence of the servant but not for his willful wrong or trespass.

2 Hilliard, Torts, 524; *McManus* v. *Crickett*, 1 East, 106; *Sharrod* v. *London & N. W. R. Co.* 4 Exch. 508; *Roe* v. *Birkenhead, L. & C. J. R. Co.* 7 Exch. 86; *Wright* v. *Wilcox*, 19 Wend. 345.

Where the agent does any act of his own free will, without reference to his functions as a corporate agent, the corporation is not responsible.

Etting v. *Commercial Bank*, 7 Rob. (La.) 459; *Dyer* v. *Ridley*, 28 La. Ann. 6; *Isaacs* v. *Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418; *Evansville & C. R. Co.* v. *Baum*, 26 Ind. 72; *New Orleans, J. & G. N. R. Co.* v. *Harrison*, 48 Miss 112; *Flower* v. *Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; Pierce, Railroads, 270; Field, Priv. Corp. §§ 524, 623.

The character of the porter had always been good. The liability of the master does not arise where the servant has stepped aside from his employment to commit a tort.

Cooley, Torts, 535; *Howe* v. *Newmarch*, 12 Allen, 49; *Poulton* v. *London & S. W. R. Co.* L. R. 2 Q. B. 534; *Little Miami R. Co.* v. *Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373; *Stephenson* v. *Southern Pac. R. Co.* 15 L. R. A. 475, 93 Cal. 558; *Mott* v. *Consumer's Ice Co.* 73 N. Y. 543; *Rounds* v. *Delaware, L. & W. R. Co.* 64 N. Y. 129; *Ayerigg* v. *New York & E. R. Co.* 20 N. J. L. 460; *Snyder* v. *Hannibal & St. J. R. Co.* 60 Mo. 413; *Cosgrove* v. *Ogden*, 49 N. Y. 257, 10 Am. Rep. 361; *Chicago, B. & Q. R. Co.* v. *Casey*, 9 Ill. App. 643; *McKeon* v. *Citizens R. Co.* 42 Mo. 79; *McManus* v. *Crickett*, 1 East, 106; *Philadelphia, G. & N. R. Co.* v. *Wilt*, 4 Whart. 143; *Miller* v. *Burlington & M. R. Co.* 8 Neb. 219; *Illinois Cent. R. Co.* v. *Downey*, 18 Ill. 259; *Chicago & N. W. R. Co.* v. *Bayfield*, 37 Mich. 205; *Wood* v. *Detroit City Street R. Co.* 52 Mich. 402, 50 Am. Rep 259. *Johnson* v. *Barber*, 10 Ill. 425, 50 Am. Dec. 416. *Mali* v. *Lord*, 39 N. Y. 381, 100 Am. Dec. 448. *Fraser* v. *Freeman*, 43 N. Y. 566, 3 Am. Rep. 740; *International & G. N. R. Co.* v. *Anderson*, 82 Tex. 516; *Crocker* v. *New London, W. & P. R. Co.* 24 Conn. 248; *Smith* v. *Memphis & A. C. Packet Co.* (Tenn.) June 5, 1885; *Fink* v. *Potter*, 17 Ill. 406; *Flower* v. *Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Bolingbroke* v. *Swindon New Town Local Board*, L. R. 9 C. P. 575; *Oxford* v. *Peter*, 28 Ill. 434.

By his remarks and rulings the trial judge practically directed the jury to disregard all the expert testimony offered by the defense as to the extent or permanency of plaintiff's injuries, and suggested that the character of the porter who was the main witness for the defense and upon whose testimony the defense largely rested, was of no consequence

McKinn v. *Whelan*, 27 Cal. 300; *McDuff* v. *Detroit Evening Journal Co.* 84 Mich. 9; *State* v. *Tickel*, 13 Nev. 502; *McIntosh* v. *McIntosh*, 79 Mich. 198; *Darrow* v. *Pierce*, 91 Mich. 68; *Graham* v. *McReynolds*, 90 Tenn. 673; *Brunker* v. *Cummins*, 133 Ind. 443; Thomp. Trials, § 218.

Mr. **Wm. L. Joy**, for defendant in error:

In this case the sole representative of the company in charge of the car was the porter who committed the assault; therefore, at that time, in all matters connected with the care and protection of the passenger, he was acting for the company, and as such service required constant vigilance and attention, he was at all times engaged in that service.

The assault was the grossest violation of the very duty he was employed to perform.

Philadelphia & R. R. Co v. *Derby*, 55 U. S 14 How. 468 (14: 502): Story, Agency, § 452 Smith, Master & Servant, 152.

Where the misconduct of the agent causes a breach of the obligation or contract of the principal, then the principal will be liable in an action, whether such misconduct be willful or malicious, or merely negligent.

Milwaukee & M. R. Co. v. *Finney*, 10 Wis. 389; *Weed* v. *Panama R. Co.* 17 N. Y. 362, 72 Am. Dec. 474; *Bryant* v. *Rich*, 106 Mass. 180. 8 Am. Rep. 311; *McKinley* v. *Chicago & N. W. R. Co.* 44 Iowa, 314, 24 Am. Rep. 748; *Craker* v. *Chicago & N. W. R. Co.* 36 Wis. 657; *Terre Haute & I. R. Co.* v. *Jackson*, 81 Ind. 19, 6 Am. & Eng. R. Cas. 178; *Chicago & E. R. Co.* v. *Flexman*, 103 Ill. 546, 42 Am. Rep. 33. 8 Am. & Eng. R. Cas. 354; *Stewart* v. *Brooklyn & C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185, 12 Am. & Eng. R. Cas. 127-129; *Goddard* v. *Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39; 22 Am. & Eng. Enc. Law, 797.

By the Court: *Judgment affirmed, with costs and interest, by a divided court.*

FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1893,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

TWENTY EIGHTH RULE.

THE STANDARD UNDERGROUND CABLE CO., *Plff. in Err.*, *v.* JOHN P. STOCKTON, Attorney General, etc. [No. 636.]

In error to Court of Chancery of State of New Jersey.

Mr. A. Q. Keasbey for plaintiff in error. *Mr. John P. Stockton* for defendant in error.

July 24, 1893. Dismissed pursuant to 28th Rule.

WAGER SWAYNE, *Trustee, et al., Appts.*, *v.* SOLON HUMPHREYS *et al.*, Receivers. [No. 468.]

Appeal from Circuit Court of the United States for District of Indiana.

Messrs. F. M. Whitridge and *J. M. Butler* for appellants. *Mr. Thomas H. Hubbard* for appellees.

July 25, 1893. Dismissed pursuant to 28th Rule.

THE MASSACHUSETTS BENEFIT ASSO. *Plff. in Err.*, *v.* SARAH G. MILES. [No. 226.]

In Error to Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. F. Carroll Brewster for plaintiff in error. *Messrs. James A. Develin* and *Richard P. White* for defendant in error.

August 12, 1893. Dismissed pursuant to 28th Rule.

THE KENTUCKY CENTRAL R. CO. *Plff. in Err.*, *v.* THE COMMONWEALTH OF KENTUCKY. [No. 364.]

In Error to Court of Appeals of the State of Kentucky.

Mr. John G. Carlisle for plaintiff in error. *Mr. W. J. Hendrick* for defendant in error.

August 31, 1893. Dismissed pursuant to 28th Rule.

THOMAS D. PRICE, *Plff. in Err.*, *v.* THEODORE PARKHURST *et al.* [No. 943.]

In Error to United States Circuit Court of Appeals for the 8th Circuit.

Mr. Henry Wise Garnett for plaintiff in error. *Mr. R. S. Morrison* for defendant in error.

September 7, 1893. Dismissed pursuant to 28th Rule.

THE TOWNSHIP OF GILL'S CREEK, *Appt.*, *v.* THE MASSACHUSETTS & SOUTHERN CONSTRUCTION CO. [No. 504.]

Appeal from Circuit Court of the United States for the District of South Carolina.

Messrs. C. R. Miles and *Ira B. Jones* for appellant. *Mr. Samuel Lord* for appellee.

September 19, 1893. Dismissed pursuant to 28th Rule.

THE PEOPLE OF STATE OF NEW YORK *ex rel.* WILLIAM MERTENS *et al.*, *Plffs. in Err.*, *v.* FREDERICK COOK, Sec'y of State of N Y. [No. 222.]

In Error to Supreme Court State of New York.

Mr. Sherman Kearts for plaintiffs in error. *Mr. Charles F. Tabor* for defendant in error.

September 20, 1893. Dismissed pursuant to 28th Rule.

WILLIS J. PERKINS, *Appt.*, *v.* CHARLES W. EATON *et al.* [No. 118.]

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Mr. Edward Taggart for appellant. *Mr. Philip J. O'Reilly* for appellees.

September 28, 1893. Dismissed pursuant to 28th Rule.

TENTH RULE.

THE CONSOLIDATED BUNGING APPARATUS CO. *Appt.*, *v.* THE PETER SCHOENHOFE BREWING CO. [No. 11.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. Ephraim Banning, Thos. A. Banning and *Wells W. Leggett* for appellant. *Mr. C. P. Jacobs* for appellee.

October 10, 1893. Dismissed with costs, pursuant to the 10th Rule.

EDWARD T. FARISH *et al.*, *Appts.*, *v.* THE NEW MEXICO MINING CO. *et al.* [No. 22.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. John D. Pope for appellants. *Messrs. W. L. Jeffries, W. Earle* and *S. B. Elkins* for appellees.

October 11, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE CONSOLIDATED BUNGING APPARATUS CO. *et al., Appts.*, v. THE H. CLAUSEN & SON BREWING CO. [No. 24.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. Ephraim Banning and *Thos. A. Banning* for appellants. *Mr. C. P. Jacobs* for appellee.

October 11, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE JOLIET MANUFACTURING CO., *Appt.*, v. THE KEYSTONE MANUFACTURING CO. *et al.* [No. 40.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Messrs. John W. Munday and *Edmund Adcock* for appellant. *Mr. J. G. Manahan* for appellee.

October 13, 1893. Dismissed with costs, pursuant to the 10th Rule.

BENJAMIN F. LE WARNE, *Appt.*, v. THE MEXICAN INTERNATIONAL IMPROVEMENT CO. *et al.* [No. 65.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. H. L. Lazarus for appellant. *Mr. W. W. Howe* for appellee.

October 26, 1893. Dismissed with costs, pursuant to the 10th Rule.

JOHN A. GREENE *et al., Appts.*, v. DANIEL A. WOODHOUSE *et al.* [No. 69.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. B. F. Lee and *W. H. L. Lee* for appellants. *Mr. A. V. Briesen* for appellees.

October 30, 1893. Dismissed with costs, pursuant to the 10th Rule.

M. C. HENLEY, *Appt.*, v. THE RICHMOND CHECK ROWER CO. *et al.* [No. 91.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. R. H. Parkinson for appellant. *Messrs. E. E. Wood* and *Edward Boyd* for appellees.

November 16, 1893. Dismissed with costs, pursuant to the 10th Rule.

M. C. HENLEY, *Appt.*, v. WM. C. SHOEMAKER *et al.* [No. 92.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. R. H. Parkinson for appellant. *Messrs. E. E. Wood* and *Edward Boyd* for appellees.

November 17, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE MINNEAPOLIS & ST. LOUIS RAILWAY CO., *Plff. in Err.*, v. R. F. PARSHALL. [No. 104.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. Eppa Hunton for plaintiff in error. *Messrs. W. F. Vilas, G. C. Squires* and *F. W. M. Cutcheon* for defendant in error.

November 20, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE CENTRAL TRUST CO. OF NEW YORK, *Appt.*, v. J. J. DUFF. [No. 120.]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Messrs. Edgar M. Johnson and *W. M. Baxter* for appellant. No appearance for appellee.

November 24, 1893. Dismissed with costs, pursuant to the 10th Rule.

J. M. BAIN, *Plff. in Err.*, v. THE UNITED STATES. [No. 611.]

In Error to the District Court of the United States for the Southern District of Ohio.

Mr. G. H. Wald for plaintiff in error. Atty-Gen for defendant in error.

November 27, 1893. Dismissed pursuant to the 10th Rule.

THE CONSOLIDATED PATENTS COMPANY *et al., Appts.*, v. A. HUN BERRY. [No. 125.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. W. A. Redding for appellants. *Mr. Causten Browne* for appellee.

November 27, 1893. Dismissed with costs, pursuant to the 10th Rule.

MADISON D. SHIPMAN, *Appt.*, v. MAX BEEBER *et al.* [No. 132.]

Appeal from the Circuit Court of the United States for the Northern District of New York.

Mr. W. C. Witter for appellant. *Messrs. Jno. R. Bennett* and *W. B. H. Dowse* for appellee.

November 28, 1893. Dismissed with costs, pursuant to the 10th Rule.

ALBRECHT KNEULE *et al., Plffs. in Err.*, v. MARY V. DELP. [No. 133.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. J. H. Heverin for plaintiffs in error. No appearance for defendant in error.

November 28, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE FALLS RIVET CO. *et al., Appts.*, v. WM. B. WOLFE *et al.* [No. 139.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. Livingston Gifford for appellants. No appearance for appellees.

November 29, 1893 Dismissed with costs, pursuant to the 10th Rule.

WILLIAM DOWNING, *Appt.*, v. J. W. C. WILSON *et al.* [No. 142.]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Mr. W. H. De Witt for appellant. No appearance for appellee.

November 29, 1893. Dismissed with costs, pursuant to the 10th Rule.

RUDOLPH ZIMMERMAN, *Plff. in Err.*, v. E. R. OLIVER. [No. 145.]

In Error to the Circuit Court of the United States for the Western District of Texas.

Messrs. C. W. Ogden, S. M. Ellis and *Wm. A. McKenney* for plaintiff in error. No appearance for defendant in error.

December 4, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE AMERICAN RAPID TELEGRAPH CO., *Appt.*, *v.* THE BOSTON SAFE DEPOSIT & TRUST CO. [No. 151.]

Appeal from the Circuit Court of the United States for the District of Connecticut.

Mr. R. G. Ingersoll for appellant. *Messrs. W. G. Wilson* and *M. W. Seymour* for appellees.

December 5, 1893. Dismissed with costs, pursuant to the 10th Rule.

ANDREW L. BRITTON, *Appt.*, *v.* ISAAC B. KLEINERT. [No. 154.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Jerome Carty for appellant. *Mr. Jas. A. Hudson* for appellee.

December 6, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE BAY CITY STREET RAILWAY CO., *Plff. in Err.*, *v.* ROBBINS B. TAYLOR *et al.* [No. 168.]

In Error to the Supreme Court of the State of Michigan.

Mr. H. H. Hatch for plaintiff in error. *Mr. T. A. E. Weadock* for defendant in error.

December 12, 1893. Dismissed with costs, pursuant to the 10th Rule.

THE REPUBLIC IRON MINING CO., *Plff. in Err.*, *v.* CHARLES M. JONES. [No. 172.]

In error to the Circuit Court of the United States for the Northern District of Georgia.

Mr. Reuben Arnold for plaintiff in error. No appearance for defendant in error.

December 14, 1893. Dismissed with costs, pursuant to the 10th Rule.

JOHN M. WILKERSON, Sheriff, etc., *Appt.*, *v.* C. A. RAHRER. [No. 184.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Mr. L. B. Kellogg for appellant. No appearance for appellee.

December 20, 1893. Dismissed with costs, pursuant to the 10th Rule.

JOHN M. WILKERSON, Sheriff, etc., *Appt.*, *v.* JACOB H. SICHER. [No. 185.] And J. D. M. CONRAD, Marshal, etc., *Appt.*, *v.* GEORGE BELL. [No. 186.]

Appeals from the Circuit Court of the United States for the District of Kansas.

Mr. L. B. Kellogg for appellants. No appearance for appellees.

December 21, 1893. Dismissed with costs, pursuant to the 10th Rule.

PROSPER LAMAL, *Plff. in Err.*, *v.* THE UNITED STATES. [No. 205.]

In error to the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. G. A. Breaux for plaintiff in error. *Atty-Gen.* for defendant in error.

January 12, 1894. Dismissed pursuant to the 10th Rule.

THE SHULTZ BELTING CO., *Appt.*, *v.* THE WILLEMSEN BELTING CO. [No. 215.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. C. H. Krum for appellant. *Mr. S. N. Taylor* for appellee.

January 17, 1894. Dismissed with costs, pursuant to the 10th Rule.

HERMAN ROYER, *Appt.*, *v.* THE SHULTZ BELTING CO. [No. 216.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. J. O. Broadhead and *M. A. Wheaton* for appellant. *Mr. C. H. Krum* for appellee.

January 17, 1894. Dismissed with costs, pursuant to the 10th Rule.

HERMAN ROYER, *Appt.*, *v.* THE SHULTZ BELTING CO. [No. 217.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. J. O. Broadhead and *M. A. Wheaton* for appellant. *Mr. C. H. Krum* for appellee.

January 18, 1894. Dismissed with costs, pursuant to the 10th Rule.

PATRICK MCGUIRE, *Plff. in Err.*, *v.* THE VARIETY IRON WORKS CO. [No. 219.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. J. L. High and *James Frake* for plaintiff in error. *Messrs. E. E. Prussing, J. C. Hutchins* and *A. A. Goodrich* for defendant in error.

January 18, 1894. Dismissed with costs, pursuant to the 10th Rule.

MARGARET B. SOWLES *et al.*, *Plffs. in Err.*, *v.* CHESTER W. WITTERS, Receiver, etc. [No. 231.]

In Error to the Circuit Court of the United States for the District of Vermont.

Mr. E. A. Sowles for plaintiffs in error. *Mr. C. W. Witters* for defendant in error.

January 25, 1894. Dismissed with costs, pursuant to the 10th Rule.

JAMES R. ENGLISH, Administrator, etc., *Appt.*, *v.* H. RIEMAN DUVAL, Receiver, etc. [No. 232.]

Appeal from the Circuit Court of the United States for the Northern District of Florida.

Mr. F. P. Fleming for appellant. No appearance for appellee.

January 25, 1894. Dismissed with costs, pursuant to the 10th Rule.

ISAAC S. JENNINGS, *Plff. in Err.*, *v.* RACHEL ANN BAEDER. [No. 241.]

In Error to the Circuit Court of the United States for the District of New Jersey.

Mr. Barker Gummere for plaintiff in error. No appearance for defendant in error.

January 26, 1894. Dismissed with costs, pursuant to the 10th Rule.

BERNHARD RUBENS, *Plff. in Err.* *v.* WILLIAM H. ROBERTSON, Collector, etc. [No. 247.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. D. P. Hays for plaintiff in error. *Atty. Gen.* for defendant in error.

January 31, 1894. Dismissed with costs, pursuant to the 10th Rule.

W. H. BARNETT, *Plff. in Err.*, *v.* THE CITY OF DENISON. [No. 250.]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Mr. Sawnie Robertson for plaintiff in error. No appearance for defendant in error.

February 1, 1894. Dismissed with costs, pursuant to the 10th Rule.

C. S. STARKEY, *Plff. in Err.*, *v.* NELSON BURNHAM. [No. 126.]

In Error to the Supreme Court of the State of Kansas.

Mr. William Lawrence for plaintiff in error. *Messrs. A. T. Britton* and *A. B. Browne* for defendants in error.

March 6, 1894. Dismissed with costs, pursuant to the 10th Rule.

C. S. STARKEY, *Plffs. in Err.*, *v.* CHARLES ENGLEHART. [No. 127.]

In Error to the Supreme Court of the State of Kansas.

Mr. William Lawrence for plaintiff in error. *Messrs. A. T. Britton* and *A. B. Browne* for defendant in error.

March 6, 1894. Dismissed with costs, pursuant to the 10th Rule.

A. DALLEMAND, ETC., *Plff. in Err.* *v.* THE ODD FELLOWS SAVINGS BANK *et al.* [No. 269.]

In Error to the Supreme Court of the State of California.

Messrs. S. F. Phillips and *F. D. McKenney* for plaintiffs in error. No appearance for defendants in error.

March 8, 1894. Dismissed with costs, pursuant to the 10th Rule.

C. S. MILLS, *Plff. in Err.*, *v.* LEWIS P. WINSTON. [No. 270.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Mr. W. L. Royall for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

March 8, 1894. Dismissed with costs, pursuant to the 10th Rule.

ELLIS ABRAM, *Plff. in Err.*, *v.* LEWIS P. WINSTON. [No. 271.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Mr. W. L. Royall for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

March 9, 1894. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM L. ROYALL, *Plff. in Err.*, *v.* JOHN K. CHILDREY. [No. 272.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Mr. W. L. Royall for plaintiff in error. *Mr. R. Taylor Scott* for defendant in errror.

March 9, 1894. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM L. ROYALL, *Plff. in Err.*, *v.* SAMUEL C. GREENHOW. [No. 273.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Mr. W. L. Royall for plaintiff in error. *Mr. R. Taylor Scott* for defendant in error.

March 9, 1894. Dismissed with costs, pursuant to the 10th Rule

THE TAYLOR MANUFACTURING CO., *Appt.*, *v.* M. J. HATCHER & CO. [No. 277.]

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Mr. Clifford Anderson for appellant. No appearance for appellees.

March 12, 1894. Dismissed with costs, pursuant to the 10th Rule.

THE DAVIS SEWING MACHINE CO., *Appt.* *v.* THE HAT SWEAT MANUFACTURING CO. [No. 279]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Wm. A. Jenner for appellant. *Mr. Jno. R. Bennett* for appellee.

March 12, 1894. Dismissed with costs, pursuant to the 10th Rule.

JOHN DOBSON *et al.*, *Appts.*, *v.* FANNIE C. GRAHAM, Executrix, etc. [No. 282.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Hector T. Fenton for appellants. No appearance for appellee.

March 14, 1894. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM GLASMANN, *Appt.*, *v.* MARY O'DONNELL. [No. 287.]

Appeal from the Supreme Court of the Territory of Utah.

Mr. R. N. Baskin for appellant. *Mr. J. L. Rawlins* for appellee.

March 14, 1894. Dismissed with costs, pursuant to the 10th Rule.

W. D. LAWTON, *Appt.*, *v.* JOHN G. EAGLESON *et al.* [No. 290.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Mr. M. A. Wheaton for appellant. *Mr. Jas. A. Skilton* for appellee.

March 14, 1894. Dismissed with costs, pursuant to the 10th Rule.

W. G. HUSKINS, *Plff. in Err.*, *v.* THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. [No. 302.]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Mr. G. W. Pickle for plaintiff in error. *Mr. Edward Colston* for defendant in error.

March 16, 1894. Dismissed with costs pursuant to the 10th Rule.

THE CONSOLIDATED PATENTS CO. *et al.*, *Appts.*, *v.* JAMES E. BARNEY, AS THE NATIONAL VENTILATION CO. [No. 808.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. Wm. A. Redding for appellants. No appearance for appellee.

March 19, 1894. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM DEERING, *Appt.*, *v.* THE MCCORMICK HARVESTING MACHINE CO. [No. 321.]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Messrs. Ephraim Ranning and *Thomas A.*

Banning for appellant. No appearance for appellee.

March 21, 1894. Dismissed with costs, pursuant to the 10th Rule.

HUGH YOUNG *et al., Appts.*, *v.* THADDEUS A. JACKSON. [No. 325.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Edwin H. Brown for appellants. *Messrs. R. M. Morgan* and *Geo. W. Brown, Jr.*, for appellee.

March 22, 1894. Dismissed with costs, pursuant to the 10th Rule.

THE CELLULOID MANUFACTURING CO., *Appt.* *v.* THE CELLONITE MANUFACTURING CO., *et al.* [No. 333.]

Appeal from the Circuit Court of the United States for the Southern D strict of New York.

Mr. Frederic H. Betts for appellant. *Mr. Jno. R. Bennett* for appellees.

March 27, 1894. Dismissed with costs, pursuant to the 10th Rule.

CLEVELAND COUNTY, *Plff. in Err.*, *v.* THE UNITED STATES, *ex rel.* MILTON SHIRK. [No. 343.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. Sol. F. Clark for plaintiff in error. No appearance for defendant in error.

March 29, 1894. Dismissed with costs, pursuant to the 10th Rule.

SIXTEENTH RULE.

THE SYRACUSE WATER CO., *Plff. in Err.*, *v.* THE CITY OF SYRACUSE *et al.* [No. 131.]

In Error to the Supreme Court of the State of New York.

Mr. G. F. Comstock for plaintiff in error. *Messrs. Edwin S. Jenney* and *Carroll McKenney* for defendant in error.

November 29, 1893. Dismissed with costs, pursuant to the 16th Rule, on motion of Mr. Carroll McKenney for the defendants in error.

THE AMERICAN TUBE & IRON CO., *Plff. in Err.*, *v.* JOHN R. DAVIS, Guardian, etc. [No. 146.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Messrs. T. W. Sanderson and *M. A. Norris* for plaintiff in error. *Mr. A. J. Woolf* for defendant in error.

December 4, 1893. Dismissed with costs, pursuant to the 16th Rule, on motion of Mr. A. J. Woolf, for the defendant in error.

PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS DENIED.

ROBERT F. ASPLEY, *Plff. in Err.*, *v.* J. P. MURPHY *et al.* [No. 953.]

Mr. A. H. Garland for plaintiff in error. *Messrs. F. M. Etheridge* and *W. P. Ellison* for defendant in error.

November 6, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

THE SINGER MANUFACTURING CO., *Plff in Err.*, *v.* A. BRILL. [No. 955.]

Messrs. C. K. Offield and *M. A. Wheaton* for plaintiff in error. *Messrs. J. J. Scrivener* and *W. A. Maury* for defendant in error.

November 13, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

WILLIAM J. RAINEY, *Appt.*, *v.* GEORGE W. HERBERT *et al.* [No. 976.]

Mr. Samuel Dickson for appellant. No appearance for appellees.

November 20, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

IN THE MATTER OF CERTAIN IMPORTATIONS OF MERCHANDISE MADE BY GUSTAVE A. JAHN & CO., PER "ALPS." [No. 1023.]

Mr. Edwin B. Smith for petitioners. No opposition.

October 30, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

THE ALABAMA IRON & RAILWAY CO. *et al.*, *Appts.*, *v.* THE ANNISTON LOAN & TRUST CO. [No. 1033.]

Mr. Henry B. Tompkins for appellants. *Mr. John B. Knox* for appellee.

October 16, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

THE HARTFORD FIRE INSURANCE CO. *et al.*, *Appts.*, *v.* THE BONNER MERCANTILE CO. [No. 1034.]

Mr. T. C. Van Ness for appellants. *Messrs. M. Kirkpatrick* and *J. W. Forbis* for appellee.

October 16, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

THE PRESS COMPANY, LIMITED, *Plff. in Err.*, *v.* THE CITY BANK OF HARTFORD. [No. 1068.]

Messrs. H. L. Carson and *Jas. H. Shakespeare* for plaintiff in error. *Messrs. Jno. Hampton Barnes* and *Geo. Tucker Bispham* for defendant in error.

December 4, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

WILLIAM H. LAKIN, *Plff. in Err.*, *v.* JOHN H. ROBERTS *et al.* [No. 1069.]

Mr. H. L. Gear for plaintiff in error. No one opposed.

December 11, 1893. Petition for a writ of error or writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit denied.

THE STEAM TUG "E. A. PACKER," ETC., *Appt.*, *v.* THE NEW JERSEY LIGHTERAGE CO. [No. 1072.]

Mr. E. D. McCarthy for appellant. *Mr. R. D. Benedict* for appellee.

December 18, 1893. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

JOHN STEWART *et al.*, *Appts.*, *v.* WILLIAM T. SMITH. [No. 1081.]

Mr. Hector T. Fenton for appellants. No one opposed.

January 22, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit denied.

GEORGE BAILEY *et al.*, *Appts.*, *v.* JOHN P. SUNDBERG. [No. 1095.]

Mr. George A. Black for appellants. No one opposed.

January 15, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

THE DAVID BRADLEY MANUFACTURING CO., *Appt.*, *v.* THE EAGLE MANUFACTURING CO. [No. 1103]; and THE MOLINE PLOW CO., *Appt.*, *v.* THE EAGLE MANUFACTURING CO. [No. 1104.]

Messrs. L. L. Bond and *C. E. Pickard* for appellants. *Messrs. Geo. H. Christy* and *Nath'l French* for appellee.

February 5, 1894. Petition for writs of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

THE STEAMSHIP "MANHANSET," ETC., *Appt.*, *v.* PETER NELSON. [No. 1115.]

Mr. E. B. Convers for appellant. *Mr. E. G. Davis* for appellee.

March 5, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

THE UNITED STATES, *Appt.*, *v.* EISNER & MENDELSON CO. [No. 1133.]

Messrs. W. W. Dudley, L. T. Michener and *C. A. Ray* for appellee. No opposition.

March 26, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

J. TWING BROOKS, Executor, etc., *Appt.*, *v.* F. A. RAYNOLDS. [No. 1147.]

Mr. Lawrence Maxwell, Jr., for appellant. *Mr. Francis J. Wing* for appellee.

April 23, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit denied.

LEONORA AUGUSTA ARNOLD *et al.*, *Appts.*, *v.* CHARLES A. CHESEBROUGH *et al.* [No. 1152.]

Messrs. Jos. H. Choate, J. H. V. Arnold, and *Roger Foster* for appellants. *Mr. Walter S. Logan* for appellees.

March 26, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

THE NEW ORLEANS & NORTHEASTERN RAILROAD CO. *et al.*, *Plffs. in Err.* *v.* OSCAR THOMAS. [No. 1161.]

Messrs. E. H. Farrar, E. B. Kruttschnitt and *B. F. Jonas* for plaintiffs in error. No one in opposition.

April 4, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

THE FRANKLIN SAVINGS BANK *et al.*, *Appts.*, *v.* ROBERT C. TAYLOR *et al.* [No 1171.]

Messrs. Wm. H. Swift and *T. D. Jones* for appellants. *Mr. Edwin L. Harpham* for appellees.

May 14, 1894. Petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit denied.

A. SCHWARTZ & SONS *et al.*, *Plffs. in Err.*, *v.* THE H. B. CLAFLIN CO. [No. 1195.]

Mr. W. W. Howe for plaintiff in error. *Messrs. H. L. Lazarus* and *E. B. Kruttschnitt* for defendant in error.

April 30, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit denied.

HENRY A. MORGAN, as President of the New York Times, *Plff. in Err.*, *v.* SIGISMUNDO E. HALBERSTADT. [No. 1198.]

Mr. John C. Pennie for plaintiff in error. *Messrs. Robert G. Ingersoll* and *Robert H. Griffin* for defendant in error.

May 14, 1894. Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit denied.

MISCELLANEOUS.

CHARLES WUNDERLE *et al.*, *Plffs. in Err.*, *v.* CATHERINE WUNDERLE. [No. 1037.]

In Error to the Supreme Court of the State of Illinois.

Mr. William A. McKenney for plaintiffs in error. *Mr. Daniel D. Goodell* for defendant in error.

October 10, 1893. Dismissed with costs, on motion of *Mr. William A. McKenney* for the plaintiffs in error.

THE ALBANY COUNTY BANK, *Plff. in Err.*, *v.* THE DROVERS' NATIONAL BANK OF UNION STOCK YARDS, LAKE, ILL. [No. 540.]

In Error to the Circuit Court of the United States for the Northern District of New York.

Messrs. Francis Kernan and *Alex. Porter Morse* for plaintiff in error. *Mr. S. W. Rosendale* for defendant in error

October 10, 1893. Dismissed on motion of *Mr. Alexander Porter Morse*, for the plaintiff in error.

W. E. TROTTER, *Appt.*, *v.* B. LOWENSTEIN & BROS. *et al.* [No. 262.]

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

Messrs. F. G. Barry, R. C. Beckett, A. H. Garland and *H. J. May* for the appellant. No appearance for the appellees.

October 10, 1893. Dismissed with costs, on motion of *Mr. A. H. Garland* for the appellant.

THE UNITED STATES, *ex rel.* JAMES K. O. SHERWOOD, *Plff. in Err.*, *v.* WILLIAM E. WOODRUFF, Collector, etc. [No. 105.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Messrs. F. W. Compton and *F. M. Clarke* for plaintiff in error. No appearance for defendant in error.

October 11, 1893. Dismissed with costs, on motion of counsel for the plaintiff in error.

THE NEW ORLEANS CANAL & BANKING CO. *et al.*, *Appts.*, *v.* D. H. REYNOLDS *et al.* [No. 141.]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. S. F. Clark for the appellants. No appearance for the appellees.

October 11, 1893. Dismissed with costs, on motion of counsel for appellants.

THE TOLEDO, ANN ARBOR & NORTH MICHIGAN RAILWAY CO., *Plff. in Err.*, *v.* CLIFFORD F. EDDY. [No. 179.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Messrs. E. W. Tolerton and *Jno. H. Doyle* for plaintiff in error. *Mr. J. K. Hamilton* for defendant in error.

October 11, 1893. Dismissed with costs, per stipulation.

C. M. RAYMOND, *Plff. in Err.*, *v.* LLOYD G. REED *et al.* [No. 249.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. S. Schayer, Jr., for plaintiff in error. *Mr. J. W. Douglass* for defendants in error.

October 11, 1893. Dismissed with costs, on motion of counsel for the plaintiff in error.

THE EQUITABLE ACCIDENT INSURANCE CO., OF CINCINNATI, OHIO., *Plff. in Err.*, *v.* EDGAR P. SAWYER *et al.*, Executors, etc. [No. 300.]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Mr. Charles Barber for the plaintiff in error. *Mr. Chas. W. Felker* for defendants in error.

October 11, 1893. Dismissed with costs, per stipulation.

E. F. SKINNER, *et al.*, *Plffs in Err.*, *v.* THE UNITED STATES. [No. 525.]

In Error to the Circuit Court of the United States for the Northern District of Florida.

Mr. W. A. Blount for plaintiffs in error. No appearance for defendant in error.

October 11, 1893. Dismissed, on authority of counsel for the plaintiffs in error.

THE PLATTE & DENVER CANAL & MILLING COMPANY, *Plff. in Err.*, *v.* JOHN DOWELL *et al.* [No. 757.]

In Error to the Supreme Court of the State of Colorado.

Mr. V. D. Markham for plaintiff in error. No appearance for defendant in error.

October 11, 1893. Dismissed with costs, on motion of counsel for plaintiff in error.

THE DISTRICT OF COLUMBIA, *Plff. in Err.*, *v.* MATILDA S. CHURCH *et al.* [No. 32], and THE DISTRICT OF COLUMBIA, *Plff. in Err.*, *v.* J. HARRISON JOHNSON. [No. 33.]

In Error to the Supreme Court of the District of Columbia.

Messrs. A. G. Riddle, H. E. Davis and *S. T. Thomas*, for plaintiff in error. No appearance for defendant in error.

October 12, 1893. Dismissed with costs, on motion of counsel for plaintiff in error.

CHARLES E. MILLER *et al.*, Executors, etc., *Plffs. in Err.*, *v.* JAMES M. CONSTABLE *et al.* [No. 44], and JAMES M. CONSTABLE *et al.*, *Plffs. in Err.*, *v.* CHARLES E. MILLER *et al.*, Executors, etc. [No. 45.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Atty. Gen. for Miller *et al.* *Messrs. Stephen G. Clarke* and *Edwin B. Smith*, for Constable *et al.*

October 16, 1893. Judgment reversed per stipulation, and cause remanded to be proceeded in according to law.

CHARLES E. MILLER *et al.* Executors, etc., *Plffs. in Err.*, *v.* JAMES M. CONSTABLE *et al.* [No. 46.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Atty. Gen. for plaintiffs in error. *Messrs. Stephen G. Clarke* and *Edwin B. Smith* for defendants in error.

October 16, 1893. Judgment reversed with costs, per stipulation, and cause remanded to be proceeded in according to law.

CHARLES MORAN, Trustee, *Appt.*, *v.* THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY CO. *et al.* [No. 2.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Mr. George Hoadly, for appellant. *Mr. R. A. Harrison* for appellees.

October 17, 1893. Dismissed with costs, on motion of *Mr. George Hoadly*, for the appellant.

SINGLETON M. ASHENFELTER, *Appt.*, *v.* THE TERRITORY OF NEW MEXICO, *ex rel.* EDWARD C. WADE. [No. 1.]

Appeal from the Supreme Court of the Territory of New Mexico.

Messrs. H. L. Warren, S. W. Pennypacker and *C. W. McKeehan*, for appellant. *Mr. C. H. Armes*, for appellee.

October 18, 1893. Dismissed with costs, on authority of counsel for appellant, on motion of *Mr. Solicitor General Maxwell.*

THE UNITED STATES, *Appt.*, *v.* ADOLPH MARIX. [No. 359.]

Appeal from the Court of Claims.

Atty. Gen. for appellant. *Mr. John S. Blair*, for appellee.

October 18, 1893. Judgment reversed and cause remanded to be proceeded in according to law, per stipulation, on motion of *Mr. Solicitor General Maxwell*, for appellant.

THE BELMONT PLANTING & MANUFACTURING CO., *Appt.*, *v.* WILLIAM L. SCOTT. [No. 881.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Messrs. E. H. Farrar, E. B. Kruttschnitt and *B. F. Jonas*, for appellant. *Mr. Henry P. Dart*, for appellee.

October 18, 1893. Dismissed with costs, on authority of counsel for appellant.

THOMAS HUGHES *et al.*, *Plffs. in Err.*, *v.* THE UNITED STATES. [No. 916.]

In Error to the District Court of the United

States for the Western District of Pennsylvania.

Mr. E. S. McCalmont, for plaintiff in error. *Atty. Gen.* for defendant in error.

October 23, 1893. Judgment affirmed for want of prosecution.

YEE AH SHEEN, *Appt.*, *v.* THE UNITED STATES. [No. 419.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. E. B. Stonehill and *W. H. Lamar*, for appellant. *Atty. Gen.* for appellee.

October 23, 1893. Dismissed, on authority of counsel for appellant, on motion of *Mr. Solicitor General Maxwell*, for appellee.

THE UNITED STATES, *ex rel.* THE INTERNATIONAL CONTRACTING CO., *Plff. in Err.*, *v.* STEPHEN B. ELKINS, Secretary of the Department of War. [No. 878.]

In Error to the Supreme Court of the District of Columbia.

Messrs. A. S. Worthington, W. W. Dudley and *L. T. Michener*, for plaintiff in error. *Atty. Gen.* for defendant in error.

October 23, 1893. Dismissed with costs, the cause having abated, on motion of *Mr. Solicitor General Maxwell*, for the defendant in error.

WILLIAM L. WALLACE, Executor, etc., *et al.*, *Appts.*, *v.* THEO. W. MEYERS, Comptroller etc. [No. 28].

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Eugene H. Lewis for appellants. *Messrs. S. W. Rosendale* and *Geo. K. French* for appellee.

October 23, 1893. Dismissed, per stipulation, on motion of *Mr. Geo. K. French* for appellee.

ELLIS G. HUGHES, *Plff. in Err.*, *v.* THE DUNDEE MORTGAGE & TRUST INVESTMENT CO. (Limited). [Nos. 288, 289.]

In Error to the Circuit Court of the United States for the District of Oregon.

Mr. J. N. Dolph for plaintiff in error. *Mr. Thos Dewitt Cuyler* for defendant in error.

October 25, 1893. Dismissed with costs, on motion of *Mr. J. N. Dolph* for the plaintiff in error.

THE UNITED STATES, *Appt.*, *v.* ROBERT BARBER. [No. 99].

Appeal from the District Court of the United States for the Middle District of Alabama.

Atty. Gen. for appellant. *Messrs. W. W. Dudley* and *R. R. McMahon* for appellee.

October 30, 1893. Decree reversed per stipulation and cause remanded to be proceeded in according to law, on motion of *Mr. Solicitor General Maxwell* for the appellant.

L. H. SCHNEIDER, *Plff. in Err.*, *v.* BENJAMIN U. KEYSER. [No. 103].

In Error to the Supreme Court of the District of Columbia.

Messrs. H. H. Wells, Jr., and *A. A. Birney* for plaintiff in error. No appearance for defendant in error.

November 2, 1893. Dismissed with costs on motion of counsel for plaintiff in error.

THE UNITED STATES, *Appt.*, *v.* THOMAS N. KING. [No. 975].

Appeal from the Court of Claims.

Atty. Gen. for appellant. *Mr. C. C. Lancaster* for appellee.

November 2, 1893. Dismissed per stipulation, on motion of *Mr. C. C. Lancaster* for the appellee.

JOSEPH FRANK, *Plff. in Err.*, *v.* DANIEL RICHTER. [No. 218.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. A. M. Pence for plaintiff in error. *Mr. C. H. Remy* for defendant in error.

November 3, 1893. Dismissed with costs, on motion of counsel for the plaintiff in error.

WILLIAM L. MCFALL, *Plff. in Err.*, *v.* THE STATE OF SOUTH CAROLINA. [No. 1058.]

In Error to the Supreme Court of the State of South Carolina.

Mr. D. A. Townsend for defendant in error.

November 6, 1893. Docketed and dismissed, with costs, on motion of *Mr. D. A. Townsend* for the defendant in error.

JOSIE WILLIAMS, *Plff. in Err.*, *v.* T. H. CLANCY *et al.* [No. 1059].

In Error to the Supreme Court of the State of Washington.

Mr. H. J. May for defendants in error.

November 6, 1893. Docketed and dismissed, with costs, on motion of *Mr. H. J. May*, for the defendants in error.

PETER REIS *et al.*, *Plff. in Err.*, *v.* T. H. CLANCY *et al.* [No 1060].

In Error to the Supreme Court of the State of Washington

Mr. H. J. May for defendants in error.

November 6, 1893. Docketed and dismissed with costs, on motion of *Mr. H. J. May*, for the defendants in error.

M. B. BUFORD *et al.*, *Plffs. in Err.*, *v.* JOHN A. TAYLOR *et al.* [No. 781].

In Error to the Supreme Court of the Territory of Utah.

Mr. John A. Marshall for plaintiffs in error. No appearance for defendants in error.

November 8, 1893. Dismissed with costs, on motion of counsel for plaintiffs in error.

M. B. BUFORD *et al.*, *Plffs. in Err.*, *v.* THE UNITED STATES. [No. 806.]

In Error to the Supreme Court of the Territory of Utah.

Mr. John A. Marshall for plaintiffs in error. No appearance for defendant in error.

November 8, 1893. Dismissed on motion of counsel for plaintiffs in error.

THE CLEARFIELD BITUMINOUS COAL CORPORATION, *Plff. in Err.*, *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 76.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. M. E. Olmsted for plaintiff in error. *Messrs. W. S. Kirkpatrick, J. F. Sanderson* and *J. A. Stranahan* for defendant in error.

November 9, 1893. Dismissed with costs, on motion of *Mr. M. E. Olmsted* for the plaintiff in error.

THE PHILADELPHIA CO., *Plff. in Err.*, *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 691.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. M. E. Olmsted for plaintiff in error. *Mr. J. A. Stranahan* for defendant in error.

November 9, 1893. Dismissed with costs, on motion of *Mr. M. E. Olmsted* for the plaintiff in error.

THE EDISON ELECTRIC LIGHT CO. OF PHILADELPHIA, *Plff. in Err.*, *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 692.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. M. E. Olmsted for plaintiff in error. *Mr. J. A. Stranahan* for defendant in error.

November 9, 1893. Dismissed with costs, on motion of *Mr. M. E. Olmsted* for the plaintiff in error.

THE BRUSH ELECTRIC LIGHT CO., *Plff. in Err.*, *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 693.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. M. E. Olmsted for plaintiff in error. *Mr. J. A. Stranahan* for defendant in error.

November 9, 1893. Dismissed with costs, on motion of *Mr. M. E. Olmsted* for the plaintiff in error.

SAMUEL HENRY, *Plff. in Err.*, *v.* F. VON LEAR, Use of Marie Louise Martinez. [No. 80.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Messrs. Silas W. Pettit and *H. B. Gill* for plaintiff in error. *Mr. Richard P. White* for defendant in error.

November 10, 1893. Judgment reversed, and cause remanded with directions to remand the case to the state court. Costs in this court and in the circuit court to be paid by the plaintiff in error.

THE LOUISVILLE, NEW ORLEANS & TEXAS RAILWAY CO., *Plff. in Err.*, *v.* EDWARD M. BURNETT. [No. 88.]

In Error to the Seventeenth Judicial District Court of the State of Louisiana.

Messrs. E. H. Farrar, E. B. Kruttschnitt and *B. F. Jonas* for plaintiff in error. No appearance for defendant in error.

November 15, 1893. Dismissed with costs, on authority of counsel for the plaintiff in error.

T. B. NEEDLES, U. S. Marshal, etc., *et al.*, *Appts.*, *v.* BENJAMIN BROWN. [No. 96.]

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

Atty. Gen. for appellants. No appearance for appellees.

November 17, 1893. Dismissed with costs, on motion of *Mr. Solicitor General Maxwell* for the appellants.

WILLIAM M. HARRISON *et al.*, etc., *Plffs. in Err.*, *v.* THE TARBORO OIL MILLS. [No. 95.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. H. C. McCormick for plaintiffs in error. *Mr. Hill Burgwin* for defendant in error.

November 22, 1893. Dismissed with costs, per stipulation.

THE ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. *Plff. in Err.*, *v.* THE MARINE INSURANCE CO. OF LONDON. [No. 112.]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. John F. Dillon for plaintiff in error. *Messrs. U. M. Rose* and *G. B. Rose* for defendant in error.

November 23, 1893. Judgment reversed with costs, per stipulation, and cause remanded for further proceedings to be had therein in conformity with law.

HENRY B. MORROW, TRUSTEE, *et al.*, *Appts.*, *v.* THE CUMBERLAND TELEPHONE & TELEGRAPH CO. [No. 140.]

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Messrs. S. Watson and *G. W. Pickle* for appellants. *Mr. J. M. Dickinson* for appellee.

November 24, 1893. Decree affirmed with costs, per stipulation.

JOHN BOYD, *Appt.*, *v.* WILLIAM L. STEDMAN *et al.* [No. 124.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Messrs. Charles Hobson and *Hubert Howson* for appellants. *Mr. Causten Browne* for appellees.

November 27, 1893. Dismissed with costs, on motion of *Mr. Hubert Howson* for the appellant.

WILLIAM A. COLE, *Plff. in Err.*, *v.* THE UNITED STATES. [No. 1007.]

In Error to the District Court of the United States for the Northern District of Texas.

Mr. Eugene Williams for plaintiff in error. *Atty. Gen.* for defendant in error.

December 4, 1893. Dismissed, the cause having abated by death of plaintiff in error, on motion of *Mr. Assistant Attorney General Conrad* for the defendant in error.

THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY CO., *Plff. in Err.*, *v.* NELLIE E. PIERCE. [No. 153.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. H. A. Gardner and *Wm. McFadon* for plaintiff in error. *Mr. John C. Black* for defendant in error.

December 8, 1893. Judgment reversed with costs and cause remanded, to be proceeded in according to law, per stipulation, on motion of *Mr. John C. Black* for the defendant in error.

THE VILLAGE OF HOLLY, *Plff. in Err.*, *v.* GEORGE F. HUNTER. [No. 180.]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Mr. F. A. Baker for plaintiff in error. *Mr. W. L. Carpenter* for defendant in error.

December 11, 1893. Judgment affirmed with costs and interest by a divided court.

THE PENNSYLVANIA CO., *Plff. in Err.*, *v.* B. M. CAMPBELL, Administrator, etc. [No. 164.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Messrs. J. T. Brooks and *J. R. Carey* for plaintiff in error. *Mr. T. W. Sanderson* for defendant in error.

December 13, 1893. Dismissed with costs, per stipulation.

AH SING, *Appt.*, *v.* THE UNITED STATES *et al.* [No. 1014]. CHUN SHANG YUEN. *Appt.*, *v.* THE UNITED STATES *et al.* [No. 1015], FONG LOUIE, *Appt.*, *v.* THE UNITED STATES *et al.* [No. 1016], FONG WYE. *Appt.*, *v.* THE UNITED STATES *et al.* [No. 1017], and AH CHING, *Appt.*, *v.* THE UNITED STATES *et al.* [No. 1018].

Appeals from the District Court of the United States for the Northern District of California.

Messrs. J. Hubley Ashton, Joseph H. Choate, Harvey S. Brown and *Thos. D. Riordan* for appellants. *Atty. Gen.* for appellees.

December 18, 1893. Dismissed, on motion of *Mr. J. Hubley Ashton* for the appellants.

LEONG MOY QUE, *Appt.*, *v.* THE UNITED STATES. [No. 418.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. E. B. Stonehill and *W. H. Lamar* for appellant. *Atty. Gen.* for appellee.

January 3, 1894. Decree affirmed for want of prosecution.

JOHN CADWALADER, Collector, etc., *Plff. in Err.*, *v.* HARRY R. SHULTZ. [No. 202.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Atty. Gen. for plaintiff in error. *Mr. E. L. Perkins* for defendant in error.

January 3, 1894. Judgment reversed with costs and cause remanded to be proceeded in according to law, per stipulation, on motion of *Mr. Solicitor General Maxwell* for the plaintiff in error.

ANTHONY F. SEEBERGER, Collector, etc., *Plff. in Err.*, *v.* WILLIAM BEST *et al.* [No. 275.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Atty. Gen. for plaintiff in error. *Mr. P. L. Shuman* for defendants in error.

January 3, 1894. Dismissed with costs on motion of *Mr. Solicitor General Maxwell* for the plaintiff in error.

ANDREW L. SMITH *et al.*, *Appts.*, *v.* JOHN PIRKL. [No. 200.]

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Mr. G. G. Prelinghuysen for appellants. *Mr. Henry Stockbridge, Jr.*, for appellee.

January 3, 1894. Dismissed per stipulation.

THE BOSTON & MAINE RAILROAD, *Plff. in Err.*, *v.* EUGENE D. RAMSEY. [No. 513.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Mr. Solomon Lincoln for plaintiff in error. *Messrs. S. B. Allen* and *F. W. Hackett* for defendant in error.

January 8, 1894. Dismissed with costs per stipulation, on motion of *Mr. Frank W. Hackett* for the defendant in error.

THE NEWPORT NEWS & MISSISSIPPI VALLEY CO. *et al.*, *Plffs. in Err.*, *v.* MARTIN R. HENDRICKS, Administrator. [No. 159.]

In error to the Supreme Court of the State of Tennessee.

Mr. Holmes Cummins for plaintiffs in error. No appearance for defendant in error.

January 8, 1894. Dismissed, on motion of *Mr. S. P. Walker* in behalf of counsel.

CLARENCE M. CLARK, *Appt.*, *v.* J. F. SMITH. [No. 372.]

Appeal from the Circuit Court of the United States for the Western District of Virginia.

Mr. Richard C. Dale for appellant. No appearance for appellee.

January 17, 1894. Dismissed with costs, on motion of counsel for appellant.

THE CENTRAL OHIO RAILROAD CO. as Reorganized *et al.*, *Plffs. in Err.*, *v.* THE CITY OF COLUMBUS, use of MICHAEL ENRIGHT *et al.* [No. 240.]

In Error to the Supreme Court of the State of Ohio.

Messrs. John K. Cowen and *Hugh L. Bond, Jr.*, for plaintiffs in error. No appearance for defendant in error.

January 18, 1894. Dismissed with costs, on motion of counsel for the plaintiffs in error.

R. D. WOOD *et al.*, *Appts.*, *v.* THE CORRY WATER WORKS CO. *et al.* [No. 380.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Messrs. Samuel Dickinson and *R. C. Dale* for appellants. *Mr. John McCleave* for appellees.

January 19, 1894. Dismissed with costs on motion of counsel for appellants.

ANN HICKIES, Executrix, etc., *et al.*, *Appts.*, *v.* CHARLES E. PHILES *et al.* [No. 12.]

Appeal from the Supreme Court of the Territory of Arizona.

Marcus A. Smith and *Patrick O'Farrell* for appellants. *Messrs. Wm. H. Barnes* and *W. P. Montague* for appellees.

January 22, 1894. Decree affirmed with costs for want of prosecution.

OSCAR L. RICHARD *et al.*, *Plffs. in Err.*, *v.* ELIZABETH HEDDEN, Administratrix of E. L. HEDDEN, Collector, etc. [No. 563.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Messrs. S. G. Clarke and *Edwin B. Smith* for plaintiffs in error. *Atty. Gen.* for defendant in error.

January 22, 1894. Dismissed with costs on motion of *Mr. Edwin B. Smith* for the plaintiffs in error.

YUNG SHEA *et al.*, *Appts.*, *v.* THE UNITED STATES. [No. 1109.]

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Atty. Gen. for appellee.

January 29, 1894. Docketed and dismissed on motion of *Mr. Solicitor General Maxwell* for the appellee.

CORNELIUS WILLIAMS, *Plff. in Err.*, *v.* MAY WILLIAMS. [No. 1079.]

In Error to the Supreme Court of the State of New York.

Mr. Benjamin F. Tracy for plaintiff in error. *Mr. Austen G. Fox* for defendant in error.

February 1, 1894. Dismissed, per stipulation.

OTIS F. PRESBREY *et al.*, *Appts.*, *v.* EFFIE H. KLINE [No. 769.]

Appeal from the Supreme Court of the District of Columbia.

Mr. H. H. Wells for appellants. *Mr. Wm. F. Mattingly* for appellee.

February 5, 1894. Dismissed with costs, per stipulation.

RICHARD H. SIMMS, *Appt.*, *v.* JOHN F. COOK, Devisee and Trustee. [No. 1117.]

Appeal from the Court of Appeals of the District of Columbia.

Mr. Calderon Carlisle for appellee.

February 5, 1894. Docketed and dismissed, with costs, on motion of *Mr. Calderon Carlisle* for the appellee.

THE UNITED STATES, *Appt.*, *v.* JAMES M. PATTERSON *et al.*, Executors, etc. [No. 952.]

Appeal from the Court of Claims.

Atty Gen. for appellant. No appearance for appellees.

March 5, 1894. Dismissed on motion of *Mr. Solicitor General Maxwell* for the appellant.

THE VIRGINIA BUFFALO LITHIA SPRINGS CO., *Appt.*, *v.* THOMAS F. GOODE. [No. 457.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Mr. W. W. Henry for appellant. *Messrs. Wm. A. Maury* and *Leigh R. Page* for appellee.

March 5, 1894. Dismissed per stipulation on motion of *Mr. William A. Maury* for the appellee.

THE HEINE SAFETY BOILER CO., *Appt.*, *v.* THE SMITH FEED WATER HEATER & PURIFIER CO. [No. 391.], and THE HEINE SAFETY BOILER CO., *Appt.*, *v.* THE ANHEUSER-BUSCH BREWING ASSO. [No. 392.]

Appeals from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Paul Bakewell for appellants. *Mr. A. C. Fowler* for appellees.

March 5, 1894. Dismissed with costs, per stipulation.

JOHN H. DRAKE *et al.*, *Appts.*, *v.* THE KNOX ROCK BLASTING CO. [No 541.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Livingston Gifford for appellants. *Mr. W. Bakewell* for appellees.

March 5, 1894. Dismissed with costs, per stipulation.

ROBERT ALDEN FALES, *Appt.*, *v.* JAMES MCMONAGLE, Jailor, etc. [No. 802.]

Appeal from the Circuit Court of the United States for the District of New Jersey.

Messrs. Harry E. Richards and *Thos. S. Henry* for appellant. *Mr. E. W. Crane* for appellee.

March 12, 1894. Dismissed, per stipulation.

WINFIELD SCOTT KEYES *et al.*, *Appts.*, *v.* THE PUEBLO SMELTING & REFINING CO. [No. 403.], and THE PUEBLO SMELTING & REFINING CO., *Appt.*, *v.* WINFIELD SCOTT KEYES *et al.* [No. 404.]

Appeals from the Circuit Court of the United States for the District of Colorado.

Messrs. Robert E. Foot and *G. G. Symes* for Keyes *et al.* *Mr. Charles E. Gast* for Smelting & Refining Co.

March 19, 1894. Dismissed, per stipulation.

RUSSELL HUNTLEY *et al.*, *Plffs. in Err.*, *v.* THE COMMONWEALTH OF MASSACHUSETTS. [No. 750.]

In Error to the Superior Court of the State of Massachusetts.

Messrs. R. M. Morse, A. H. Veeder and *W. J. Campbell* for plaintiffs in error. *Mr. A. E. Pillsbury* for defendant in error.

March 26, 1894. Dismissed, per stipulation.

THE MISSOURI PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* OSWALD BAIER, as Administrator, etc. [No. 1078.]

In Error to the Supreme Court of the State of Nebraska.

Messrs. John F. Dillon and *W. S. Pierce* for plaintiff in error. *Mr. John C. Watson* for defendant in error.

March 26, 1894. Dismissed, per stipulation.

DANIEL BENTON, alias WILLIAM NEWBY, *Appt.*, *v.* THE UNITED STATES. [No. 1165.]

Appeal from the District Court of the United States for the Southern District of Illinois.

Atty. Gen. for appellee.

March 30, 1894. Docketed and dismissed.

ANTHONY F. SEEBERGER, Collector, etc., *Plff. in Err.*, *v.* FRANK L. DAVIS. [No. 786.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Atty. Gen. for plaintiff in error. *Mr. P. L. Shuman* for defendant in error.

April 2, 1894. Dismissed with costs, on motion of *Mr. Solicitor General Maxwell* for the plaintiff in error.

JOHN ANDERSON, *Plff. in Err.*, *v.* THE MINNESOTA IRON CO. [No. 425.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Mr. Jas. N. Castle for plaintiff in error.

Messrs. J. H. Chandler and *F. B. Kellogg* for defendant in error.

April 4, 1894. Dismissed, per stipulation.

LEVY, DREYFUS & CO., *Appts.*, *v.* WILLIAM MACK. [No. 643.] and WILLIAM MACK, *Appt.*, *v.* LEVY, DREYFUS & CO. [No. 644.]

Appeals from the Circuit Court of the United States for the Southern District of New York.

Mr. Jas. A. Hudson for Levy, D. & Co. *Mr. A. H. West* for Mack.

April 6, 1894. Dismissed, per stipulation.

THE UNITED STATES, *Appt.*, *v.* THE PEOPLE OF THE STATE OF ILLINOIS *et al.* [No. 349.]

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Atty. Gen. for appellant. *Mr. James Fentress* for Illinois Cent. R. Co.

April 9, 1894. On motion of *Mr. Solicitor General Maxwell*, and it appearing to the court that the United States were not parties to the suit in the circuit court, it is ordered that this appeal be, and the same is hereby, stricken from the docket. Per *Mr. Justice* **Field.**

LOUIS K. HYDE, Receiver, etc., *Appt.*, *v.* JAMES W. LAMBERT, etc. [No. 987.]

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Messrs. E. H. Farrar, E. B. Kruttschnitt and *B. F. Jonas* for appellant. *Mr. Frank Johnson* for appellee.

April 9, 1894. Decree reversed per stipulation and cause remanded to be proceeded in according to law.

SARAH G. MARSHALL *et al.*, *Appts.*, *v.* WOODBURY WHEELER *et al.* [No 748.]

Appeal from the Supreme Court of the District of Columbia.

Mr. Calderon Carlisle for appellants. *Mr. Wm. A. McKenney* for appellees.

April 9, 1894. Dismissed with costs.

LEONORA A. ARNOLD *et al.*, *Appts.*, *v.* CHARLES A. CHESEBROUGH *et al.* [No. 911.]

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Mr. John H. V. Arnold for appellants. *Messrs. Walter S. Logan* and *Chas. M. Demond* for appellees.

April 23, 1894. Dismissed for the want of jurisdiction.

LOUISA M. CRAIG, Administratrix, etc., *Plff. in Err.*, *v.* THE MOUNT CARBON CO. (Limited). [No. 553.]

In Error to the Circuit Court of the United States for the District of West Virginia.

Mr. James F. Brown for plaintiff in error. *Mr. Edward B. Knight* for defendant in error.

April 26, 1894. Dismissed with costs, per stipulation.

MILTON HUMES *et al.*, *Plffs. in Err.*, *v.* THE THIRD NATIONAL BANK OF CHATTANOOGA, Tenn. [No. 990.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Joseph Wheeler for plaintiffs in error. *Messrs. Wm. Richardson* and *Geo. T. White* for defendant in error.

April 30, 1894. Dismissed with costs, per stipulation, on motion of *Mr. William A Maury* in behalf of counsel.

THE DETROIT CITY RAILWAY *et al.*, *Appts.*, *v.* THE CITY OF DETROIT. [No. 1183.]

Messrs John C. Donnelly and *Henry M. Duffield* for appellants. *Mr. C. A. Kent* for appellee.

May 14, 1894. Dismissed for want of jurisdiction. (*Mr. Justice* **Brown** took no part in the consideration and disposition of this case.)

JOHN SCHWEITZER *et al.*, *Plffs. in Err.*, *v.* ANN SOPHIA BRYGGER, Executrix, etc. [No. 1150.]

In Error to the Supreme Court of the State of Washington.

Messrs. S. F. Phillips and *F. D. McKenney* for plaintiffs in error. *Messrs. Chas. K. Jenner* and *Louis Henry Legg* for defendant in error.

May 14, 1894. Dismissed with costs on motion of *Mr. Frederic D. McKenney* for the plaintiffs in error.

THE TRUSTEES & FELLOWS OF BROWN UNIVERSITY, *Appt.*, *v.* THE RHODE ISLAND COLLEGE OF AGRICULTURE & MECHANICS ARTS *et al.* [No. 989.]

Appeal from the Circuit Court of the United States for the District of Rhode Island.

Mr. Arthur L. Brown for appellant. *Mr. James Tillinghast* for appellee.

May 14, 1894. Dismissed, per stipulation, on motion of *Mr. Alex. Britton* in behalf of counsel.

HENRY T. BROWN, *Plff. in Err.*, *v.* WILLIAM JOLIFFE *et al.* [No. 402.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Edward Colston for plaintiff in error. No appearance for defendants in error.

May 14, 1894. Dismissed with costs, on motion of counsel for plaintiff in error.

J. MCGREGOR ADAMS, *Appt.* *v.* M. M. BUCK *et al.* [No. 428.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. J. H. Raymond for appellant. *Messrs. E. Smith* and *Geo. H. Knight* for appellees.

May 14, 1894. Dismissed with costs, per stipulation.

THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* D. A. MILLER, [No. 412.], THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* BEN WHITE, [No. 719.], THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* LEM WATTS *et al.* [No. 720.], THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* THOMAS BRICK, [No. 725.], THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* THOMAS D. BRICK. [No. 726], and THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* J. F. COMSTOCK. [No. 741.].

In Error to the Supreme Court of the State of Texas.

Messrs. John F. Dillon and *W. S. Pierce* for plaintiff in error. *Mr. James Turner* for defendant in error in Nos. 412 and 720. No ap-

pearance for defendant in error in other cases.

May 26, 1894. Dismissed with costs on motion of *Mr. D. D. Duncan*, in behalf of counsel for the plaintiff in error.

THE TEXAS & PACIFIC RAILWAY CO., *Plff. in Err.*, *v.* JAMES LAVERTY. [No. 1107.]

In Error to the Court of Civil Appeals of the State of Texas.

Messrs. John F. Dillon and *W. S. Pierce* for plaintiff in error. No appearance for defendant in error.

May 26, 1894. Dismissed, with costs, on motion of *Mr. D. D. Duncan* in behalf of counsel for plaintiff in error.

property engaged in commerce within the state, this does not cast a burden on interstate commerce.

[No. 908.]

Argued March 27, 28, 1894. Decided May 26, 1894.

IN ERROR to the Supreme Court of the State of Indiana, to review a decree of that court, affirming the decree of the superior court of Marion county, in that state, in favor of the defendant, Victor M. Backus, treasurer of said county, in an action brought by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, plaintiff, to restrain the collection of taxes upon the property of said company, etc. *Affirmed.*

The facts are stated in the opinion.

Mr. **John T. Dye** for plaintiff in error.

Messrs. **Alonzo Greene Smith,** Atty. Gen. of Indiana, **William A. Ketcham,** *Albert J. Beveridge* and *John W. Kern* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

This case is similar to the two just decided, in that it was a suit brought by this plaintiff in the same court, challenging an assessment of its railroad property for the same year, by the same board, with the same result both in the trial and supreme court of the state. Hence it is useless to reconsider the questions decided in those cases as to the constitutionality of the act itself, or those which depend solely upon like testimony. There was, however, in the trial of this case a more elaborate effort to show that the state board included in its assessment the value of property outside the state, and also that the valuation placed nominally upon the property within the state was largely based upon interstate business done by the plaintiff, and thus, as is claimed, to that extent, placed a direct burden upon interstate commerce, which, it is conceded, is beyond the power of the state to cast. It becomes necessary, therefore, to notice a little in detail the testimony which was received, as well as that which was excluded on the hearing.

It may be premised that there was much testimony of a character similar to that given in the other cases. Beyond that, there was a large amount of testimony received as well as some offered and rejected for the purpose of showing what was presented to the board for consideration, the method by which it [441 reached its conclusions, and the elements which entered into its estimate of value. The principal witness relied on in respect to these matters was the secretary of state, a member of the board. By him it was proved that no witness was sworn and examined, and no inquiry made in that way, as to the value of this property. It appeared that the return made by the company was before the board for consideration. The court ruled out an offer to prove that outside of such return no books, papers, or documents, except Poor's Manual and the Investor's Guide, were produced before the board, or considered by it in making the assessment; that Poor's Manual was used by it for data upon which to

State legislation prohibiting the sale of an article imitating or resembling butter cannot interfere with the sale of oleomargarine imported from another state, in the original package bearing a United States revenue stamp, by a person holding a United States license for its sale. Waterbury v. Egan, 3 Misc. 355.

A state law is void as an interference with interstate commerce in so far as it requires original packages of baking powder, not deleterious to health, manufactured in another state, by citizens thereof and imported into the former state, to be labeled in any particular manner, and imposes a penalty for such sale when not so labeled. *Re* Ware, 53 Fed. Rep. 788.

A state statute prohibiting the sale of seed unless the year in which it is grown is plainly marked on each package, except on a sale of seed in open bulk by farmers to other farmers or gardeners, is void as to seed brought from another state and sold in original packages. Re Sanders, 18 L. R. A. 549, 52 Fed. Rep. 802.

The police power of a state is subordinate to that of Congress to regulate commerce between the states. Com. v. Paul, 10 Pa. Co. Ct. 332.

The power of Congress to regulate commerce among the states does not embrace commerce which is completely internal or between different parts of the same state. Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192 (36: 672).

In the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state does not render that business foreign which is otherwise domestic. Lehigh Valley R. Co. v. Pennsylvania, *supra.*

A state statute requiring railway officers to assign the passengers to coaches or compartments set apart for the race to which they belong is a regulation of commerce, which, though valid as applied to domestic passengers, is unconstitutional as applied to interstate passengers. State v. Hicks, 44 La. Ann. 770.

The Maine statute which makes railroad tickets good for six years, with the right of the holder to stop off at usual stopping places, cannot be held to apply to a ticket purchased in Canada for a continuous passage over defendant's road from that Dominion through Vermont and New Hampshire into Maine, since, applied to such a case, the statute would be unconstitutional as interfering with both state and foreign commerce. Lafarier v. Grand Trunk R. Co. 84 Me. 286.

The regulation of the charges of a grain elevator is not a regulation of interstate commerce, although the grain passing through it is brought from another state. Budd v. New York, 143 U. S. 517 (36: 247). 4 Inters. Com. Rep. 45.

A statute prohibiting the shipment out of the state of oysters taken in the waters of the state, while they are in shells, and also prohibiting the taking of such oysters by any person who is not a resident of the state, is not unconstitutional as a regulation of interstate commerce. State v. Harrub, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 95 Ala. 176.

A state statute prohibiting game birds to be killed for the purpose of conveying them out of the state is not an unlawful interference with interstate commerce. State v. Geer, 13 L. R. A. 804, 61 Conn. 144, 3 Inters. Com. Rep. 732.

N. Y. Laws 1846, chap. 62, imposing a duty upon foreign goods sold at auction, as applied to sales not in the original packages in which they were imported, but in the separate packages contained in such original packages, is not an unauthorized interference with commerce by the state. People v. Wilmerding, 62 Hun, 391.

A state statute compelling the shipment of

SOME UNPUBLISHED DECISIONS OF PREVIOUS TERMS.

UNITED STATES, *Appt.*,
v.
THOMAS P. HARRISON ET AL.

(See S. C. Reporter's ed. 154 U. S. 531.)

Grant by Spanish government for Colony to be formed by Baron de Bastrop vested no title in him. See 52 U. S. 11 How. 609 (13: 834).

[No. 126.]
Submitted April 21, 1852. Decided April 23, 1852.

APPEAL from the District Court of the United States for the Eastern District of Louisiana.

Mr. Attorney General for appellant.

No appearance for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The appellees in this case claim title to the land in question under certain instruments of writing executed by the Baron Carondelet in favor of the Baron de Bastrop in 1796 and 1797, which are fully set out in the case of *United States* v. *Philadelphia*, reported in 52 U. S. 11 How. 609 [13: 834]. It was decided in that case that these instruments of writing did not convey to the Baron Bastrop a title to the lands therein described. The decree in this case in favor of the appellees must therefore be reversed, and a mandate issued directing the district court to enter a decree in favor of the United States and dismiss the petition.

This case not to be reported; the evidence and principles decided being the same in substance with the case referred to in 11 Howard's Reports.

UNITED STATES, *Appt.*,
v.
EDWARD W. CARRERE ET AL.

UNITED STATES,
v.
JOSEPH GRAFTON and Wife.

(See S. C. Reporter's ed. 154 U. S. 532.)

Grant by Spanish government for Colony to be formed by Baron de Bastrop vested no title in him. See 52 U. S. 11 How. 609 (13:834).

[Nos. 78, 80.]
Submitted March 1, 1853. Decided March 3, 1853.

APPEALS from the District Court of the United States for the Eastern District of Louisiana.

Mr. Attorney General for appellant.

No appearance for appellees.

Mr. Chief Justice **Taney** delivered the opinion of the court:

The appellees in these two cases claim title under an instrument of writing which they allege was a grant by the Spanish authorities to the Baron de Bastrop. In the case of the *United States* v. *Philadelphia*, reported in 52 U. S. 11 How. 609 [13: 834], the court decided that this instrument of writing conveyed no title to the Baron de Bastrop; and consequently the petitioners can derive no title to themselves under it.

The decree in each of these cases must therefore be reversed and a mandate issued to the circuit court, directing the petitions to be dismissed.

CONNELLSVILLE & SOUTHERN PENNSYLVANIA RAILROAD CO., etc., *Appt.*,
v.
MAYOR & CITY COUNCIL OF BALTIMORE, etc.

(See S. C. Reporter's ed. 154 U. S. 553.)

Motion to dismiss appeal—Rescission of order.

[No. 413.]
Argued April 26, 1867. Decided April 29, 1867.

APPEAL from the Circuit Court of the United States for the Western District of Pennsylvania.

Messrs. John Knox, Andrew Stewart and *J. S. Black* for appellants.

Messrs. J. H. B. Latrobe, R. Johnson and *J. L. Thomas, Jr.* for appellees.

Mr. Chief Justice **Chase** delivered the opinion of the court:

We have considered the motion to dismiss the appeal of the Pittsburgh & Connellsville Railroad Company and are of opinion that that company was a proper party defendant in the court below and the appeal in the record appears to have been taken by this defendant as well as by the others. We must, therefore, overrule the motion to dismiss.

We have, also, further considered the motion to rescind the order heretofore made assigning

the matter for hearing at this term, and have come to the conclusion that the order should be rescinded.

And it is so directed.

WILLIAM H. WILLIAMSON, *Plff. in Err.*,
v.
MOORE.

(See S. C. Reporter's ed. 154 U. S. 557.)

Chancellor's power to discharge testamentary trustees and appoint others—state rule of property governs—constitutional law as to obligation of contracts.

[No. 421.]
Argued February 14, 1868. Decided April 6, 1868.

IN ERROR to the Court of Appeals of the State of New York. Motion to dismiss.

Mr. David Dudley Field for plaintiffs in error.

Mr. H. E. Davis for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

The facts of the case are substantially the same as in the case just decided. *Williamson* v. *Suydam*, 73 U. S. 6 Wall. 723 (18: 967).

The case, among other things, alleges that the Act of April 1, 1814, was unconstitutional and void, as impairing the obligation of contracts.

Judgment of the state court was to the contrary in express terms, as appears in the record.

Motion overruled.

WILLARD, *Appt.*,
v.
WILLARD ET AL.

(See S. C. Reporter's ed. 154 U. S. 563.)

Washington City may assess abutting owners for paving streets. See 81 U. S. 14 Wall. 676 (20: 719).

[No. 90.]
Argued February 25, 1870. Decided March 7, 1870.

APPEAL from the Supreme Court of the District of Columbia.

Messrs. W. D. Davidge and *W. F. Mattingly* for appellant.

Messrs. R. T. Merrick and *R. J. Brent* for appellees.

Mr. Justice **Nelson** delivered the opinion of the court:

This is an appeal from the Supreme Court of the District of Columbia.

The bill is, substantially, the same as in the case of *Willard* v. *Presbury*, 81 U. S. 14 Wall. 676 [20; 719], and the proofs the same. The decision in that case governs this.

Reversed.

EX PARTE: *In re* RUFUS WAPLES
v.
E. W. BURBANK.

(See S. C. Reporter's ed. 154 U. S. 579.)

Confiscation—libel of review—writ of prohibition in admiralty cases. See 77 U. S. 10 Wall. 541 (19: 981).

[No. 10, on the Original Docket.]
Argued December 19, 20, 1870. Decided January 9, 1871.

Mr. Thomas J. Durant for petitioner.

Mr. Caleb Cushing in opposition.

Mr. Justice **Swayne** delivered the opinion of the court:

The facts are the same in this case, and the same questions are involved, as in the preceding case of *Ex parte Graham*, just decided, 77 U. S. 10 Wall. 541 [19, 981], and this case is disposed of in the same way. The same entry will be made in both cases.

WILLIAM F. DAVIDSON, *Plff. in Err.*,
v.
ARTHUR CONNELLY.

(See S. C. Reporter's ed. 154 U. S. 589.)

Jurisdiction under 25th section of Judiciary Act.

[No. 510.]
Submitted January 12, 1872. Decided February 5, 1872.

IN ERROR to the Supreme Court of the State of Minnesota.

Mr. Lorenzo Allis for plaintiff in error.

Mr. James Smith, Jr., for defendant in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

On looking into the record we do not find that any question was decided in the state court of which we have jurisdiction under the 25th section of the Judiciary Act.

The writ of error, therefore, must be dismissed.

EUNICE N. GRAY, *Plff. in Err.*,
v.
WM. F. COAN ET AL.

(See S. C. Reporter's ed. 154 U. S. 589.)

Jurisdiction under the 25th section of the Judiciary Act must appear affirmatively from the record.

[No. 481.]
Argued December 15, 1871. Decided December 18, 1871.

IN ERROR to the Supreme Court of the State of Iowa.

On motion.

Mr. Daniel Gray for plaintiff in error.

Messrs. Walter I. Hayes and *A. Y. Cotton* for defendants in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

This is a motion to dismiss a writ of error to the Supreme Court of Iowa.

On looking into the record we find no question under the 25th section of the Judiciary Act made by the pleadings or passed upon by the court; and we have often held that it must appear affirmatively from the record that such a question was made and passed upon before this court can acquire jurisdiction to review the judgment of a state court upon writ of error.

The motion must therefore be allowed and the writ of error must be dismissed.

MANUEL DIAZ, *Appt.*,
v.
UNITED STATES ET AL.

(See S. C. Reporter's ed. 154 U. S. 590.)

Mexican land grant in California. See 69 U. S. 2 Wall. 279 (17: 856), and 70 U. S. 3 Wall. 434 (18: 221).

[No. 97.]
Submitted February 10, 1873. Decided March 3, 1873.

APPEAL from the Circuit Court of the United States for the District of California.

Mr. S. O. Houghton for appellant.

Mr. Attorney General for appellee.

Mr. Chief Justice **Chase** delivered the opinion of the court:

I am instructed to say that the decree in the Circuit Court for the District of California is affirmed on the authority of *Pico* v. *United States*, 69 U. S. 2 Wall. 279 [17: 856], and *Peralta* v. *United States*, 70 U. S. 3 Wall. 434 [18: 221]. It is not thought necessary to do more than to refer to these cases.

EXECUTORS OF ALEXANDER NORTON, *Plff. in Err.*,
v.
DAVID JAMISON.

(See S. C. Reporter's ed. 154 U. S. 591.)

Moot case not decided.

[No. 192.]
Submitted December 6, 1872. Decided January 13, 1873.

IN ERROR to the Supreme Court of the State of Louisiana.

Mr. Miles Taylor for plaintiffs in error.

Mr. D. G. Campbell for defendant in error.

Mr. Chief Justice **Chase** delivered the opinion of the court:

Our decision in this case must be governed by the case of *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 [21: 929], and the writ of error must be dismissed.

JACOB HUMBIRD, *Plff. in Err.*,
v.
BOARD OF SUPERVISORS OF THE COUNTY OF JACKSON.

(See S. C. Reporter's ed. 154 U. S. 592.)

State decisions when followed in the issue of municipal bonds—subsequent decision or act of legislature when cannot invalidate. See 83 U. S. 16 Wall. 678 (21:382.)

[No. 209.]
Argued April 9, 1873. Decided April 28, 1873.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin.

Mr. M. H. Carpenter for plaintiff in error.

Messrs. H. L. Palmer and *F. W. Pitkin* for defendant in error.

Mr. Justice **Clifford** delivered the opinion of the court:

The case is controlled by the rule established by this court in the case of *Olcott* v. *Fond du Lac County Supra.* 83 U. S. 16 Wall. 678 [21: 382], decided at the present term, to which reference is made for the grounds of the judgment in this case.

Judgment reversed and the cause remanded with directions to issue a new venire.

CITY COUNCIL OF CHARLESTON ET AL., *Appts.*,
v.
MORRIS K. JESSUP.

(See S. C. Reporter's ed. 154 U. S. 592.)

State alteration of charters of corporations —state control over—immunity from taxation.

[No. 234.]
Argued February 14, 1873. Decided March 31, 1873.

APPEAL from the Circuit Court of the United States for the District of South Carolina.

Mr. D. T. Corbin for appellants.

Mr. T. G. Barker for appellee.

Mr. Justice **Field** delivered the opinion of the court:

This case is governed by the decision in *Tomlinson* and others, appellants, against the same defendant, 82 U. S. 15 Wall. 454 [21: 207]. Upon the authority of that decision the decree must be reversed, and the cause be remanded to the court below with directions to dismiss the suit; and it is so ordered.

BROOKE MACKALL, SR., ET AL., *Appts.*,
v.
ALFRED RICHARDS ET AL.

(See S. C. Reporter's ed. 154 U. S. 624.)

No question of law.

[No. 184.]

Argued and Submitted March 15, 1877. Decided March 19, 1877.

APPEAL from the Supreme Court of the District of Columbia.

Mr. C. Ingle for appellants.

Messrs. W. B. Webb and *Thomas Wilson* for appellees.

Mr. Chief Justice **Waite** announced the opinion of the court:

This record presents for our consideration only a question of fact and without discussing the testimony it is sufficient to say that after a careful examination of the case we are entirely satisfied with the decree below, which is consequently affirmed.

No further opinion will be delivered.

JAMES W. McCREADY, *Plff. in Err.*,
v.
COMMONWEALTH OF VIRGINIA.

(See S. C. Reporter's ed. 154 U. S. 638.)

Lands under tide water—right of fishing—oyster beds. See 94 U. S. 391 (24: 248.)

[No. 992.]

Stipulation that this case abide decision in No. 625 filed April 6, 1877. Decided April 30, 1877.

IN ERROR to the Supreme Court of Appeals of the State of Virginia.

Messrs L. R. Page and *Robert Ould* for plaintiff in error.

Mr. R. T. Daniel for defendant in error.

Mr. Chief Justice **Waite** announced the judgment of the court:

The parties having stipulated that this case shall abide the event of that just decided *McCready* v. *Virginia*, 94 U. S. 391 [24: 248], the judgment of the supreme court of appeals of Virginia is affirmed.

WILLIAM G. W. JAEGER ET AL., *Appts.*,
v.
GLEDSTANES A. MOORE.

(See S. C. Reporter's ed. 154 U. S. 641.)

No question of law.

[No. 232.]

Argued April 15, 16, 1879. Decided May 5, 1879.

APPEAL from the Supreme Court of the District of Columbia.

Messrs. Enoch Totten and *Linden Kent* for appellants.

Messrs. Robert D. Morrison and *E. J. D. Cross* for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This decree is reversed as to the appellant Ulman, but in all other respects affirmed. The cause is remanded with instructions to dismiss the bill as to Ulman and to enforce the deed of trust under which the appellee claims only against that part of the premises therein described which was not conveyed to him. The costs of this court are to be paid, one half by the appellants Jaeger, and one half by the appellee. No further opinion will be delivered.

MRS. M. E. BURKE, *Plff. in Err.*,
v.
LOUIS TREGRE ET AL.

(See S. C. Reporter's ed. 154 U. S. 641.)

Louisiana provisional court, when dissolved—military orders. See 86 U. S. 19 Wall. 519 (22: 158).

[No. 253.]

Submitted April 23, 1879. Decided May 5, 1879.

IN ERROR to the Supreme Court of the State of Louisiana.

Mr. Geo. S. Lacey for plaintiff in error.

Mr. Thomas L. Bayne for defendants in error.

Mr. Chief Justice **Waite** announced the judgment of the court:

The only Federal question presented for our consideration in this case not decided adversely to the present appellant in *Burke* v. *Tregre*, 86 U. S. 19 Wall. 519 [22: 158], is that which relates to the effect of General Orders Nos. 60 and 70 upon the judicial sale under which the appellees claim. As to these orders it was found as a fact by the supreme court of the state that they were suspended by a special permit allowing the sale to be made, and we think this finding is sustained by the evidence.

Judgment affirmed.

FRANK F. CASE, Receiver, etc., *Appt.*,
v.
ALFRED MARCHAND ET AL.

(See S. C. Reporter's ed. 154 U. S. 642.)

Being no question of law, conflicting evidence, when calls for affirmance.

[No. 804.]

Submitted January 13, 1879. Decided January 27, 1879.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

Messrs. J. D. Rouse and *William Grant* for appellant.

Mr. Joseph P. Hornor for appellees.

Mr. Justice **Miller** delivered the opinion of the court:

The Crescent City National Bank of New Orleans having failed to redeem some of its circulating notes, on a demand made March 17, 1873, was put into liquidation, and the present appellant appointed receiver by the comptroller of the currency. In the process of liquidation the comptroller issued a call of seventy per cent upon the amount of the capital stock held by each shareholder at the time of the failure, and the suit now before us on appeal is a bill in equity brought in the circuit court of the United States to discover who was liable under this order on fifty shares of the stock, standing in the name of Edward Lubie, and for a decree for the sum assessed.

The bill charged that Lubie was insolvent, and that the transfer of the shares on the books of the corporation, made by Keenan, one of the defendants, to Lubie, a day or two before the failure, was a device to evade the liability under the Act of Congress, which it is the purpose of this bill to enforce, and that Alfred Marchand, the other defendant, was the real owner of the stock when the bank failed.

Lubie permitted a decree to be taken *pro confesso* against himself, and then became a witness against Marchand, and swears that he merely acted for Marchand and permitted the stock to be transferred to his name, because he was insolvent and could not be hurt, and that Marchand furnished the money paid to Keenan for the shares. Marchand denies all this under examination as a witness. There is much other conflicting and doubtful testimony. The case is one whose decision involves no question of law, and is otherwise unimportant, and we shall not criticise the evidence closely in this opinion. Lubie renders himself incredible by his own confessions and by his manner of testifying.

The books of the company and the certificates of the shares delivered to him are record evidence against him, and while there are suspicious circumstances against Marchand, there is not enough to justify us in reversing the decree of the circuit court in his favor, and it is accordingly affirmed.

WILLIAM FAXON ET AL., *Plffs. in Err.*,
v.
THOMAS RUSSELL, Collector, etc.

(See S. C. Reporter's ed. 154 U. S. 644.)

Tariff Act construed. See 96 U. S. 135 (24: 810), and 96 U. S. 143 (24: 813).

[No. 846.]
Submitted January 13, 1879. Decided January 20, 1879.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts.

Mr. Charles Levi Woodbury for plaintiff in error.

Mr. Attorney General for defendant in error.

Mr. Chief Justice **Waite** announced the judgment of the court:

The judgment in this case is reversed upon the authority of *Arthur* v. *Davies*, 96 U. S. 135 [24: 810], and the cause remanded for further proceedings in accordance with this decision. Upon another trial, however, no allowances can be made for the reduction of ten per cent claimed under section 2 of the Act of June 6, 1872 (17 Stat. at L. 232), that point having been decided adversely to the plaintiff in error in *Arthur* v. *Rheims*, 96 U. S. 143 [24: 813].

W. K. INGERSOLL, Assignee, etc., *Appt.*,
v.
MARY L. BOURNE and J. W. BOURNE.

(See S. C. Reporter's ed. 154 U. S. 645.)

Review of bankruptcy judgment, proceedings by creditors. See 93 U. S. 347 (23: 923).

[No. 949.]
Submitted Nov. 25, 1878. Decided Dec. 2, 1878.

APPEAL from the Circuit Court of the United States for the Southern District of Mississippi. Motion to dismiss.

Messrs. G. Gordon Adam and *P. Phillips* for the motion.

Messrs. W. B. Pittman and *A. B. Pittman* in opposition.

Mr. Chief Justice **Waite** delivered the opinion of the court:

In *Wiswall* v. *Campbell*, 93 U. S. 347 [23: 923], we decided that an appeal to this court would not lie from the judgment of a circuit court in a proceeding by a creditor to prove his demand against the estate of a bankrupt. This is clearly such a case. Although, on account of the peculiar character of the demand, the proceeding assumed to some extent the form of a suit in equity, it was instituted and carried on solely for the purpose of obtaining the allowance of the demand against the estate of the bankrupt.

The motion to dismiss is, therefore, granted, upon the authority of the case cited. Dismissed.

THOMAS J. WOOLFOLK ET AL., *Appts.*,
v.
ROBERT N. NISBET, Trustee, etc.

(See S. C. Reporter's ed. 154 U. S. 650.)

No question of law.

[No. 78.]
Argued Nov. 17, 18, 1879. Decided Dec. 1. 1879.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Mr. Clifford Anderson for appellants.

Mr. R. F. Lyon for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

After full consideration of all the evidence in this case we are satisfied—

1. That James H. Woolfolk was insolvent when he made the conveyance to Sowell C. Woolfolk, which is complained of;

2. That Sowell C. Woolfolk had reasonable cause to believe such insolvency when he received the conveyance; and

3. That the conveyance was made with a view to defeat the object and operation of the bankrupt law.

There is no dispute about the law applicable to this state of facts, and as we deem it unnecessary to discuss the evidence in detail, no further opinion will be delivered.

The decree of the circuit court is affirmed.

ELLEN B. PONDER, *Appt.*, *v.* LAVINIA L. DELAUNEY ET AL., ADMX'S etc.

(See S. C. Reporter's ed. 154 U. S. 651.)

No question of law.

[No. 204.]

Argued Mar. 16, 1880. Decided Mar. 29, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Mr. R. J. Moses for appellant.

Messrs. Charles N. West and *William Reynolds* for appellees.

Mr. Chief Justice **Waite** delivered the opinion of the court:

This case presents only a question of fact which we are satisfied was decided right in the court below. There is no sufficient evidence to set aside the settlement between the parties as expressed in the receipt in full executed when the sum agreed on was paid.

As that is the only matter in dispute the decree is affirmed.

THEOPHILUS S. FONTAINE, *Appt.*, *v.* JOHN McNAB.

(See S. C. Reporter's ed. 154 U. S. 652.)

No question of law.

[No. 205.]

Argued Mar. 17, 1880. Decided Mar. 29, 1880.

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

Mr. R. J. Moses for appellant.

Mr. A. R. Lawton for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

From the evidence in this case we find:

1. That the trust deed from Flewellyn to Shorter was duly executed and delivered. Under the ruling of the supreme court of Georgia in *Dinkins v. Moore*, 17 Ga. 62, there was sufficient proof of delivery to authorize the record.

2 That the deed, when executed and delivered, had upon it internal revenue stamps to the amount of thirty dollars, which was all that was required.

3. That the deed, including the stamp, was properly recorded, March 15, 1867. And—

4. That at the time of the advertisement for sale under the trust deed there was no newspaper published in Quitman county, and that the Cuthbert Appeal had a general circulation in that county.

There is no dispute but that upon this state of facts the decree below must be affirmed, and it is consequently so ordered.

UNITED STATES, *Appt.*, *v.* WILLIAM B. WILLIAMS.

(See S. C. Reporter's ed. 154 U. S. 652.)

No question of law.

[No. 216.]

Argued Dec. 23, 1879. Decided Jan. 5, 1880

APPEAL from the Court of Claims.

Mr. Attorney General for appellant.

Messrs. O. S. Lovell and *Lewis Abraham* for appellee.

Mr Chief Justice **Waite** delivered the opinion of the court:

We are satisfied with the judgment below. The points raised and considered below have not been presented here, and that raised and argued here does not seem to have been presented there. We think upon the facts found it sufficiently appears that the terms and conditions of the promised reward were complied with, and that the claimant was entitled to recover what was offered for the services he rendered.

Judgment affirmed.

AUGUSTUS JOUAN, *Appt.*, *v.* WILLARD DIVOLL.

(See S. C. Reporter's ed. 154 U. S. 657.)

No question of law.

[No. 485.]

Submitted Dec. 22, 1879. Decided Jan. 5, 1880.

APPEAL from the Supreme Court of the District of Columbia.

Mr. J. D. McPherson for appellant.

Mr. J. G. Kimball for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We think the evidence shows that Divoll was induced to make his purchase from Cooke on the representation of Jouan that Cooke

was the owner of one half the claim. For this reason Jouan is now estopped from denying Cooke's title. As Jouan and Cooke have settled all their disputes and Jouan has been released by Cooke from all further liability to him under the original assignment, Cooke's representatives are not necessary parties to this suit. This objection does not seem to have been made below.

By the terms of the assignment to Cooke he was bound to pay all costs and expenses incurred in prosecuting the claim. It was right, therefore, to deduct from Divoll's share of the money recovered a corresponding share of the expenses.

The decree is affirmed.

N. A. COWDREY, *Appt.*,
v.
J. V. W. VANDENBURGH ET AL.

(See S. C. Reporter's ed. 154 U. S. 659.)

Non negotiable demands—power of sale. See Cowdrey v. Vandenburgh, 101 U. S. 572 (25: 923).

[No. 1076.]
Submitted Jan. 14, 1880. Decided Mar. 8, 1880.

APPEAL from the Supreme Court of the District of Columbia.

Mr. Joseph H. Bradley for appellant.

Mr. James G. Payne for appellees.

Mr. Justice **Field** delivered the opinion of the court:

The decree in this case is affirmed for the reasons given in the above opinion.

WILLIAM H. GROAT ET AL., *Appts.*,
v.
OWEN O'HARE.

(See S. C. Reporter's ed. 154 U. S. 660.)

No question of law—reversed on facts.

[No. 85.]
Argued Oct. 21, 1880. Decided Nov. 8, 1880.

APPEAL from the Supreme Court of the District of Columbia.

Mr. T. T. Crittenden for appellants.

Messrs. R. T. Merrick and *M. F. Morris* for appellee.

Mr. Chief Justice **Waite** delivered the opinion of the court:

We are not satisfied from the evidence that the court below was right in directing the auditor, in stating the accounts of the partnership, to credit O'Hare with $2926.20, for items set out in Schedule D, annexed to the first report. It is clear to us that the items, amounting in the aggregate to $1650, for hire of horse and buggy, are not proven, but it is impossible from the case as it now stands, to determine what amount, if any, should be allowed for these and the other claims in that schedule.

We think, also, that the parties should be permitted to produce further evidence in respect to the certificates amounting to $5600, which O'Hare on his cross examination before the auditor under the reference from the general term, admits he received from the Evans Concrete Company. It is clear that he should now be charged with this amount, unless it has already been included in the accounts as stated by the auditor.

It is impossible to determine from the case as it is now presented whether he has been so charged or not.

We find no other errors in the action of the court below. The decree is reversed and the cause remanded with instructions to permit the parties, if they desire, to take further testimony in respect to the items of charge by O'Hare, as stated in Schedule D, and the certificates received by O'Hare from the Evans Concrete Company, and for such further proceedings, not inconsistent with this opinion, as shall seem to be necessary.

TOWN OF ROBERTS, *Plff. in Errr.*,
v.
MATTHEW BOLLES ET AL.

(See S. C. Reporter's ed. 154 U. S. 670.)

Negotiability of municipal bonds—bona fide purchaser—state decision.

[No. 48.]
Submitted Oct. 20, 1881. Decided Oct. 25, 1881.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Mr. Andrew J. Bell for plaintiff in error.

Mr. George O. Ide for defendants in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed on the authority of *Roberts* v. *Bolles*, 101 U. S. 119 [25: 850], which we see no reason for reconsidering.

DAVIS LEVY, *Plff. in Errr.*,
v.
FERDINAND DANGEL.

(See S. C. Reporter's ed. 154 U. S. 671.)

Exceptions necessary to review. See 102 U. S. 120 (26: 58).

[No. 72.]
Submitted November 4, 1881. Decided November 14, 1881.

IN ERROR to the Supreme Court of the Territory of Idaho.

Mr. Fillmore Beall for plaintiff in error.

Mr. George Ainslie for defendant in error.

Mr. Chief Justice **Waite** delivered the opinion of the court:

The judgment in this case is affirmed. The demurrer to the complaint was properly overruled, and we cannot consider the questions presented on the motion for a new trial. *Pittsburg, C. & St. L. R. Co.* v. *Heck*, 102 U. S. 120 [26: 58].

swer a question in such an investigation may be made the subject of a separate judicial inquiry, under the guise of enforcing a duty, there may be as many separate controversies as there are questions. It follows also that each controversy thus submitted to the court gives the right of appeal to the defeated party. Thus, the extraordinary spectacle would be presented of this court or of the court of appeals deciding in succession a series of objections to evidence, arising in a controversy carried on before another and non-judicial tribunal. It is a perversion alike of language and of thought to speak seriously of this as a proper method of judicial action.

The courts have uniformly and repeated refused to recognize as "cases or controversies" questions arising at a preliminary stage before the judicial power is called into exercise, or subject to revision by another department after the courts have done with them.

United States v. *Ritchie*, 58 U. S. 17 How. 525 (15: 236); *Election Supvrs. Case*, 114 Mass. 247; *Ex parte Siebold*, 100 U. S. 399 (25: 727).

The court will look at the nature of the right, and not merely at the form in which it is asserted, to determine whether there is or is not a "case" for judicial consideration.

Den v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 282-284 (15: 376, 377).

The case at bar is fatally defective, both as to substance, and form, and can by no possibility gain any standing in a Federal court.

The application is an attempt to borrow the process of contempt for use in an administrative inquiry, and it has no other substantial purpose.

The right of trial by jury as guaranteed by the Constitution forbids the creation of new methods of procedure in cases involving private rights.

Scott v. *Neely*, 140 U. S. 106 (35: 358); *Puterbaugh* v. *Smith*, 131 Ill. 199.

The judicial process of contempt is not a legitimate method for the enforcement of executive or legislative command.

Kilbourn v. *Thompson*, 103 U. S. 168 (26. 377); *Langenberg* v. *Decker*, 16 L. R. A. 108, 131 Ind. 471; *Wyatt* v. *People*, 17 Colo. 252.

The mere ownership of the stock in the switching roads by the steel company would not constitute a violation of the Interstate Commerce Law.

Pullman Palace Car Co. v. *Missouri Pac. R. Co.* 115 U. S. 587 (29: 499).

Mr. Justice **Harlan** delivered the opinion of the court:

This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July 1892 by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and amended by the acts of March 2, 1889 and February 10, 1891. 24 Stat. at L. 379, chap. 104; 25 Stat. at L. 855, chap. 382; 26 Stat. at L 743, chap. 128; 1 Rev. Stat. Supp. 529, 684, 891.

The petition was based on the 12th section of the Act authorizing the Commission to invoke [457] the aid of any court of the *United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476, 480.

The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property, wholly within one state and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory. But they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "railroad" as used in the Act includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" includes all instrumentalities of shipment or carriage.

All charges made for services rendered or to be rendered *in the transportation of pas-[458] sengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. § 1.

Any carrier subject to the provision of the Act, directly or indirectly, by special rate, rebate, drawback, or other device, charging, demanding, collecting, or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property, than it charges, demands, collects, or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the Act expressly declares to be unlawful. § 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular per-

APPENDIX I.

Supreme Court of the United States.

ALLOTMENT ORDER.

APRIL 2, 1894.

The Chief Justice announced the following order:

There having been an associate justice of this court appointed since the last term closed, it is ordered that the following allottment be made of the chief justice and associate justices of said court among the circuits, agreeably to the Act of Congress in such case made and provided, and that said allottment be entered of record, viz:

For the first circuit, Horace Gray, associate justice.
For the second circuit, Henry B. Brown, associate justice.
For the third circuit, George Shiras, jr., associate justice.
For the fourth circuit, Melville W. Fuller, chief justice.
For the fifth circuit, Edward D. White, associate justice.
For the sixth circuit, Howell E. Jackson, associate justice.
For the seventh circuit, John M. Harlan, associate justice.
For the eighth circuit, David J. Brewer, associate justice.
For the ninth circuit, Stephen J. Field, associate justice

APPENDIX II.

AMENDMENT TO RULE.

(SEE RULE, APPENDIX, BOOK 20, PP. 918, 919.)

Supreme Court of the United States.

OCTOBER TERM, 1893.

It is ordered that the Rules of Practice in Equity be, and they are hereby, amended by striking out in rule 82 the words "both the judges," and in rule 89

the words "both judges," and by inserting in each rule, in place of the words stricken out, the words "a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judge, and the district judge for the district."

Promulgated April 16, 1894.

The above rules now read as follows:

82.

The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District, concurring in the appointment), and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensations shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowod by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

89.

The Circuit Courts (a majority of all the judges thereof, including the Justice of the Supreme Court, the Circuit Judges, and the District Judge for the District, concurring therein), may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.